

6-7-2024

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Recommended Citation

Sydney Manning, *Healthcare in Carceral Settings: Providing Alternatives for the Medically Vulnerable Incarcerated Person*, 22 Seattle J. Soc. Just. (2024).

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Healthcare in Carceral Settings: Providing Alternatives for the Medically Vulnerable Incarcerated Person

Sydney Manning

I. INTRODUCTION

“How a society treats its most vulnerable—be they children, the infirm or the elderly—is always a measure of its humanity.”¹

It is no secret that carceral environments are uncomfortable by nature—people who are incarcerated² are confined in space, regimented in schedule, limited in possessions as well as contact with the outside world, and bound to a place that can be dirty, violent, and dangerous.³ In the United States, a correctional facility is a place of punishment, not of recovery,⁴ and the environment has a reputation for being harsh compared to the standards of many wealthy and industrialized nations, such as Northern European nations which practice a minimalist approach to punishment.⁵ For most,

¹ Matthew Rycroft, Permanent Resident of the U.K., to the U.N., Remarks at the SCOR Open Deb. on Children and Armed Conflict (June 18, 2015), in U.N. Doc. S/PV.7466, https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/spv_74667.pdf [<https://perma.cc/KJ7C-RB49>].

² See generally Lawrence Bartley et al., *The Language Project*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2021/04/12/the-language-project> [<https://perma.cc/A6VP-5C85>]. This article seeks to employ person-first language when speaking about people who have had various contacts with the criminal legal system.

³ Derek S. Jeffreys, *What Is the Purpose of a Jail*, in AMERICA’S JAILS: THE SEARCH FOR HUMAN DIGNITY IN AN AGE OF MASS INCARCERATION 37 (2018).

⁴ *Id.* at 37.

⁵ Ram Subramanian, *How Some European Prisons Are Based on Dignity Instead of Dehumanization*, BRENNAN CTR. FOR JUST. (Nov. 29, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-some-european-prisons-are-based-dignity-instead-dehumanization> [<https://perma.cc/ZN63-GUWT>]. This article highlights approaches in Finland, Germany, the Netherlands, and Norway.

such a facility is an unpleasant environment.⁶ But for some, this environment is much worse—it is torturous; it is deadly.⁷

People with disabilities⁸ are overrepresented in the American penal system, yet there has been shockingly little success in meeting appropriate standards of care for them.⁹ Programs and activities are not always made accessible to those with a sensory impairment, which denies these individuals the ability to learn new skills and form social connections.¹⁰ People with physical impairments may be unable to navigate narrow corridors or leave their cell at all, thus inadvertently subjecting them to solitary confinement without justification.¹¹ Moreover, they are sometimes deliberately housed in solitary confinement “for their own safety” when the general environment cannot be made safe for them.¹² Unfortunately,

⁶ Josefin Hedstrom, *The American and Swedish Criminal Justice System: A Comparative Study*, ELECTRONIC THESES AND DISSERTATIONS, PAPER 3397, 68 (May 2018) (M.A. Thesis, East Tennessee State University) (East Tennessee State University Digital Commons), <https://dc.etsu.edu/cgi/viewcontent.cgi?article=4835&context=etd> [<https://perma.cc/HBY2-TDPN>].

⁷ Jessica M. Grosholz & Daniel C. Semenza, *Health Conditions and Victimization among Incarcerated Individuals in U.S. Jails*, 74 J. CRIM. JUST. 1, 6 (2021).

⁸ See A.J. Withers & Liat Ben-Moshe, *Radical Disability Politics*, in ROUTLEDGE HANDBOOK OF RADICAL POLITICS, 179 (A.J. Withers et al. eds., 2019). Throughout this article, attempts are made to use person-first language when speaking about individuals with disabilities and other health concerns or different lifestyles.

⁹ Jeffreys, *supra* note 3, at 95.

¹⁰ RACHAEL SEEVERS, DISABILITY RTS. WASH. ST., MAKING HARD TIME HARDER: PROGRAMMATIC ACCOMMODATIONS FOR INMATES WITH DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT (2016).

¹¹ See NAT’L COMM’N ON CORRECTIONAL HEALTHCARE, POSITION STATEMENT: SOLITARY CONFINEMENT (ISOLATION) (2016) (Solitary confinement is the practice, widely recognized as deleterious to the individual, of housing an individual separately from the rest of the population of a carceral facility, typically used as punishment for extreme transgressions).

¹² Kayley Bebbler, *Cruel but Not Unusual: Solitary Confinement in Washington State’s County Jails*, DISABILITY RTS. WASH. ST. (Nov. 2016), https://www.disabilityrightswa.org/wp-content/uploads/2017/12/CruelButNotUnusual_November2016.pdf. [<https://perma.cc/37AE-FP5U>].

incarcerated people with disabilities are subjected to violence and abuse from both the guards¹³ and the fellow incarcerated at an extreme rate.¹⁴

Complex medication management is challenging in a carceral setting, especially with effective self-management being at odds with security concerns.¹⁵ As a result, people may be unable to access necessary medical supplies when incarcerated, leading to serious health consequences without intervention.¹⁶ These problems are continuously exacerbated by the increasing population of incarcerated people with disabilities.¹⁷ Not only do the overall incarceration rates continue to climb, but the average age of incarcerated people is also increasing, consequentially creating a growing class of elderly incarcerated people with age-related conditions and disabilities.¹⁸ These factors together indicate that concerns for the management of health conditions and disabilities in the carceral setting will only increase over time.

Without appropriate accommodations and medical care, imprisonment unavoidably imposes torturous conditions— isolation, pain, and illness—in violation of the Constitution.¹⁹ The penal system’s failures to create appropriate environments and provide adequate medication and health management have led to catastrophic results, as will be discussed throughout, for incarcerated people who are medically vulnerable.²⁰ As a

¹³ Rebecca Vallas, *Nearly Half of All Women in Jail Are Disabled*, THE NATION (Jul. 19, 2016), <https://www.thenation.com/article/archive/nearly-half-of-all-women-in-jail-are-disabled/#:~:text=Prison%20and%20jail%20inmates%20with,guards%20and%20other%20correctional%20employees> [https://perma.cc/KM5T-588F].

¹⁴ Grosholz & Semenza, *supra* note 7, at 6.

¹⁵ See generally SEEVERS, *supra* note 10.

¹⁶ *Id.*

¹⁷ JAMELIA MORGAN, CAGED IN: SOLITARY CONFINEMENT’S DEVASTATING HARM ON PRISONERS WITH PHYSICAL DISABILITIES 15 (2017), <https://www.aclu.org/wp-content/uploads/legal-documents/010916-aclu-solitarydisabilityreport-single.pdf> [https://perma.cc/R6FL-XCSM].

¹⁸ *Id.*

¹⁹ U.S. CONST. amend. VIII.

²⁰ See *infra* II A.

result, they are subjected to indignities belying recognition of their humanity, and conditions far beyond what society would ever intentionally mete out as punishment. In recognition of offenders with needs that cannot be appropriately managed in such settings, it is time to look at how, and whether, these vulnerable populations should be imprisoned.

This article seeks to understand the nature of the carceral system's failure to care for its people with physical disabilities and other health vulnerabilities before suggesting a more progressive and compassionate approach. It will focus on incarcerated individuals made physically vulnerable by their conditions, recognizing that the complexities of mental and developmental disabilities within the carceral system are out of the scope of this analysis.

First, this article will detail how people with disabilities have been treated in carceral facilities historically, along with the reforms that sought to remedy these practices. It will describe current standards of care, and how they fall short of the protections that all people—including incarcerated people—deserve. It will also detail myriad ways that the current system fails to live up to even those minimal standards. Next, this article will summarize the shortcomings of previous solutions that have been proposed or attempted. Finally, it will propose a new solution to how society must approach these issues with the most vulnerable offenders and describe several potential options for future pursuit.

II. BACKGROUND

A. The Medically Vulnerable Incarcerated Person (MVIP)

At the onset, it is important to understand the myriad populations who experience unique vulnerabilities while incarcerated. There are many populations with needs far beyond what the carceral setting appears to accommodate currently, which will hereinafter be designated as the Medically Vulnerable Incarcerated Person (MVIP). Because of the

interlocking needs and difficulties faced by incarcerated people with a wide range of struggles, it is difficult to appropriately capture all impacted people under a single label. Therefore, the MVIP class includes several at-risk categories to deliver the broadest and most effective strategy. These categories include people with physical disabilities, people with chronic health conditions, pregnant people, and people with age-related concerns.

1. Disability

a) History

People with disabilities have long been overrepresented among the incarcerated.²¹ For example, laws prohibiting begging and vagrancy once led to the incarceration of people with disabilities.²² With little differentiation between offenders, a person unable to work due to their disability—and therefore forced to beg—would be confined alongside the violent and dangerous, and treated accordingly.²³ Historically, there was little consideration for such an individual’s health and safety when it came to the conditions of their confinement. Protection for incarcerated people with disabilities began with the Rehabilitation Act of 1973, which was one of the first civil rights laws protecting people with disabilities²⁴ in the United States.²⁵ Section 504 of the Act prohibits discrimination against people with disabilities in programs that receive federal financial assistance, including people who are incarcerated.²⁶

²¹ CHRIS CHAPMAN, ALLISON C. CAREY, & LIAT BEN-MOSHE, *DISABILITY INCARCERATED 4* (Chris Chapman, Allison C. Carey & Liat Ben-Moshe eds., 2014).

²² *Id.*

²³ *Id.*

²⁴ (The Act defined a person with a disability as a person who has “. . . has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and can benefit in terms of an employment outcome from vocational rehabilitation services . . .”); 29 U.S.C. § 701 (7)(20)(A) (1973). We recognize that this definition is not as expansive as society has come to realize justice requires.

²⁵ 29 U.S.C. § 701 (1973).

²⁶ 29 U.S.C. § 701 (504) (1973).

The Americans with Disabilities Act (ADA) expanded protections and made requirements applicable to state-run facilities in 1990.²⁷ The ADA states that “no qualified individual with a disability shall ... be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”²⁸ In 1998, the Supreme Court of the United States (SCOTUS) held that the ADA applies to people in prisons.²⁹ They opined that, because prisons are public entities and the ADA does not differentiate between types of public entities, the protections afforded by the ADA apply to incarcerated people.³⁰ Under this standard, prisons must ensure that all programs and services are accessible.³¹ The Department of Justice (DOJ) is empowered to create regulations enforcing the ADA,³² thus enabling subsequent policy updates and recommendations to further solidify the protections for incarcerated people with disabilities.³³

There have also been consistent regulatory reforms aimed at improving experiences for incarcerated people with disabilities at the state and local levels.³⁴ Washington State’s definition of disability expands upon that of the ADA by not requiring a condition to “substantially limit a major life activity.”³⁵ However, most changes to disability protections in Washington State’s carceral facilities stem from lawsuits, not from legislation.³⁶

²⁷ 42 U.S.C. § 12131 (1990).

²⁸ 42 U.S.C. § 12132 (1990).

²⁹ *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206 (1998).

³⁰ *Id.*

³¹ 42 U.S.C. § 12132 (1990).

³² *Id.*

³³ U.S. DEP’T OF JUSTICE, C.R. DIV., DISABILITY RTS. SECTION, ADA/SECTION 504 DESIGN GUIDE: ACCESSIBLE CELLS IN CORR. FACILITIES (2020).

³⁴ See generally *Amplifying Voices of Incarcerated Individuals with Disabilities (AVID)*, <https://disabilityrightswa.org/programs/avid/> [<https://perma.cc/7U3T-BFPG>]. (AVID works to end the abuse and neglect of people with disabilities who are currently incarcerated in Washington State, and their ongoing efforts are here documented).

³⁵ WASH. ST. HUMAN RTS. COMM’N, GUIDE TO DISABILITY AND WASHINGTON STATE NONDISCRIMINATION LAWS,

b) Current Protections

Currently, all government-operated correctional facilities are required to comply with the ADA Section 504 accessibility standards in numerous ways. For example, the ADA promulgates a detailed guide to cell accessibility that sets forth best practices for cell design.³⁷ This is because the shape and size of hallways and doors, the configuration of furniture, the layout of cells, and the location of accessible cells are all particularly important to ensure that mobility-impaired persons can maneuver effectively and safely.³⁸ The ADA also requires a portion of the cells to be equipped with communication features for the deaf or hard of hearing, such as visible alarm signals accompanying any audible alarm system, and, where present, telephones with volume control.³⁹ Compliance with ADA programming standards may include holding meetings in a more accessible location or providing auxiliary materials, ensuring that library materials are available in audio format, providing interpreters or telecommunications devices for the deaf (TDD), and expanding work programs to accommodate a wider range of abilities.⁴⁰ Compliance also entails removing unnecessary eligibility standards that could prevent those with disabilities from participating in a program or activity.⁴¹

<https://www.hum.wa.gov/sites/default/files/public/publications/Disability%20Q%20and%20A.pdf> [<https://perma.cc/T5VL-EQUX>].

³⁶ *Cases*, DISABILITY RTS. WASH. ST., <https://www.disabilityrightswa.org/cases/> [<https://perma.cc/Y4PV-B6JM>]. (Complaints filed by Disability Rights Washington (DRW) largely center on practices that are already expressly prohibited by current law).

³⁷ U.S. DEP'T OF JUSTICE, *supra* note 33.

³⁸ *Id.*

³⁹ ADA NAT'L NETWORK, DETENTION & CORRECTIONAL FACILITIES (2019), [https://adata.org/sites/adata.org/files/files/Detention%20%26%20Correctional%20Facilities_final2019\(1\).pdf](https://adata.org/sites/adata.org/files/files/Detention%20%26%20Correctional%20Facilities_final2019(1).pdf) [<https://perma.cc/WY3C-2JJ8>].

⁴⁰ Paula N. Rubin, *The Americans with Disabilities Act's Impact on Corrections*, 57 CORR. TODAY 2, 4–5 (1995).

⁴¹ 42 U.S.C. § 12132 (1990) (The legislation is silent as to what, precisely, makes a potentially discriminatory eligibility standard unnecessary. Arguably, this designation applies to any rules that could prevent a person with a disability from accessing services).

If a person receives services, they should receive services in the most integrated setting appropriate to their needs—in other words, they *must not* be segregated from other people to receive housing or participate in programs.⁴² Accessible cells must be made available in all locations and at every security level to avoid moving individuals to an inappropriate environment in pursuit of accessible housing.⁴³ Individuals should not be placed in solitary confinement, housed in medical areas, or moved between security levels to house them appropriately,⁴⁴ nor should they be temporarily placed in a location that does not meet physical access requirements while awaiting the construction of accommodative measures.⁴⁵

In *Pierce v. District of Columbia*, the court held that:

“...Prison officials have an affirmative duty to assess the potential accommodation needs of inmates with known disabilities who are taken into custody and to provide the accommodations that are necessary for those inmates to access the prison’s programs and services, without regard to whether or not the disabled individual has made a specific request for accommodation and without relying solely on the assumptions of prison officials regarding that individual’s needs.”⁴⁶

In other words, a prison must proactively investigate and provide necessary accommodations. Finally, although beyond the scope of this article, it is worth noting that ADA protections also apply to private entities running programs within or related to government-run carceral facilities.⁴⁷

⁴² General Prohibitions Against Discrimination, 28 C.F.R. § 35.130 (1990).

⁴³ ADA NAT’L NETWORK, *supra* note 39.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Pierce v. District of Columbia*, 128 F.Supp.3d 250, 272 (D.D.C. 2015).

⁴⁷ Steven E. Gordon, THE ADA IN STATE AND LOCAL COURTS, LAW ENFORCEMENT AND DETENTION FACILITIES, https://adainfo.org/wp-content/uploads/imported/5.2%20Law%20Enforcement_Gordon-1-slide-per-page-handout.pdf [<https://perma.cc/YW8R-ZU2P>].

c) Current Realities

Despite the existence of protective measures, incarcerated individuals with disabilities consistently encounter distinct challenges at various levels nationwide, perhaps due to the lack of adherence to protective policies and a restrictive, inconsistent interpretation of the Americans with Disabilities Act (ADA).⁴⁸ Instances of non-compliance include the absence of visual alert systems,⁴⁹ the inability to provide accessible cells, and the inappropriate use of solitary confinement for mere convenience.⁵⁰ Additionally, basic accommodations such as requests for lower bunks for mobility-impaired individuals are often denied, which is dehumanizing.⁵¹ Moreover, any of the above situations can lead to serious consequences because carceral facilities are already inherently dangerous environments.⁵² Those with disabilities are at a much higher risk of encountering violence in their daily lives,⁵³ and when imprisoned, can be at risk from their fellow incarcerated as well as the correctional staff entrusted with their safety.⁵⁴ The potential intersection of the dangers of incarceration with the dangers of having a disability create an entirely new, and horrifying, reality.⁵⁵

⁴⁸ *Munoz v. California Dep't of Corr. & Rehab.*, 842 Fed. Appx. 59 (9th Cir. 2021).

⁴⁹ Jamelia Morgan, *Prisoners with Physical Disabilities Are Forgotten and Neglected in America*, ACLU (Jan. 12, 2017), <https://www.aclu.org/news/prisoners-rights/prisoners-physical-disabilities-are-forgotten-and> [<https://perma.cc/E9Z8-VJJK>].

⁵⁰ *Id.*

⁵¹ *Munoz*, 841 Fed. Appx. 59.

⁵² Shon Hopwood, *How Atrocious Prisons Conditions Make Us All Less Safe*, BRENNAN CTR. FOR JUST. (Aug. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe> [<https://perma.cc/T2X8-2K28>].

⁵³ See generally ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, CRIME AGAINST PERSONS WITH DISABILITIES, 2009–2015—STATISTICAL TABLES (2017), <https://bjs.ojp.gov/content/pub/pdf/capd0915st.pdf> [<https://perma.cc/NGE4-HX2T>].

⁵⁴ *Armstrong v. Newsom*, 484 F. Supp. 3d 808, 819 (N.D. Cal. 2020), *aff'd*, 58 F.4th 1283 (9th Cir. 2023).

⁵⁵ Kelly Davis & Jeff McDonald, *Confiscated Wheelchairs, Dangerous Bunks, No Sign Language: San Diego County Jails Are Perilous for People with Disabilities, Suit Says*, SAN DIEGO UNION TRIBUNE, (Apr. 30, 2023), <https://www.sandiegouniontribune.com/news/watchdog/story/2023-04-30/confiscated->

2. Chronic Illness

a) Current Protections

Correctional facilities have an affirmative duty to provide medical care to the incarcerated.⁵⁶ This stems from the Constitution’s prohibition on cruel and unusual punishment—courts have reasoned that deliberate indifference to an incarcerated person’s serious illness or injury is de facto torture on the part of the carceral facility.⁵⁷ The Supreme Court’s holding in *Estelle v. Gamble* drew upon what the Justices considered to be “evolving standards of decency”⁵⁸, to establish that refusal to provide adequate treatment was a Constitutional violation “...whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed” and that such a violation gave rise to a cause of action for the incarcerated person so harmed.⁵⁹ While this assertion has continued to hold sway in court decisions,⁶⁰ it is worth noting that this holding requires a deliberate, not accidental, failure to procure necessary treatment.⁶¹

Additionally, there is little established guidance as to what specific duties are required under this framework, leaving states with extensive power to determine what is and is not medically necessary.⁶² Current guidelines

wheelchairs-dangerous-bunks-no-sign-language-san-diego-county-jails-are-perilous-for-people-with-disabilities-suit-says [https://perma.cc/N68F-F3NS].

⁵⁶ COLUM. HUM. RTS. L. REV., *Your Right to Adequate Medical Care, in A JAILHOUSE LAWYER’S MANUAL* 706 (11th ed., 2017), <https://jlm.law.columbia.edu/files/2017/05/35.-Ch.-23.pdf> [https://perma.cc/E9MM-CWLB].

⁵⁷ *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976).

⁵⁸ *Id.* at 106.

⁵⁹ *Id.* at 103.

⁶⁰ *Brown v. Plata*, 563 U.S. 493, 511, 131 S. Ct. 1910, 1928, 179 L. Ed. 2d 969 (2011).

⁶¹ *Gamble*, 429 U.S. at 105.

⁶² Greg Dober, *Beyond Estelle: Medical Rights for Incarcerated Patients*, PRISON LEGAL NEWS (Nov. 2019), at 1.

promulgated by health institutes indicate that frequent monitoring and intervention are mandatory for several common chronic health conditions, such as heart disease, respiratory illness, kidney disease, diabetes, and epilepsy to prevent complications and deterioration of incarcerated people's health.⁶³ Individual organizations centered on specific diseases, such as the American Diabetes Association and the American Association for the Study of Liver Diseases, have also established guidelines for managing them in carceral settings⁶⁴ while the CDC has promulgated guidelines for tuberculosis management for incarcerated populations.⁶⁵

Washington State law indicates that carceral facilities must provide all medically necessary care to their residents.⁶⁶ This includes certain services and items for purchase but also paying for patient care when the patient cannot.⁶⁷ Healthcare services through Washington's Department of Corrections (DOC) are largely governed by RCW Chapter 72.10, which offers some guidance on how the Department handles the healthcare needs of incarcerated individuals.⁶⁸ This law intends to provide, "basic medical services as may be mandated by the federal Constitution and the

<https://www.prisonlegalnews.org/news/2019/nov/4/beyond-estelle-medical-rights-incarcerated-patients/> [<https://perma.cc/95V8-TCYU>].

⁶³ NAT'L INST. FOR HEALTH AND CARE EXCELLENCE, PHYSICAL HEALTH OF PEOPLE IN PRISON: ASSESSMENT, DIAGNOSIS AND MANAGEMENT OF PHYSICAL HEALTH PROBLEMS 248 (2016) [hereinafter "NICE Guideline Template"].

⁶⁴ See, e.g., AM. DIABETES ASS'N, DIABETES MGMT. IN DET. FACILITIES (2021), <https://diabetes.org/sites/default/files/2021-11/ADA-position-statement-diabetes-management-detention-settings-2021.pdf> [<https://perma.cc/26M2-4FGV>]; AM' ASS'N FOR THE STUDY OF LIVER DISEASES, HCV TESTING AND TREATMENT IN CORRECTIONAL SETTINGS (2023), <https://www.hcvguidelines.org/unique-populations/correctional> [<https://perma.cc/W4NE-M2UM>].

⁶⁵ CDC, CORRECTIONAL FACILITIES (2022), <https://www.cdc.gov/tb/topic/populations/correctional/default.htm> [<https://perma.cc/KM8V-D7R2>].

⁶⁶ WASH. REV. CODE. § 72.10.005.

⁶⁷ STATE DEP'T OF CORR., HEALTH SERV. DIV., HEALTH PLAN, 15 (2021) [hereinafter HEALTH PLAN].

⁶⁸ WASH. REV. CODE § 72.10.

Constitution of the state of Washington.”⁶⁹ Most of the criteria for decision-making are outlined in the Washington DOC Health Plan, which appears on the Department of Corrections’ website.⁷⁰ In its most simple form, the Health Plan requires that services are medically necessary or necessary for the health and safety of the incarcerated community for public health reasons, *and* one of the following:

- “Required by law, regulation, or Department policy;
- Ordered by a Department health care practitioner;
- Authorized according to Department policies and procedures;
- Delivered in the most cost-effective manner and location consistent with safe, appropriate care.”⁷¹

The same website notes the following:

“If a facility is unable to provide any of the services covered in the Washington DOC Health Plan, an incarcerated individual may be transferred to another facility to ensure access to the medically necessary services. Emergent and acute care beyond local capability is provided at community hospitals.

...

Many of the larger institutions have chronic care and other specialty services routinely available on-site. For those that do not, when those types of services are medically necessary, DOC health care staff can refer incarcerated individuals to community specialists. Specialty services include cardiology, orthopedics, oncology, general surgery, oral surgery, obstetrics and gynecology.”⁷²

⁶⁹ WASH. REV. CODE § 72.10.005.

⁷⁰ *Id.*

⁷¹ Wash. Dep’t of Corr., *Health Services*, <https://www.doc.wa.gov/corrections/services/health.htm#> [https://perma.cc/VS2K-DBBT].

⁷² *Id.*

b) Current Realities

While carceral facilities are now better equipped to handle medication management and medical equipment requests, there are still many difficulties faced by incarcerated people seeking access to these resources.⁷³ Medication regimens are subject to change at the direction of carceral facility staff who are mandated to provide the cheapest option available even if the patient had previously been using a different regimen.⁷⁴ Upon entry, there is no guarantee that an individual will be able to bring or keep their medications.⁷⁵ Requesting medication or an assistive device that has not been pre-approved requires an approval process wherein health professionals consider not only the benefit to the patient but factors such as facility security and cost,⁷⁶ and requests based upon “social function” or convenience to the patient are often not approved.⁷⁷ For example, Washington State’s list of unauthorized medical requests includes such basic items as prescription eyeglasses, treatment for eating disorders, and treatment for motor skill disorders.⁷⁸

Shockingly, an incarcerated diabetic patient recently passed away after being restrained in his cell without access to insulin or appropriate medical care.⁷⁹ This demonstrates an extreme need for additional reforms within

⁷³ Sam McCann, *Health Care behind Bars: Missed Appointments, No Standards, and High Costs*, VERA (Jun. 29, 2022), <https://www.vera.org/news/health-care-behind-bars-missed-appointments-no-standards-and-high-costs> [https://perma.cc/7PLS-X9GC].

⁷⁴ HEALTH PLAN, *supra* note 67, at 14.

⁷⁵ DISABILITY RTS. NW., A GUIDE TO ACCESSING MEDICATION FOR INMATES IN WASHINGTON STATE JAILS, https://disabilityrightswa.org/publications/guide-accessing-medication-inmates-washington-state-jails/#Medication_brought_into_jail_by_an_inmate [https://perma.cc/SBG9-Z346].

⁷⁶ *Pharmaceutical Mgmt. and Formulary Manual*, WASH. ST. DEP’T OF CORR., 14–15, <https://www.doc.wa.gov/docs/publications/600-HA002.pdf> [https://perma.cc/W57N-EADM].

⁷⁷ HEALTH PLAN, *supra* note 67, at 7, 9, 33.

⁷⁸ *Id.* at 19.

⁷⁹ *\$6.5 Million to Family of Wash. Diabetic Prisoner Who Died*, PRISON L. NEWS (Nov. 7, 2017), <https://www.prisonlegalnews.org/news/2017/nov/7/washington-state-pays-65-million-family-diabetic-prisoner-who-died/> [https://perma.cc/TN82-5RZY].

Washington’s carceral system and raises the specter that insulin or other lifesaving medicines may be withheld from the incarcerated due to negligence, punishment, or even as a method of control.⁸⁰ Language in the Washington DOC Health Plan raises additional concerns, stating in pertinent part the following:

“When a patient is disruptive, unruly, abusive or uncooperative to the extent the behavior seriously impairs the Department’s ability to furnish services to the patient population in general, or when the behavior poses a threat to DOC staff, authorized health services may be discontinued unless the behavior is due to a treatable mental or medical illness.”⁸¹

This raises the question of whether life-saving medication can be modified, neglected, or abandoned when a patient is “disruptive” or “uncooperative.” Recent investigations have also found that incarcerated patients in Washington State may end up waiting months or years before receiving necessary medical care.⁸² The same investigation, performed and published by PBS, found as follows:

“One inmate with a hernia that caused him daily pain could not get surgery because treating his injury was not necessary in the department’s calculus. In a court declaration, he recounted crying as he tried to push the hernia back in during a visit with his wife; he worried the visit would be cut short if he called for help. Another described medical staff denying surgery to remove objects embedded in his temple even though he struggled to eat, sleep or walk, while a man who struggled to breathe after his nose was badly broken said the department refused to pay for a specialist to examine him.”⁸³

⁸⁰ *Id.*

⁸¹ HEALTH PLAN, *supra* note 67, at 13.

⁸² Levi Pulkkinen, *Health Care in WA Prisons Leaves Inmates Waiting Months or Years for Help* (Aug. 4, 2020), CROSSCUT, <https://crosscut.com/news/2020/08/health-care-wa-prisons-leaves-inmates-waiting-months-or-years-help> [<https://perma.cc/DRX5-KXA2>].

⁸³ *Id.*

Although some facilities will permit incarcerated individuals to self-manage certain medication,⁸⁴ in many circumstances, incarcerated people are forbidden from doing so, meaning they cannot keep medication on their person or in their cell.⁸⁵ In such facilities, incarcerated people may be administered medicine once a day under close supervision.⁸⁶ This is potentially disastrous for those who require medicine multiple times per day, or for whom the timing of their medication is crucial.⁸⁷ Contrasting disease management policies of individual facilities with the management policies set forth by national experts⁸⁸ reveals a chasm between appropriate care and actual care.⁸⁹

3. Pregnancy

Historically, those who give birth while incarcerated have often been deprived of contact with their newborn shortly after birth.⁹⁰ Modern ethical standards demand respect for reproductive autonomy, including during pregnancy and childbirth.⁹¹ Yet, the experience of giving birth is often traumatic, even for those outside of the carceral context, and can result in

⁸⁴ DISABILITY RTS. NW., A GUIDE TO ACCESSING MEDICATION FOR INMATES IN WASHINGTON STATE JAILS, https://disabilityrightswa.org/publications/guide-accessing-medication-inmates-washington-state-jails/#Medication_brought_into_jail_by_an_inmate [<https://perma.cc/C6UQ-LQSS>].

⁸⁵ Morgan, *supra* note 17, at 30.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ James S. Hirsch, *Behind Bars, with Diabetes*, DIATRIBE LEARN (Jul. 31, 2012), <https://diatribe.org/behind-bars-diabetes-0> [<https://perma.cc/Z7J5-GY37>].

⁸⁹ Emily Widra, *New data confirms that prisons neglected COVID-19 mitigation strategies, putting public health at risk*, PRISON POL'Y INITIATIVE (Oct. 13, 2022), https://www.prisonpolicy.org/blog/2022/10/13/covid_policies/ [<https://perma.cc/FFV8-GSDU>].

⁹⁰ *Women in Prison: Programs and Alternatives: Hearing before the Committee on the Judiciary*, 103rd Cong. 11 (1993) (statement of Larry Pressler, Senator) [hereinafter Pressler].

⁹¹ Elselijn Kingma, *Harming One to Benefit Another: The Paradox of Autonomy and Consent in Maternity Care*, BIOETHICS (Jun. 5, 2021), <https://pubmed.ncbi.nlm.nih.gov/33835517/> [<https://perma.cc/2TRS-DA3Y>].

feelings of objectification, dehumanization, and lack of agency which create enduring suffering.⁹² The carceral environment is even more challenging in this respect:

I was only eight and a half months [pregnant]. I'm like, "Why are you making me have my baby?" The doctor said, "We need to speed this up." But she wasn't ready to come out. This is what happened. As I was taking my pants down, my water broke, and I started bawling and crying because I wasn't ready to have her. I said, "I want to wait until [the doulas] get here." But then he started the Pitocin, and I started having more contractions. I requested the doulas to be there, and they weren't. I didn't appreciate that. I didn't feel that was right. When the nurse saw the doulas, she told them to leave or they would be arrested. I didn't know about the breathing. . . It was just me, the doctor, the officer, and the nurse. . . I at least got to spend twenty-four hours with her and breastfeed her. I needed that extra time to bond with my baby. I don't feel right being away from her.⁹³

When pregnant people are incarcerated, they experience unique challenges and risks, few of which carceral settings are willing to address. These challenges and risks can include the danger of standard security practices, inadequate healthcare, and nutrition, as well as the trauma of the birthing experience and post-natal separation.⁹⁴

a) Security Measures

Restraints are a standard security measure in carceral settings. But with approximately 4.4% of female detainees pregnant at intake,⁹⁵ the

⁹² *Id.*

⁹³ RICKIE SOLINGER ET AL., *Birthing Program in Washington State*, in INTERRUPTED LIFE EXPERIENCES OF INCARCERATED WOMEN IN THE UNITED STATES 87 (2010).

⁹⁴ *Id.* at 87–88.

⁹⁵ Nat'l Assoc. of State Mental Health Program Directors, *Best Practices in the Use of Restraints with Pregnant Women and Girls Under Correctional Custody*, U.S. DEP'T OF JUST. OFF. OF JUST. PROGRAMS 3 (2014), [http://www.nasmhpd.org/sites/default/files/Best_Practices_Use_of_Restraints_Pregnant\(2\).pdf](http://www.nasmhpd.org/sites/default/files/Best_Practices_Use_of_Restraints_Pregnant(2).pdf) [<https://perma.cc/Z7UN-XBCM>].

Department of Health and Human Services (DHHS) advocates a gender-responsive approach to security. The DHHS has recognized that “[w]omen and girls in correctional settings are more likely to have high-risk pregnancies for a variety of reasons” and that shackling further contributes to the risk of negative outcomes⁹⁶—an assertion supported by many medical associations.⁹⁷ And while federal law may attempt to offer slight protections, policies vary within state facilities. Although Washington State law does prohibit the use of restraints (barring “extraordinary circumstances”) upon pregnant people during late-stage pregnancy, delivery, and recovery,⁹⁸ this is not the case in all states⁹⁹ despite the lack of evidence showing a correlation between the prohibition of shackling and increased escape attempts.¹⁰⁰ Furthermore, shackling during earlier stages of pregnancy may still contribute to serious injury and difficulty in rendering medical care.¹⁰¹ Arguably, the dangerous consequences that arise from being considered a “flight risk” meriting shackling raises concerning potential for abuse.

b) Nutrition and Healthcare

Being incarcerated during pregnancy also correlates with a higher risk of miscarriage, premature birth, and infants being small for their gestational

⁹⁶ *Id.* at 5.

⁹⁷ UNIV. OF CHI. L. SCH.—GLOBAL HUM. RTS. CLINIC, CHI. LEGAL ADVOC. FOR INCARCERATED MOTHERS, & ACLU NAT’L PRISON PROJECT, THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES (2014), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1008&context=ihr> [<https://perma.cc/CSL4-YT8V>] [hereinafter UNIV. OF CHI. L. SCH.].

⁹⁸ WASH. REV. CODE § 72.09.651 (2010).

⁹⁹ UNIV. OF CHI. L. SCH., *supra* note 97, at 1.

¹⁰⁰ *Id.*

¹⁰¹ Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15 AMA J. ETHICS 779, 780 (2013).

age¹⁰² due to factors such as inadequate nutrition (in terms of both caloric content and essential vitamins) and healthcare.¹⁰³ Nutrition and healthcare within carceral facilities are often inadequate to meet the needs of even a healthy person,¹⁰⁴ let alone a pregnant person whose nutritional needs increase dramatically during their pregnancy.¹⁰⁵ In particular, pregnant people frequently need additional vitamins as well as routine examinations to assess complications and ensure healthy fetal development. Pregnancy itself can create additional health concerns for the pregnant person, such as bone weakness,¹⁰⁶ gestational diabetes, and physical symptoms such as nausea and pain, all of which can further endanger the fetus.¹⁰⁷

c) Birth and Separation

Notwithstanding the trauma and dehumanization of being shackled while giving birth, few who give birth while incarcerated are permitted to choose the manner and location of their birth—an issue of incredible importance. People giving birth while incarcerated are often separated from their

¹⁰² Rebecca J. Shlafer et al., *Best Practices for Nutrition Care of Pregnant Women in Prison*, J. CORR. HEALTHCARE, 297 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6671683/> [https://perma.cc/ZWY3-FHW6].

¹⁰³ *Id.*

¹⁰⁴ Hedstrom, *supra* note 6, at 68.

¹⁰⁵ *Nutrition During Pregnancy to Support a Healthy Mom and Baby*, OFF. OF DISEASE PREVENTION & HEALTH PROMOTION (Feb. 16, 2022), <https://health.gov/news/202202/nutrition-during-pregnancy-support-healthy-mom-and-baby#:~:text=weight%20gain%20guidelines-,during%20pregnancy.,that%20is%20overweight%20or%20obese.> [https://perma.cc/G892-QUYE].

¹⁰⁶ *Pregnancy, Breastfeeding, and Bone Health*, NAT'L INST. OF ARTHRITIS & MUSCULOSKELETAL & SKIN DISEASES (May 2023), <https://www.niams.nih.gov/health-topics/pregnancy-breastfeeding-and-bone-health> [https://perma.cc/HV56-6XLF].

¹⁰⁷ *What Health Problems Can Develop During Pregnancy?* EUNICE KENNEDY SHRIVER NAT'L INST. OF CHILD HEALTH & HUM. DEV. (Jan. 31, 2017), <https://www.nichd.nih.gov/health/topics/preconceptioncare/conditioninfo/health-problems> [https://perma.cc/9TWL-LWSB].

children shortly after birth.¹⁰⁸ However, the first year of a baby's life is a critical stage where skin-to-skin contact with the parent after birth is increasingly recognized as paramount to healthy cognitive, physical, and social development, and the effects of the absence of this contact are noticeable even into the child's adulthood.¹⁰⁹ It is also important for the health of the birthing parent, as such contact reduces post-partum depression rates and aids in hormone regulation as well as post-birth recovery.¹¹⁰ The deprivations imposed by carceral settings, therefore, clearly promote lasting negative outcomes not only for the parent but also the child—"[i]n essence, the child also feels the burden of the sentence that we have given to their mother."¹¹¹ Children of incarcerated parents are unduly punished by this separation and experience an increased risk of future psychological trauma, social as well as educational difficulties, and contacts with the criminal justice system.¹¹²

4. Aging

a) History

Age is not an illness; however, there are many conditions and concerns attendant with the aging process, and various societies have long recognized that elders have unique needs.¹¹³ The proportion of aging and elderly

¹⁰⁸ Alisa Roth, *A Novel Prison Program for Pregnant Women and Their Babies*, CONN. PUB. RADIO <https://www.ctpublic.org/2023-11-21/a-novel-prison-program-for-pregnant-women-and-their-babies> [<https://perma.cc/EEH3-5K5L>].

¹⁰⁹ *The Importance of Skin-to-Skin with Baby after Delivery*, SANFORD HEALTH NEWS (Jun. 20, 2023), <https://news.sanfordhealth.org/childrens/the-importance-of-skin-to-skin-after-delivery-you-should-know/> [<https://perma.cc/7NJ6-D6EX>].

¹¹⁰ *Id.*

¹¹¹ Pressler, *supra* note 90.

¹¹² *Children of Incarcerated Parents*, YOUTH.GOV, <https://youth.gov/youth-topics/children-of-incarcerated-parents> [<https://perma.cc/7ET2-JUYE>].

¹¹³ LIBRETEXTS, *Phases of Aging, in* LIFESPAN DEVELOPMENT, https://socialsci.libretexts.org/Courses/Foothill_College/Psych_40%3A_Lifespan_Devel

individuals incarcerated has been rising steadily in the United States largely due to increases in lengthy or indeterminate sentences.¹¹⁴ In Washington State, this effect is especially prominent due to the state's early adoption of the "three strikes" law, which resulted in a higher proportion of individuals sentenced to life in prison.¹¹⁵

This rise in the proportion of elderly incarcerated individuals, though, is not due to a rise in older individuals committing crimes. According to sociological theory, most offenders "age out" of criminal behavior, naturally exhibiting less recidivism as they mature.¹¹⁶ These factors raise questions regarding whether it is necessary to maintain the incarceration of elderly individuals.¹¹⁷ For many, the length of their sentence far exceeds the expected length of their criminal career.¹¹⁸ Lawbreaking tends to peak in an individual's late teens to twenties and decrease proportionate to a person's age, raising questions as to whether longer sentences are truly necessary to secure public safety.¹¹⁹ Some theorize that releasing elderly incarcerated individuals will not endanger public safety because these individuals are inherently less likely to re-offend as they age due to improved self-control and decreased motivation or ability to offend.¹²⁰ A survey of federal cases

opment_(Pilati)/10%3A_Late_Adulthood/10.03%3A_Phases_of_Aging
[<https://perma.cc/JT9T-S7EM>].

¹¹⁴ Violet Handtke et al., *The Collision of Care and Punishment: Ageing Prisoners' View on Compassionate Release*, 19 PUNISHMENT & SOC'Y 6 (2017), https://journals.sagepub.com/doi/pdf/10.1177/1462474516644679?casa_token=qvGipWyGzk4AAAAA:zzQwPzQp31QkMKOI7eIj7OiQhB8P5ywRIxpSZ9G-G5B8DwRIPZoUm9k3PpusUjzmB2xUfNzWOdY [<https://perma.cc/Y9FQ-JPME>].

¹¹⁵ Steve Karimi, *Aging Inmates and Washington State Prisons*, KARIMILAW (Jul. 18, 2019), https://www.karimilawoffice.com/Washington_State-prisons-and-aging-inmates [<https://perma.cc/S8GU-BR5G>].

¹¹⁶ Dana Goldstein, *Too Old to Commit Crime?*, MARSHALL PROJECT (Mar. 20, 2015), <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime> [<https://perma.cc/SDEV-LA98>].

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

lends support to this assertion, indicating that for those above the age of fifty, the rate of recidivism drops to approximately 15%, in contrast with the general rate of 41%.¹²¹

Scandinavian sentencing policy provides a useful model for changing sentencing for older adults in the American carceral system. The penal policy in Scandinavian nations is often to eschew life sentences in favor of a shorter term of years¹²² followed by the possibility of extension in the event that the offender is still shown to be dangerous at the end of their original sentence.¹²³ The ability to impose a life sentence is retained and holds “symbolic value,”¹²⁴ however, individuals sentenced to life imprisonment are still able to petition for clemency (which is frequently granted).¹²⁵ With sentences rarely lasting until offenders reach old age while imprisoned, and the extreme rarity of serving an entire life sentence, it should be no surprise that the average age of incarcerated individuals in Scandinavian countries is low, with the highest age range being Norway at 30-39 years old.¹²⁶ This general strategy appears to be effective, as it is widely acknowledged that Nordic penal policies result in significantly lower recidivism rates.¹²⁷

¹²¹ *Elderly in Prison and Compassionate Release*, NOLAN CTR. FOR JUST.: AMER. CONSERVATIVE UNION FOUND., <https://conservativejusticereform.org/issue/elderly-in-prison-and-compassionate-release/> [<https://perma.cc/N2U3-469A>].

¹²² Doris Schartmueller, *Life Imprisonment in Scandinavia: The Ultimate Punishment in the Penal Environments of Denmark, Finland, and Sweden* (Aug. 2015) (Ph.D. Dissertation, Northern Arizona Univ.), available at <https://www.epea.org/wp-content/uploads/LIFE-IMPRISONMENT-IN-SCANDINAVIA.pdf> [<https://perma.cc/J2YC-Y9SU>].

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ Schartmueller, *supra* note 122.

¹²⁷ *What We Can Learn From Norway's Prison System: Rehabilitation & Recidivism*, FIRST STEP ALLIANCE (Nov. 26, 2023), <https://www.firststepalliance.org/post/norway-prison-system-lessons#:~:text=The%20most%20profound%20benefit%3A%20Norway,recidivism%20rate%20is%20only%2025%25.> [<https://perma.cc/8G86-NH6F>].

Despite evidence that lengthy sentences and the incarceration of the elderly are unnecessary, there still exists an increasingly aging incarcerated population which presents advanced challenges for carceral healthcare, especially since incarceration has an aging effect on its subjects.¹²⁸ Incarcerated individuals begin showing symptoms of advanced age much earlier than those who are not incarcerated and are considered to become “elderly” at 50 years of age.¹²⁹ With approximately 19.5% of the population incarcerated in federal prisons at or above 50 years of age, and almost 12% in their late 40s, it is apparent that a significant number of individuals will develop age-related concerns at some point during their sentence.¹³⁰

b) Current Realities

Far from creating policies protecting the growing elderly population housed within them, carceral facilities are uniquely unequipped to handle age-related concerns and often rely on employing others housed within the facility to care for their fellows.¹³¹ Approximately 64% of all incarcerated individuals above the age of 45 report at least one serious medical condition.¹³² When compared with younger individuals within the same facility, older incarcerated people are found to be at an elevated risk for diabetes, heart disease, and liver disease.¹³³ Anxiety and depression are common, and approximately one-fifth of older residents across facilities in the United States experience challenges with daily living activities.¹³⁴

¹²⁸ *Elderly in Prison and Compassionate Release*, *supra* note 121.

¹²⁹ *Id.*

¹³⁰ *Inmate Age*, FED. BUREAU OF PRISONS (Nov. 25, 2023), https://www.bop.gov/about/statistics/statistics_inmate_age.jsp [https://perma.cc/2NM8-5X99].

¹³¹ Karimi, *supra* note 115.

¹³² Kimberly A. Skarupski et al., *The Health of America's Aging Prison Population*, 40 *EPIDEMIOLOGIC REV.* 157 (Mar. 23, 2018), <https://academic.oup.com/epirev/article/40/1/157/4951841> [https://perma.cc/H7BN-EW4H].

¹³³ *Id.*

¹³⁴ *Id.*

Considering these factors, it is not surprising that overall healthcare costs for older incarcerated individuals are estimated at 3–9 times greater than that of their younger counterparts.¹³⁵ Yet, individual facilities do not always have an accurate picture of the needs of their aging populations—reports of detainee disability from guards differ widely from self-reports of incarcerated people, indicating that staff are frequently unaware of the needs and abilities of any given individual within the carceral facility.¹³⁶

When it comes to end-of-life care, incarcerated hospice patients enter earlier, stay longer, and die younger than those in the unincarcerated community.¹³⁷ Numerous studies show that dying in a carceral facility is a significant fear for those incarcerated, with their main concerns being inadequate care, the inability to see loved ones, and the potential stigma surrounding dying while incarcerated.¹³⁸ When it comes to dying, the place and manner are important to the patient's dignity and sense of well-being, with patients having the best experiences amongst loved ones in their own homes.¹³⁹ Elderly incarcerated people are denied this final mercy and must instead rely on the carceral facility for end-of-life care¹⁴⁰ which, due to its inadequacy in many instances, creates an unconstitutional state of illness and pain.¹⁴¹

Much of what constitutes appropriate palliative care for the terminally ill is simply not feasible in carceral facilities—pain medication, for instance, is

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Handtke et al., *supra* note 114.

¹³⁹ Mark Betancourt, *The Devastating Process of Dying in America without Insurance*, THE NATION (Jun. 20, 2016), <https://www.thenation.com/article/archive/the-devastating-process-of-dying-in-america-without-insurance/>[<https://perma.cc/JF2W-Z3E8>].

¹⁴⁰ Kathleen S. Messinger, *Death with Dignity for the Seemingly Undignified: Denial of Aid in Dying in Prison*, 109 J. CRIM. L. & CRIMINOLOGY 633, 656 (2019), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7655&context=jclc>

[<https://perma.cc/W32K-9YV6>].

¹⁴¹ *Id.* at 670.

apportioned on an extremely limited basis to prevent abuse.¹⁴² Incarcerated individuals are also not permitted to exert control over the end of their lives in other ways; courts have not yet definitively determined whether individuals outside of carceral facilities—let alone within carceral facilities—have the *right* to take steps to end their own life or to seek medical aid in dying, thus infringing upon the highly personal right to die, which many are coming to understand as a protected privacy right in the name of autonomy and dignity.¹⁴³ Even in states where such practices are permitted,¹⁴⁴ this ability often does not extend to those within the carceral system. The states of Washington, Oregon, and Colorado each prohibit aid in dying for incarcerated individuals while simultaneously granting this right to unincarcerated individuals.¹⁴⁵

c) Consequences

Aging while incarcerated is a grim reality. Those with age-related mobility impairments are unlikely to receive accessible cells or to be able to successfully navigate the physical environment of the facility.¹⁴⁶ Elderly incarcerated people are unable to access adequate programming due to not only their age-related impairments, but also the unique needs that they face upon release—the education and training programs currently available are often inadequate to meet the needs of an individual who is nearing retirement age and not seeking employment, or who will require daily living support upon release.¹⁴⁷ Elderly individuals are also costly to keep incarcerated due to the sharp increase in medical needs.¹⁴⁸ In short, elderly

¹⁴² *Id.*

¹⁴³ *Id.* at 652.

¹⁴⁴ *Id.* at 655.

¹⁴⁵ *Id.*

¹⁴⁶ OFF. OF THE INSPECTOR GEN., THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS 27 (2015).

¹⁴⁷ *Id.* at 52.

¹⁴⁸ *Id.*

individuals struggle both physically and mentally while incarcerated and, with little hope for sufficient rehabilitative opportunities, raise serious concerns as to whether any carceral sentence is appropriate for them.

Additionally, death and dying are of primary concern for incarcerated individuals nearing the end of life.¹⁴⁹ Incarcerated people are denied the ability to say a meaningful goodbye to loved ones, while, conversely, their loved ones are also denied in any meaningful way a real chance to say goodbye to them. Modern approaches to the human relationship with death and dying recognize that control over one's end-of-life planning and the ability to be involved with end-of-life care for loved ones is both powerful and important.¹⁵⁰ For the terminally ill incarcerated person, the last vestiges of self-determination and mercy seem stripped away despite growing public support¹⁵¹ for end-of-life rights. This raises questions over what further dignities will be absent behind bars even as society's standards of decency continue to evolve.

5. Minorities

The correlation between the factors leading to disability and disease and the factors commonly shared by incarcerated people is of concern. People of color as well as people of lower socio-economic status are

¹⁴⁹ Wyatt Stayner, *Dying behind Bars—Another Form of Capital Punishment*, PRISON JOURNALISM PROJECT (May 4, 2023), <https://prisonjournalismproject.org/2023/05/04/more-people-aging-dying-in-prison/> [<https://perma.cc/46XD-YTGP>].

¹⁵⁰ *Patients' Rights to Self-Determination at the End of Life*, AM. PUB. HEALTH ASS'N (Oct. 28, 2008), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/29/13/28/patients-rights-to-self-determination-at-the-end-of-life#:~:text=The%20American%20Public%20Health%20Association,be%20preferable%20to%20any%20alternative> [<https://perma.cc/PCX3-3W8A>].

¹⁵¹ Messinger, *supra* note 140, at 654.

overrepresented both in the incarcerated population¹⁵² and amongst those with chronic disease,¹⁵³ meaning that who are the most likely to have a medical vulnerability—and the most likely to experience complications from it—are also the most likely to experience incarceration. Furthermore, these communities are often under-diagnosed due to difficulties with obtaining adequate healthcare, which often makes effective treatment likewise unattainable.¹⁵⁴ With medication and equipment management during detention often being predicated upon previous diagnosis and current prescriptions¹⁵⁵ rather than actual need, it is easy to see how these over-incarcerated and under-treated communities will experience the worst health consequences while incarcerated.

B. Failures to Mitigate

1. Sentencing

Judges are not necessarily able to fully consider the harmful impacts of incarceration on a defendant's health when imposing a sentence. In Washington State, mitigating factors allowing for shorter sentences than usual are those factors that reduce the defendant's culpability—disability or health status is not a mitigating factor and, therefore, is not included in sentencing calculations when determining appropriate sentence lengths.¹⁵⁶ However, it is known that the development or worsening of a health

¹⁵² ASHLEY NELLIS, THE SENTENCING PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 6, 15 (2021); *see also* Kayla Marie Martensen, *Review of Carceral State Studies and Application*, 14 SOCIO. COMPASS (2020).

¹⁵³ James H. Price et al., *Racial/Ethnic Disparities in Chronic Diseases of Youths and Access to Health Care in the United States*, 2013 NAT'L LIBR. OF MED. 167 (2013).

¹⁵⁴ *Id.*

¹⁵⁵ HEALTH PLAN, *supra* note 67.

¹⁵⁶ WASH. ST. CASELOAD FORECAST COUNCIL, 2020 WASH. ST. ADULT SENTENCING GUIDELINES MANUAL (2020), https://cfc.wa.gov/sites/default/files/Publications/Adult_Sentencing_Manual_2020.pdf [<https://perma.cc/JG8J-KW67>].

condition is correlated with the length of one's sentence.¹⁵⁷ Washington State law does state that electronic home detention may be offered for some individuals, "if medical or health-related conditions, concerns or treatment would be better addressed under the home detention program, or where the health and welfare of the offender, other inmates, or staff would be jeopardized by the offender's incarceration."¹⁵⁸

Unfortunately, the electronic home detention available under this statute requires the individual to participate in school or work—a condition that not all individuals can meet. Those who have a disability and chronic health conditions have historically been, on average, less likely to be able to obtain and/or maintain gainful employment, thus rendering this sentencing option unhelpful.¹⁵⁹ Additionally, the threat of transfer to incarceration upon losing one's job creates a high potential for abuse by an employer. Unfortunately, the statute is also silent on what will happen to an offender who is temporarily unable to work or who fails to secure immediate employment upon completing a course of study. Finally, this option is not available for those who have been sentenced because of a drug-related offense and who are not also participating in the Drug Offender Sentencing Alternative

¹⁵⁷ COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, COMM. ON LAW & JUST., DIVISION OF BEHAV. & SOC. SCI. & ED., NAT'L RES. COUNCIL, BOARD ON THE HEALTH OF SELECT POPULATIONS, INST. OF MED., *I. Impact of Incarceration on Health*, in HEALTH AND INCARCERATION: A WORKSHOP SUMMARY (Aug. 8, 2013), available at <https://www.ncbi.nlm.nih.gov/books/NBK201966/> [<https://perma.cc/6XX6-6HD6>].

¹⁵⁸ WASH. REV. CODE § 9.94A.734.

¹⁵⁹ Mia Ives-Ruble, Rose Khattar, & Lily Roberts, *Removing Obstacles for Disabled Workers Would Strengthen the U.S. Labor Market*, CTR. FOR AM. PROGRESS (May 24, 2022), <https://www.americanprogress.org/article/removing-obstacles-for-disabled-workers-would-strengthen-the-u-s-labor-market/#:~:text=Line%20graph%20showing%20that%20from,for%20those%20without%20a%20disability> [<https://perma.cc/T35U-W5AB>]; see also Jean Stewart & Marta Russell, *Disablement, Prison, and Historical Segregation*, MONTHLY REV. (Jul. 1, 2001), <https://monthlyreview.org/2001/07/01/disablement-prison-and-historical-segregation/> [<https://perma.cc/3PHB-77E8>].

Program (DOSA).¹⁶⁰ This electronic home detention option is also subject to other conviction-based restrictions as well, such as for violent offenses.¹⁶¹ Therefore, while a potential alternative sentence for medically vulnerable individuals does exist, the conditions upon its availability ultimately cause a lack of viability for many people.¹⁶²

2. Adaptation

If the MVIP cannot avoid carrying out their sentence inside a carceral facility, are there ways to adapt the facility itself to accommodate their needs? There have been efforts nationwide to force carceral facilities to redesign for accessibility concerns, such as implementing ramps and widening hallways to comply with ADA recommendations for mobility impairment, or ensuring free access to assistive devices for the Deaf and hard of hearing.¹⁶³ However, even when carceral facilities have the appropriate supplies, they frequently fail to provide these supplies to incarcerated people.¹⁶⁴ These facilities, it seems, are either unable to comply with ADA requirements or are outright ignoring them.¹⁶⁵

¹⁶⁰ See *infra* for further discussion on Washington's DOSA program and the program's requirements.

¹⁶¹ WASH. REV. CODE § 9.94A.734(1).

¹⁶² WASH. REV. CODE § 9.94A.734(4)(a).

¹⁶³ U.S. DEP'T OF JUSTICE, ENFORCING THE ADA (1999) <https://archive.ada.gov/julsep99.htm> [<https://perma.cc/X9TU-WW75>].

¹⁶⁴ U.S. Attorney's Office, Western District of Washington State, *DOJ and Clark County Jail Resolve Alleged Violations of Americans with Disabilities Act* (Jul. 15, 2021), <https://www.justice.gov/usao-wdwa/pr/doj-and-clark-county-jail-resolve-alleged-violations-americans-disabilities-act> [<https://perma.cc/32VK-65GZ>].

¹⁶⁵ Erika Eichelberger, *Prisons Basically Ignore the Americans with Disabilities Act, Leaving a Third of Inmates Facing Abuse and Neglect*, VICE NEWS (Dec. 28, 2016), <https://www.vice.com/en/article/evayea/prisons-basically-ignore-the-americans-with-disabilities-act> [<https://perma.cc/9EE9-RCDB>].

3. Lawsuits under the Prison Litigation Reform Act (PLRA)

Seeking accommodations by way of suing the facility is both complicated and difficult, and usually has a low success rate.¹⁶⁶ Accommodation-seekers under the PLRA are required to exhaust the carceral facility's formal grievance procedures and all potential administrative appeals, fully pay all court filing fees and demonstrate physical injury.¹⁶⁷ However, those incarcerated with disabilities can find the formal grievance process inaccessible, thus preventing them from seeking legal action.¹⁶⁸ Furthermore, only three suits or appeals may be filed before the accommodation-seeker is forced to pay the entire filing fee upfront for their next attempt, rather than the typical installment, forcing seekers into a position of financial distress or even inability to continue their pursuit¹⁶⁹

4. Extraordinary Medical Placement

Extraordinary Medical Placement is a Washington State program¹⁷⁰ in which an incarcerated person is referred for community supervision after their health has deteriorated. Program eligibility requires satisfying four conditions: (1) having a medical condition requiring costly treatment or care; (2) release is cost-saving for the State; (3) being a low safety risk to the community; and (4) having a condition causing physical or mental incapacitation.¹⁷¹ Here, incapacitation means the person is unable or unlikely to perform the activities of daily life unassisted, engage in gainful

¹⁶⁶ ACLU, KNOW YOUR RIGHTS: THE PRISON LITIGATION REFORM ACT (PLRA), https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf [<https://perma.cc/K45Y-R984>].

¹⁶⁷ *Id.*

¹⁶⁸ REBECCA VALLAS, CTR. FOR AM. PROGRESS, DISABLED BEHIND BARS 12 (2016). <https://www.americanprogress.org/article/disabled-behind-bars/> [<https://perma.cc/VJ2N-ZKVE>].

¹⁶⁹ ACLU, *supra* note 166.

¹⁷⁰ WASH. REV. CODE § 9.94A.728.

¹⁷¹ *Id.*

employment, and participate in any criminal behavior.¹⁷² Additionally, qualification requires the seeker to have community support or be able to obtain funding for their support needs.¹⁷³ The individual's placement may be revoked at any time, and they will be required to serve the remainder of their sentence in a carceral facility.¹⁷⁴

Because of this program's strict requirements, Extraordinary Medical Placement is infrequently granted and is insufficient to address the concerns of the MVIP.¹⁷⁵ For example, individuals must be proactively referred, rather than being regularly screened for qualifying conditions.¹⁷⁶ Referrals can come from the person themselves, community members, or corrections officers;¹⁷⁷ however, referrals could be difficult given that the eligible person could be unable to refer themselves due to their incapacitation, community relationships are subject to change, and relying on officials to notice such impairments without a regular screening process is not promising.¹⁷⁸ Additionally, waiting until a condition has progressed to the point of incapacitation is especially cruel considering the preventative measures that could be taken if the individual were released. The fact that one is reincarcerated once their fragile health improves, though, is even crueler. Given the correlation between incarceration and the worsening of

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ BERNARD WARNER & SUSAN LUCAS, STATE OF WASH. DEP'T OF CORR., RELEASE OPTIONS UNDER THE EXTRAORDINARY MEDICAL PLACEMENT PROGRAM: 2012 ANNUAL REPORT TO THE THE LEGISLATURE 9 (2012), https://apps.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=EMP%20Report%202012_872d4c22-f4ef-4a83-ade1-f079b5a260dc.pdf [<https://perma.cc/9SQB-A6EP>].

¹⁷⁶ *Id.* at 7.

¹⁷⁷ *Id.*

¹⁷⁸ For instance, many conditions do not manifest externally in a manner easily recognizable by others, *see, e.g.*, Jennifer Sisk, *Invisible Illness — What You Can't See Does Hurt Her*, SOCIAL WORK TODAY, 18 (2007).

physical conditions,¹⁷⁹ it seems hardly fair to re-incarcerate a person when their condition has a strong likelihood of worsening again or to keep them incarcerated when released would prevent their incapacitation.

5. Compassionate Release

A final strategy for mitigating health consequences in carceral facilities is compassionate release. Compassionate release is the practice of allowing early release when unforeseen circumstances—typically terminal illness or debilitating age-related conditions—arise.¹⁸⁰ In recognition of the inability of correctional facilities to appropriately provide care in these cases, individuals are released in the interest of pursuing end-of-life care. But even compassionate release has its pitfalls, as it is not always an option for MVIPs. During COVID, several incarcerated people petitioned for compassionate release because their underlying conditions made them especially vulnerable to the virus and they were unable to adequately protect themselves from the disease.¹⁸¹ Their petitions were denied.¹⁸² The eligibility criteria for compassionate release are highly subjective, with approval depending on multiple factors.¹⁸³ Depending on the circumstances, the option is only available to those over 65–70 years old who have already served thirty years or 50%–75% of their sentence.¹⁸⁴ Release is typically only indicated when the petitioner is already unlikely to recover, rather than

¹⁷⁹ U.S. Dep't of Health and Human Services, *Incarceration*, HEALTHY PEOPLE 2030 <https://health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/incarceration#:~:text=Studies%20have%20shown%20that%20when,%2C%20hepatitis%2C%2C%20and%20HIV> [<https://perma.cc/G4HU-J3PU>].

¹⁸⁰ Megan Horner, *Broken and Underutilized: Understanding Compassionate Release Programs for Older Adult Prisoners*, 44 BIFOCAL 48 (2023).

¹⁸¹ Joseph Neff & Keri Blakinger, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied*. THE MARSHALL PROJECT (2020) <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied> [<https://perma.cc/58FM-7R3N>].

¹⁸² *Id.*

¹⁸³ WASH. REV. CODE § 9.94A.728

¹⁸⁴ 18 U.S.C. § 3582.

as a preventative measure. Because eligibility factors include proximity to death, many petitioners die while incarcerated before their requests are heard.¹⁸⁵

C. *This is a Violation*

The vast disparity between what is required of correctional facilities and what is actually provided demonstrates the carceral system's clear inability to meet these minimum standards. The reality of medical needs within the carceral setting is one of neglect and abuse.¹⁸⁶ As the situation currently stands, the very notion of incarcerating these populations is a violation of existing legal protections and common principles.

As previously discussed, many facilities fail to meet ADA standards for accessibility in construction and programming. Facilities may fail to comply with these basic protections, even when ordered by courts to improve conditions, and are given the funding to do so.¹⁸⁷ Additionally, the Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment, and the Supreme Court has recognized that the Eighth Amendment applies to those incarcerated because it is animated by respect for human dignity.¹⁸⁸ "A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."¹⁸⁹

It seems logical that a carceral facility would not *intentionally* violate the

¹⁸⁵ U.S. BUREAU OF PRISONS, DEP'T. OF JUST., NO. 5050.50, COMPASSIONATE RELEASE/REDUCTION OF SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. 3582(C)(A) AND 4205(G) (2019), <https://www.bop.gov/policy/progstat/5050> [<https://perma.cc/6E3N-V9UL>].

¹⁸⁶ MORGAN, *supra* note 17, at 30.

¹⁸⁷ Don Thompson, *California fails to adequately help blind and deaf prisoners*, *US judge rules*, CAPRADIO (Apr. 15, 2024) <https://www.capradio.org/articles/2024/04/15/california-fails-to-adequately-help-blind-and-deaf-prisoners-us-judge-rules/> [<https://perma.cc/93BL-PGBX>].

¹⁸⁸ *Brown v. Plata*, 563 U.S. 493, 510 (2011).

¹⁸⁹ *Id.* at 511.

Constitution by withholding appropriate care, but a sentence that may appear to be proportionate from the outside can still carry with it additional consequences based on the incarcerated individual's unique circumstances.¹⁹⁰ When it is a statistical certainty that a person will experience pain, isolation, illness, or early death because of their confinement, one might argue that incarceration of any kind is a constitutional violation due to the unavoidable pain and suffering that it brings.¹⁹¹

1. Washington State Constitutional Rights

Washington's Supreme Court made national headlines recently when it banned the State's death penalty as cruel and unusual punishment in *State v. Gregory*.¹⁹² Specifically, the Court held that the death penalty violated Article I, Section 14 of Washington's Constitution because it was administered in an "arbitrary and racially biased manner."¹⁹³ Many years ago, SCOTUS in *Estelle v. Gamble* held that failure to provide adequate medical care to incarcerated patients can also constitute cruel and unusual punishment under the Eighth Amendment of the United States Constitution.¹⁹⁴ With this in mind, the Washington Supreme Court would likely follow suit if given the opportunity. In fact, a recent case from the Washington Supreme Court ruled that the State's Department of Corrections failed to provide appropriate sanitary conditions to a wheelchair-bound incarcerated person, thus violating Washington's constitutional ban on cruel and unusual punishment, as follows:

"We hold that article I, section 14 is more protective than the Eighth Amendment for conditions of confinement. To analyze claims of unconstitutionally cruel prison conditions, we adopt a

¹⁹⁰ Davis & McDonald, *supra* note 55.

¹⁹¹ VALLAS, *supra* note 168.

¹⁹² *State v. Gregory*, 427 P.3d 621 (Wash. 2018).

¹⁹³ *Id.* at 636.

¹⁹⁴ *Estelle v. Gamble*, 429 U.S. 97 (1976).

modified version of the federal deliberate indifference standard. An individual challenging his or her conditions of confinement must demonstrate two things: (1) the conditions create an objectively significant risk of serious harm or otherwise deprive a person of the basic necessities of human dignity and (2) the conditions are not reasonably necessary to accomplish a legitimate penological goal. For the reasons explained above, Williams satisfies this test, and we hold his conditions of confinement were unconstitutionally cruel.”¹⁹⁵

Stated differently, the court held that Washington’s Constitution is even more protective than the Eighth Amendment regarding conditions of confinement and that incarcerated people do not have to meet the “deliberate indifference” standard outlined in *Farmer v. Brennan*, 511 U.S. 825 (1994) or similar federal rulings.¹⁹⁶ They simply need to show that the conditions create a significant risk of serious harm in a way that is not reasonably necessary to accomplish a legitimate penological goal.¹⁹⁷

2. Principles of Punishment

When it comes to the reasons *why* society incarcerates offenders to begin with, there are four commonly accepted principles: (1) rehabilitation, (2) incapacitation, (3) deterrence, and (4) retribution.¹⁹⁸ The attributes of rehabilitation and retribution are particularly impacted by the intersection of disability and conditions in correctional facilities. From the rehabilitation perspective, punishment is aimed at correcting the offender’s behavior and providing the resources required to comply with the law, such as treatment,

¹⁹⁵ In re Pers. Restraint of Williams, 198 Wn.2d 342 (2021).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ LIBRETEXTS, *The Principles of Punishment*, in INTRODUCTION TO CRIMINAL LAW https://socialsci.libretexts.org/Under_Construction/Purgatory/JPP_207_Substantive_Criminal_Law/01%3A_Introduction_to_Criminal_Law/1.05%3A_The_Purposes_of_Punishment#:~:text=Incapacitation%20prevents%20crime%20by%20removing,by%20punishing%20the%20defendant%20financially [<https://perma.cc/TX4B-A53M>].

counseling, and vocational training.¹⁹⁹ However, as discussed previously, rehabilitative programming is not always available to those with disabilities.²⁰⁰ Disabled incarcerated people are less likely to experience the rehabilitative goal of incarceration because they lack the opportunity to develop work skills and coping mechanisms during their sentence. Additionally, current conditions violate the retributionist sense of punishment. From the retributionist perspective, certain actions must carry certain consequences as an expression of society's moral views—crimes society believes are the most heinous carry with them the most punitive sentences. The disabled incarcerated individual, though, is consigned to a sentence inherently far more dangerous and torturous than the average incarcerated person. With near certainty, people incarcerated with a disability experience a more punitive sentence for the same crime, thus violating commonly held principles of justice.

III. NEW PATHS FORWARD

As shown, the previously discussed existing strategies are insufficient to manage these concerns. Current conditions are a violation of individual correctional facility policies, state laws, federal laws, and the Constitution. Upon reviewing the current realities facing MVIPs and the failures of current approaches to successfully protect these individuals, it becomes apparent that the best path forward is to reduce the number of MVIPs in carceral facilities as much as possible. To reduce the amount of time MVIPs spend in carceral facilities, two things need to happen: (1) that MVIPs are permitted to serve their sentences under home detention whenever possible, and (2) that any carceral portion of their sentence be reduced whenever appropriate. The first aim is to allow more people to receive home detention in recognition of their health status by holding home detention as the

¹⁹⁹ *Id.*

²⁰⁰ *See supra* section II.

default recommendation for this population. The second is because health concerns in carceral settings tend to worsen over time and the worst effects of many conditions manifest the longer one has the condition. Because incarceration has been correlated with a higher risk of developing a disability, reducing MVIP sentences in recognition of these facts will alleviate some of the most negative impacts of incarceration.

There are three potential changes—each with unique benefits and difficulties—to consider: 1) an amendment to RCW 9.94A.734, Washington State’s statute regarding electronic home detention, which will expand a judge’s discretion to impose electronic home detention in recognition of health concerns; 2) a new sentencing alternative program, which will create a streamlined method for moving this population out of carceral facilities when appropriate; 3) a new section within RCW Chapter 9, Washington State’s Criminal Code, regarding sentencing, which would presume all MVIPs are eligible for home detention unless the State can show a compelling reason why the individual should not be detained at home; and 4) a new perspective on the role of probation officers. These changes are proposed to ensure that MVIPs who live with disabilities, chronic health conditions, or otherwise have high support needs can serve part or all of their sentence *outside* of a correctional facility to maintain their health, safety, and dignity.

A. Electronic Home Detention

Each of the following propositions will ultimately result in more MVIPs being eligible for electronic home detention. Home detention is a punitive alternative in which the convicted individual serves their sentence in their home rather than in a carceral facility.²⁰¹ When under home detention, the individual may be monitored electronically via a wearable tracking device,

²⁰¹ WASH. ST. DEP’T OF CORR., PARTIAL CONFINEMENT AND SUPERVISION, <https://www.doc.wa.gov/corrections/community/docs/partial-confine-supervision-table.pdf> [<https://perma.cc/TXN3-HAUM>].

and their location is verified in person through regularly scheduled and randomized checks.²⁰² Under such detention, the incarcerated individual is only permitted to leave their home for specified purposes, like employment or medical treatment.²⁰³

When it comes to safety, it is important to note that many offenses serve as a barrier to electronic home detention²⁰⁴ and that an individual's history of compliance with the conditions of home detention is a substantial factor when determining eligibility.²⁰⁵ Because of these determinative factors, individuals convicted of violent crimes are generally not eligible for home detention.²⁰⁶ It is also important to note the significant disincentives for breaking the conditions of home detention. If a person removes monitoring equipment or leaves approved areas during a term of home confinement, they are charged with the felony of First Degree Escape²⁰⁷ on the premise that their home constitutes a detention facility during their sentence.²⁰⁸ Individuals serving sentences under home detention in Washington State will cease to receive credit for time served if they escape, fail to report for supervision, or incur a new violation of law,²⁰⁹ with escape resulting in immediate termination of home detention eligibility²¹⁰—the remainder of their term, in addition to the new sentence, will be served in a correctional facility upon capture.

²⁰² WASH. REV. CODE § 9.94A.736.

²⁰³ WASH. REV. CODE § 9.94A.735.

²⁰⁴ WASH. REV. CODE § 9.94A.734.

²⁰⁵ WASH. REV. CODE § 9.94A.73(6)(b).

²⁰⁶ WASH. REV. CODE § 9.94A.734.

²⁰⁷ WASH. REV. CODE § 9A.76.110.

²⁰⁸ *State v. Parker*, 76 Wn. App. 747, 749 (1995).

²⁰⁹ WASH. ST. DEP'T OF CORR., DOC. NO. 320.160, TOLLING OF SUPERVISION IN THE COMMUNITY 2 (2013). <https://www.doc.wa.gov/information/policies/files/320160.pdf> [<https://perma.cc/VC9H-NKVF>].

²¹⁰ WASH. ST. DEP'T OF CORR. DOC. NO. 380.450, ELECTRONIC MONITORING 3 (2021). <https://www.doc.wa.gov/information/policies/files/380450.pdf> [<https://perma.cc/HWL6-HQKE>].

Some may argue that home arrest is not sufficiently limiting or unpleasant to operate as appropriate punishment in many cases. Although rather ableist, critics may also argue that some people with disabilities remain at home even when they are not sentenced, and so a sentence of house arrest will not meaningfully impact their lives. However, many people with disabilities enjoy a high degree of freedom and independence, thus allowing them to maintain a healthy quality of life.²¹¹ Confinement to one's home is not a matter of course for this population but operates as a negative imposition upon their freedoms just as it would for any other person. Furthermore, under such a sentence the incarcerated individual is still obligated to comply with any other court-ordered conditions, such as restitution or treatment.²¹² Therefore, home detention should not be thought of as an inadequate form of punishment.

B. Identifying the MVIP

The target population for these proposals is composed of several categories of persons previously discussed in this article, who collectively create the MVIP class. The MVIP has a disability or other health concerns that cannot be appropriately managed within the carceral setting. This individual's health and safety are specifically endangered by conditions inside a carceral facility, and the insufficiency of disability accommodations, medication management, or other healthcare required but not available within the facility. Anyone with an ADA-recognized disability,²¹³ chronic health condition requiring advanced support and management, or currently experiencing any condition which, although

²¹¹ JEROME E. BICKENBACH ET AL., *DISABILITY AND THE GOOD HUMAN LIFE* 150 (2013).

²¹² WASH. REV. CODE § 9.94A.734(5).

²¹³ Andrew Pulrang, *The Pros and Cons of Identifying as Disabled*, FORBES (Jan. 19, 2023), <https://www.forbes.com/sites/andrewpulrang/2023/01/19/the-pros-and-cons-of-identifying-as-disabled/> [<https://perma.cc/M72Q-QAWV>].

temporary, rises to the level of either category²¹⁴ shall be considered an MVIP and presumed eligible for home detention under one of several novel sentencing schemes to be described later.

MVIPs will be identified by their attorneys, who will collect appropriate documentation and include it in their request for home detention during sentencing. Individuals may also qualify partway through an in-facility sentence and serve the remainder of their sentence under electronic home detention should a disability or medical concern befall them or worsen after they have been given a carceral sentence. The process for such identification may co-opt existing structures—as with Washington State’s Extraordinary Medical Placement (EMP) and Compassionate Release programs, the EMP Coordinator designated by the Assistant Secretary for Health Services²¹⁵ may review the application and determine whether the individual meets the relevant medical criteria. Alternatively, as with the in-facility sentencing alternatives, individuals whose sentence meets applicable criteria may be approved for early release once qualified.

Qualification will be determined primarily by reviewing medical history. Anyone who provides documentation of an ADA-recognized physical disability²¹⁶ will be automatically considered an MVIP. However, it is recognized that not all conditions of concern are covered by the ADA and that not all individuals with a condition classified as a disability prefer to identify as disabled.²¹⁷ Moreover, it is understood that there are many

²¹⁴ For example, pregnancy or an impermanent but serious illness.

²¹⁵ FAAM COMPASSIONATE RELEASE, EXTRAORDINARY MEDICAL PLACEMENT 1 (2021), https://famm.org/wp-content/uploads/Washington_State-Final.pdf [<https://perma.cc/5KMG-BW92>].

²¹⁶ This program would focus primarily on physical disabilities because Washington State already has a Mental Health Diversion Court. *See* Washington State Courts, Drug Courts & Other Therapeutic Courts, Mental Health Courts, https://www.courts.wa.gov/court_dir/?fa=court_dir.psc&tab=5 [<https://perma.cc/EY7E-PUG9>].

²¹⁷ Invisible Disabilities Association, *What Is an Invisible Disability?*, <https://invisibledisabilities.org/what-is-an-invisible-disability/> [<https://perma.cc/KA8V-RW2A>].

barriers to healthcare,²¹⁸ indicating that some individuals will experience delays in formal diagnosis of their concerns. To that end, participants will also be able to submit a request documenting the nature and severity of their condition. This may include medical evaluations, but also statements from family and friends, or any other records or information that the individual believes will assist in the court's determination that the individual is an MVIP. Once the court has been made aware of the individual's MVIP status, it will then consider this factor when selecting the appropriate sentence and conditions.

C. Options for Removing the MVIP from Carceral Facilities

1. Expanded Judicial Discretion

One possible solution is to amend RCW 9.94A.734, the Washington State statute concerning electronic home detention, to remove the condition of employment or schooling when electronic home detention is imposed by judicial discretion in recognition of an offender's health status. This legislation can also be updated to ensure that the defendant's criminal history did not serve as an *automatic* bar to home detention, expanding eligibility.

RCW 9.94A.734(4) states that:

Participation in a home detention program shall be conditioned upon:

- (a) The offender obtaining or maintaining current employment or attending a regular course of school study at regularly defined hours, or the offender performing parental duties to offspring or minors normally in the custody of the offender;
- (b) Abiding by the rules of the home detention program; and

²¹⁸ *Five Key Barriers to Healthcare Access in the United States*, WOLTERS KLUWER (Jul. 27, 2022), <https://www.wolterskluwer.com/en/expert-insights/five-key-barriers-to-healthcare-access-in-the-united-states> [<https://perma.cc/H7ZM-4R5E>].

(c) Compliance with court-ordered legal financial obligations.

RCW 9.94A.734(5), reading in full states that:

The home detention program may also be made available to offenders whose charges and convictions do not otherwise disqualify them if medical or health-related conditions, concerns, or treatment would be better addressed under the home detention program, or where the health and welfare of the offender, other inmates, or staff would be jeopardized by the offender's incarceration. Participation in the home detention program for medical or health-related reasons is conditioned on the offender abiding by the rules of the home detention program and complying with court-ordered restitution.

These provisions shall be amended to read:

(4) Participation in a home detention program shall be conditioned upon:

(a) The offender obtaining or maintaining current employment or attending a regular course of school study at regularly defined hours *unless electronic home detention is imposed in consideration of the offender's medical or health-related condition*, or the offender performing parental duties to offspring or minors normally in the custody of the offender;

(b) Abiding by the rules of the home detention program; and

(c) Compliance with court-ordered legal financial obligations.

(5) The home detention program may also be made available to offenders ~~whose charges and convictions do not otherwise disqualify them~~ if medical or health-related conditions, concerns, or treatment would be better addressed under the home detention program, or where the health and welfare of the offender, other inmates, or staff would be jeopardized by the offender's incarceration. *Sentencing to home detention on the basis of medical or health-related conditions shall not be conditioned on the offender obtaining or maintaining current employment or attending a regular course of school study but will otherwise be*

conditioned on the offender abiding by the rules of the home detention program and complying with court-ordered restitution.

Such an amendment to RCW 9.94A.734 aims to allow more people to receive home detention based on their health status. This amendment neatly resolves previously discussed limitations imposed by criminal history restrictions and conditions of employment by removing these conditions for MVIPs entirely. As a result, judges will be able to individually review each defendant's situation and make a reasoned determination rather than being forced to exclude them from electronic home detention based on criminal history. Of course, judges will still be able to consider criminal history as a factor, however, they will now be given more decision-making power if they find that the circumstances dictate that the defendant is still an appropriate candidate for home detention.

Additionally, offenders provided with home detention will not need to maintain or obtain work or schooling as a condition when home detention is imposed due to their health concerns. This will allow more individuals to be eligible for home detention by making it possible for them to comply with a specific difficult condition while maintaining the court's discretion to impose other conditions as it deems appropriate. The benefit of this approach is that it is relatively easy to implement. By merely expanding existing judicial discretion, this solution provides a potential method of keeping more MVIPs out of the carceral system without requiring the creation of new programs within the criminal justice system.

A drawback to this approach, though, is that it is discretionary. Data regarding the frequency of discretionary electronic home detention sentencing was unavailable at the time of publication of this article, so no conclusions can be drawn regarding a judge's likelihood of using existing or expanded discretion. Addressing the issue by merely expanding discretionary power does not mean that judges will utilize this power, or that they will utilize this power equally in all cases. Therefore, further changes are suggested below.

2. The MVIP Sentencing Alternative (MVOSA)

a) Offender Sentencing Alternatives

Washington State's existing sentencing alternative programs for unique populations make the state fertile ground for exploring alternatives to incarceration. Relying on evidence-based analysis, Washington State has already created several programs wherein certain nonviolent offenders can serve a lesser sentence if they meet specific conditions.²¹⁹ Options include, but are not limited to: serving part or all of the sentence under electronic home detention; or receiving a suspended sentence subject to certain conditions, often compliance with therapy and treatment applicable to their offense.²²⁰ With decades of experience in place for existing sentencing alternatives, expanding the current practices to encompass a new category of defendants should be straightforward.

Washington State has three categories of offender sentencing alternatives: Parental, Drug Offender, and Special Sex Offender,²²¹ and several factors are common across all currently available sentencing alternatives. Firstly, judges or correctional officers consider the nature of the offense, the individual's likelihood of re-offense, the individual's willingness to participate in treatment, and the best interests of the other impacted parties when determining who is a suitable candidate for sentencing alternatives. To be eligible, individuals must not have a prior conviction for violent, sex, or weapon offenses. Additionally, individuals may not be subject to deportation orders. The same program requirements

²¹⁹ *Sentencing Alternatives*, WASH. ST. DEP'T OF CORR., <https://doc.wa.gov/corrections/justice/sentencing/alternatives.htm#:~:text=The%20Department%20of%20Correc> [<https://perma.cc/Q9J8-647W>].

²²⁰ *Drug Offender Sentencing Alternative*, WASH. ST. DEP'T OF CORR. (2020), <https://www.justicestrategies.org/sites/default/files/FS-500-001-FOSA%20%28002%29.pdf>. [<https://perma.cc/ZWS8-YMSP>] [hereinafter "DOSA Fact Sheet"]; (For instance, a person convicted of a drug offense may be required to complete treatment for their substance use disorder as a condition of the program).

²²¹ *Id.*

may be incorporated into MVOSA to ensure compliance with current best practices as well as viability and success. Applicable program requirements for MVOSA from existing programs are discussed in greater depth below.

b) Parental Sentencing Alternative

Because research shows that children of incarcerated parents experience negative outcomes later in life²²² and are significantly more likely to end up in the criminal justice system themselves, Washington State offers Parenting Sentencing Alternatives in an attempt to maintain the family bond and interrupt the cycle of criminal activity.²²³ These programs allow some parents who have been convicted to either avoid imprisonment or exit the carceral sentence early to parent their children.²²⁴ To be eligible for parental sentencing alternatives, the individual must have custody of their minor child,²²⁵ must not have any current convictions for a felony violent or sex offense, must not currently be subject to a deportation order, and must have 12 months remaining.²²⁶

There are two types of Parental Sentencing Alternatives in Washington State. The Family & Offender Sentencing Alternative (FOSA) gives judges the option to waive a sentence and impose 12 months of community custody with conditions for treatment and other programming as appropriate.²²⁷ The Community Parenting Alternative (CPA) allows an individual to serve the last 12 months of their sentence under electronic

²²² DAVID MURPHEY & P. MAE COOPER, CHILD TRENDS, PARENTS BEHIND BARS 4–5 (Oct. 2015), <https://cms.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf> [<https://perma.cc/N4AB-9VMT>].

²²³ *Parenting Sentencing Alternative*, WASH. ST. DEP'T OF CORR. (2020), <https://www.justicestrategies.org/sites/default/files/FS-500-001-FOSA%20%28002%29.pdf>. [<https://perma.cc/4TY6-LZG8>] [hereinafter “PSA Fact Sheet”].

²²⁴ *Id.*

²²⁵ PSA Fact Sheet.

²²⁶ *Id.*

²²⁷ *Id.*

home detention, and it accepts parents who have established and ongoing relationships with their child before their offense even if they are not the current legal guardian.²²⁸ Both programs focus on developing parental skills and knowledge of child development.²²⁹ These programs, which were implemented in 2010,²³⁰ appear to be successful as the majority of participants that have completed the program have not returned to detention on new felony convictions.²³¹

c) Drug Offender Sentencing Alternative (DOSA)

The Drug Offender Sentencing Alternative (DOSA) is available for a person with a substance use disorder who is convicted of a drug offense or related crime.²³² An individual sentenced under DOSA may have part of their sentence waived or their entire sentence exchanged for community supervision on the condition that they receive substance use disorder treatment.²³³ So-called “Prison DOSA” allows individuals to serve the initial portion of their sentence in detention while receiving treatment,²³⁴ with an early release to community care up to 48 months before the expiration of their sentence. Residential DOSA allows individuals to avoid incarceration and serve their entire sentence under community supervision while receiving outpatient rehabilitation treatment.²³⁵

d) Special Sex Offender Sentencing Alternative (SSOSA)

The Special Sex Offender Sentencing Alternative (SSOSA) is available in special circumstances when offenders have no prior convictions for a sex offense whatsoever and no prior convictions for a violent offense within the

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² DOSA Fact Sheet, *supra* note 220.

²³³ *Id.* at 1.

²³⁴ *Id.*

²³⁵ *Id.*

last 5 years.²³⁶ They must not have inflicted substantial bodily harm on the victim and must have an established relationship with the victim.²³⁷ An individual sentenced under SSOSA may have part of their sentence suspended in favor of community custody and sex offender treatment.²³⁸ The court may also impose conditions regarding employment, location, restitution, and crime-related prohibitions.²³⁹ While the notion may strike the reader as alarming,²⁴⁰ proponents theorize that victims are less likely to participate in a case when the only outcome is incarceration, especially when the offender is someone known to them.²⁴¹ This program has been offered as an alternative for those cases in which victims are hesitant to cooperate with prosecution against an offender due to their connection with them.²⁴² SSOSA appears to be successful because offenders who complete SSOSA have lower recidivism rates than eligible offenders who do not participate in SSOSA.²⁴³

e) Benefits and Drawbacks of Offender Sentencing Alternatives

In Washington State, sentencing alternative programs are effective—DOSA,²⁴⁴ FOSA/PSA,²⁴⁵ and SSOSA²⁴⁶ all yield lower recidivism rates for

²³⁶ STATE OF WASH. OFF. OF FIN. MGMT., REVIEW OF THE SPECIAL SEX OFFENDER SENTENCING ALTERNATIVE (SSOSA) 18 (2013), https://sgc.wa.gov/sites/default/files/public/sopb/documents/SSOSA_review_201401.pdf. [<https://perma.cc/V9LL-L8M2>] [hereinafter “SSOSA Review”].

²³⁷ *Id.*

²³⁸ WASH. REV. CODE § 9.94A.670.

²³⁹ WASH. REV. CODE § 9.94A.670(5).

²⁴⁰ Recidivism has been as high as 25%. See Wash. St. Inst. Pub. Pol’y, *Sex Offender Sentencing in Washington State: Special Sex Offender Sentencing Alternative Revocations* (Jan. 2006), https://www.wsipp.wa.gov/ReportFile/929/Wsipp_Special-Sex-Offender-Sentencing-Alternative-Revocations_Report.pdf [<https://perma.cc/QQ9V-Q88G>].

²⁴¹ SSOSA Review, *supra* note 236, at 11.

²⁴² *Id.*

²⁴³ *Id.* at 28.

²⁴⁴ *Washington State’s Residential Drug Offender Sentencing Alternative: Recidivism & Cost Analysis*, WASH. ST. INST. FOR PUB. POL’Y 4, 7 (2014), https://www.wsipp.wa.gov/ReportFile/1577/Wsipp_Washington_States-Residential-

participants. A pilot program analogous to FOSA yielded similar results in Oregon and reduced the use of foster care.²⁴⁷ Nationally, however, sentencing alternatives do not appear to be as effective,²⁴⁸ potentially suggesting that local factors may play a role in their effectiveness. Nevertheless, such programs also do not *increase* overall recidivism rates.²⁴⁹ When it comes to whether these sentencing alternative programs are worthwhile, it is important to examine factors beyond simply whether a person reoffends—it is relevant to consider the impacts that incarcerating a person has on that person’s community, family, and overall well-being.

f) The New Offender Sentencing Alternative: MVOSA

Like existing sentencing alternatives, MVOSA will offer electronic home detention in lieu of detention in a carceral facility to those who qualify. Recommendations for the program may be made by the State or requested by the defendant’s attorney at sentencing. To ensure that individuals sentenced through MVOSA do not pose an enhanced risk²⁵⁰ to the community, several criteria in place will reduce the risk posed by participants. Eligibility criteria for MVOSA will echo established criteria

Drug-Offender-Sentencing-Alternative-Recidivism-Cost-Analysis_Report.pdf
[<https://perma.cc/9X4K-G3HB>].

²⁴⁵ Susie Leavell, *Promising Outcomes for a Parenting Sentencing Alternative*, VERA (Jan. 15, 2013), <https://www.vera.org/news/promising-outcomes-for-a-parenting-sentencing-alternative> [<https://perma.cc/W6DP-RF3P>]. (“[Of] the 230 offenders who have successfully completed the program, only two have returned to prison on a new felony since June 2010”).

²⁴⁶ SSOSA Review, *supra* note 236, at 28.

²⁴⁷ FAMILY SENTENCING ALTERNATIVE PILOT PROGRAM: REPORT TO THE SENATE AND HOUSE COMMITTEES ON JUDICIARY, OR. DEP’T OF HUM. SERV. 6 (Jan. 1, 2021), https://www.oregonlegislature.gov/citizen_engagement/Reports/Joint%20Family%20Sentencing%20Alternative%20Pilot%20Project%20Report%201_1_2021.pdf [<https://perma.cc/4GHW-Q3MB>].

²⁴⁸ Cooper Jones, *Does Alternative Sentencing Reduce Recidivism? A Preliminary Analysis*, 5 XAVIER J. OF POL. 18 (2014).

²⁴⁹ *Id.*

²⁵⁰ Such as being at particular risk for committing a violent offense.

for other sentencing alternatives in Washington State—participants must not be serving a sentence for a felony violent offense and must not have any convictions for either a felony sex offense or a felony offense involving a deadly weapon. Participants will be screened according to established measures aggregated from existing programs:²⁵¹ the nature of the harm done by their offense; their risk level; their history of violence; their violation history; and the availability of community support, as well as electronic home detention eligibility criteria such as an eligibility barrier for certain types of convictions.²⁵²

Participants shall face restrictions echoing those applied to individuals sentenced under current sentencing alternatives or otherwise serving home detention, such as refraining from illegal substances and foregoing the possession of firearms.²⁵³ Individuals will also be required to participate in applicable programming recommended based on their current charge(s), such as therapy, treatment, or skills development where appropriate. Consistent with existing programs, MVOSA recipients will be required to undergo periodic check-ins with their parole team. In recognition of the unique circumstances of the MVIP, these periodic meetings may occur at the recipient's home or virtually, subject to approval. As with other sentencing alternatives, MVOSA sentencing may be revoked if the participant violates program conditions. If a violation occurs, time served in the community under MVOSA will not be credited towards confinement time for the sentence, as is consistent with existing sentencing alternatives.

3. Presumption of Eligibility

The most complicated but also most impactful change will be to amend Chapter 9.94A of the RCW with a brand-new section regarding items that

²⁵¹ See WASH. REV. CODE § 9.94A.650–80 regarding Washington State's home detention and sentencing alternative programs.

²⁵² See WASH. REV. CODE § 9.94A.734.

²⁵³ See WASH. REV. CODE § 9.94A.701–45.

must be considered when developing a sentence. The aim is to make health concerns a factor that *must* be considered and to construe electronic home detention, not incarceration, as the default sentence for MVIPs.

This provision will operate similarly to how pre-trial detention and bail are considered—the least restrictive alternative will be chosen, and the State will have the burden of showing a compelling interest in keeping the defendant confined. Once the MVIP’s status has been determined, the State will then also have the burden of demonstrating why the MVIP was not a candidate for electronic home detention.

4. The Role of the Probation Officer

In federal cases, a probation officer is called upon to review the offender’s information and provide a recommendation to the court regarding their risk level and the appropriate sentence. Probation officers may interview the defendant, the defendant’s family, and other involved persons. Officers may also investigate family history; community ties; educational background; employment history; physical, mental, and emotional health; history of substance abuse; financial condition; and willingness to accept responsibility for the offense.²⁵⁴ Upon synthesizing these relevant factors and considering the nature of the offense, the probation officer presents their recommendation to the court.

The recommendation of the parole officer is made early in the sentencing process and can have a significant impact on the final sentence.²⁵⁵ This article proposes requiring the officer, when making their determination, to include the offender’s medical or disability status as part of a different type of safety assessment—one which calculates the risk of imprisonment to the

²⁵⁴ *Presentence Investigation*, U.S. PROB. & PRETRIAL SERV, W. DIST. OF WASH., <https://www.wawp.uscourts.gov/presentence-investigation> [https://perma.cc/5DMW-PE84].

²⁵⁵ Michael J. Lieber et al., *Sentencing Recommendations by Probation Officers and Judges: An Examination of Adult Offenders across Gender*, 28 WOMEN & CRIM. JUST. 100 (2018).

offender. Requiring the State to affirmatively indicate that incarceration does not impose an increased risk to the offender will serve two purposes. First, it forces the State to investigate and take note of these factors during the sentencing process. Second, it requires the State to certify its findings regarding the risk to the offender. This article posits that the State will hesitate to deny sentencing considerations to a person they have affirmatively determined is at an increased risk of coming to harm while incarcerated, and thus undergoing such analysis will become a useful practice when incorporated into sentencing determinations.

D. Projected Outcomes

1. Cost Reduction

Alternative sentencing is cheaper than a traditional sentence.²⁵⁶ However, the benefits will go beyond simply saving the cost of providing a cell. The DOC will save money not just by reducing the total number of people incarcerated, but also because they will no longer be required to frequently pay for the relevant medical services, supplies, and screenings—correctional facilities must bear the cost of essential care²⁵⁷ when the incarcerated person cannot afford it.²⁵⁸ Washington State spent approximately \$6,705 per incarcerated person on medical expenses in 2015.²⁵⁹ This demonstrates a cost saving to be made by reducing the amount of medically vulnerable individuals incarcerated.

Removing MVIPs from incarceration will result in cost savings for the State, with the majority of the United States spending several thousand dollars per person on healthcare for their incarcerated populations.²⁶⁰

²⁵⁶ Jones, *supra* note 248.

²⁵⁷ See generally HEALTH PLAN, *supra* note 67.

²⁵⁸ WASH. REV. CODE § 70.48.130.

²⁵⁹ *Prison Health Care Costs and Quality*, PEW TRUSTS (Oct. 18, 2017), <https://www.pewtrusts.org/en/research-and-analysis/reports/2017/10/prison-health-care-costs-and-quality> [<https://perma.cc/LY2J-RHU4>].

²⁶⁰ *Id.*

Approximately 38% of incarcerated individuals nationwide report having at least one disability.²⁶¹ With 37,000²⁶² individuals currently incarcerated in Washington State, and the roughly \$6,000 spent per person on healthcare while incarcerated,²⁶³ very rough mathematics²⁶⁴ indicate that Washington would therefore experience a cost savings of at least \$94,272,300 per year by no longer bearing the cost of medical care for the portion of the incarcerated population identified as MVIPs—and that figure does not take into account that this particular population, by nature of their unique health concerns, incur higher-than-average healthcare costs. Furthermore, in Washington State, elderly incarcerated individuals (those over the age of fifty-five) cost at least twice as much to incarcerate as younger offenders because, on average, they have three chronic conditions requiring management²⁶⁵ which result in a yearly average of \$102,386 in State costs. Additionally, average spending in carceral facilities increases in proportion to the average inmate age.²⁶⁶ With approximately 1,900²⁶⁷ incarcerated

²⁶¹ Laura M. Maruschak et al., *Disabilities Reported by Prisoners: Survey of Prison Inmates, 2016*, BUREAU OF JUST. ST. (2016), <https://bjs.ojp.gov/library/publications/disabilities-reported-prisoners-survey-prison-inmates-2016>. [<https://perma.cc/E2EM-DHKF>].

²⁶² *Washington State Profile*, PRISON POL'Y INITIATIVE (2023), <https://www.prisonpolicy.org/profiles/WA.html> [<https://perma.cc/MG9A-G3VD>].

²⁶³ *Prison Health Care Costs and Quality*, *supra* note 259.

²⁶⁴ Recognizing that these figures are sourced from reports that may lack currency, 38% of Washington's 37,000-person incarcerated population multiplied by the \$6,705 in healthcare for each incarcerated individual provides a rough figure of total yearly expenditures on Washington's MVIP community.

²⁶⁵ *Incarceration of Elderly Inmates: Research and Data Points*, OFF. OF FIN. MGMT. (2016),

https://ofm.wa.gov/sites/default/files/public/legacy/sgc/meetings/2016/01/incarceration_elderly_inmates.pdf [<https://perma.cc/2KW8-TBTS>].

²⁶⁶ *Per-Inmate Spending Higher in States with Older Inmate Populations*, PEW CHARITABLE TR. (2014), <https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2014/spending-higher-in-states-with-older-inmates> [<https://perma.cc/NF7M-4336>].

²⁶⁷ *Prison Facilities*, DEP'T. OF CORR. WASH. ST. (2023), <https://www.doc.wa.gov/corrections/incarceration/prisons/default.htm> [<https://perma.cc/G953-GLY6>].

Washingtonians²⁶⁸ above the age of fifty-five, removing elderly inmates from carceral care would create a yearly savings of approximately \$194,533,400.²⁶⁹

These rough examples do assume the eligibility of *all* impacted MVIPs for electronic home detention, and such examples cannot account for individuals present in multiple categories. However, even this cursory examination demonstrates a significant possible reduction in cost. The savings created by this reform could then be reallocated within the carceral system to support higher-quality care for the remaining population.

The cost savings to the State are not only from the reduction in responsibility to provide healthcare within carceral facilities but would also stem from downstream effects. When seeking medical care while incarcerated, individuals are often obligated to pay a co-pay.²⁷⁰ This can create a debt borne by the individual upon their release.²⁷¹ Because disability highly correlates with lack of employment²⁷² and it is difficult to obtain employment with a criminal record,²⁷³ additional difficulties are created for an already-disadvantaged individual, thus negatively impacting their community re-entry process and potentially increasing their rate of recidivism through economic stress.²⁷⁴ Former offenders who are unable to

²⁶⁸ As of June 30, 2022.

²⁶⁹ Multiplying the approximately 1,900 elderly incarcerated individuals by the estimated yearly healthcare expenditure for that population yields this rough but illuminating figure of savings to be had by correctional facilities statewide when this population is no longer incarcerated.

²⁷⁰ WASH. ST. DEP'T OF CORR. HEALTH SERV. DIV., HEALTH SERVICES ORIENTATION HANDBOOK 3 (2017), <https://doc.wa.gov/docs/publications/600-HA003.pdf> [<https://perma.cc/7LA9-TT6K>].

²⁷¹ *Id.*

²⁷² U.S. BUREAU OF LABOR STATISTICS, PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS SUMMARY (2022).

²⁷³ ACLU OF WASH., GUIDE TO CRIMINAL RECORDS AND EMPLOYMENT IN WASHINGTON STATE (2013).

²⁷⁴ See generally Joshua C. Hall et al., *Economic Freedom and Recidivism: Evidence from US States*, 21 INT. ADVANCES IN ECON. RSCH. 155 (2015). (Economic freedom

find employment are at an increased risk for recidivism, while those who can obtain steady employment after release are less likely to re-offend.²⁷⁵ Therefore, the State's costs rise even further when these individuals require state-funded support, or when additional prosecution and incarceration becomes necessary.

2. Mitigate Overcrowding and Overincarceration

When carceral facilities become crowded, it becomes harder to comply with guidelines, ensure humane conditions, and provide access to healthcare.²⁷⁶ The MVIP population is the most impacted by the consequences of overcrowding because of the decrease in available accessible spaces and healthcare resources.²⁷⁷ Thus, the MVIP population will benefit the most from a non-carceral setting. The strategies provided above will reduce the overall number of incarcerated people by providing alternatives for low-risk cases. While it is difficult to determine precisely how many MVIPs will eventually be eligible for a non-carceral sentence within the frameworks discussed by this article, removing this population from incarceration will help to alleviate, even if only partially, a long overtaxed carceral system.²⁷⁸

Additionally, as previously mentioned, people with disabilities are dramatically overrepresented in the carceral system. Firstly, disability itself leads to strained interactions with law enforcement, such as when officers

negatively correlates with recidivism rates, indicating that removing economic stressors may reduce re-offense).

²⁷⁵ Hedstrom, *supra* note 6, at 74.

²⁷⁶ Catherine Heard, *Prison Overcrowding and the Risks for Public Health: A Global Time-Bomb?*, FAIR TRIALS (Jun. 17, 2019), <https://www.fairtrials.org/articles/news/prison-overcrowding-and-risks-public-health-global-time-bomb/> [<https://perma.cc/TYH3-4ZCR>].

²⁷⁷ Morag MacDonald, *Overcrowding and Its Impact on Prison Conditions and Health*, 14 INT'L J. PRISONER HEALTH 65 (2018).

²⁷⁸ See generally GARVIN MCCAIN, VERNE C. COX, & PAUL B. PAULUS, THE EFFECT OF PRISON CROWDING ON INMATE BEHAVIOR (Dec. 1980), available at <https://bjs.ojp.gov/content/pub/pdf/epcib.pdf> [<https://perma.cc/9MKE-YYN5>].

fail to realize that behavior they consider erratic or alarming is simply a manifestation of disability symptoms,²⁷⁹ resulting in death²⁸⁰ or in criminal charges that should not have happened to begin with.²⁸¹ Additionally, as previously discussed, disability and health conditions disproportionately impact populations who already face discrimination—people of color and the economically disadvantaged. Thus, directing offenders with disabilities out of the carceral system will have a substantial impact on populations who are subject to over-incarceration—an important step towards justice for these populations.

3. Recidivism/Reintegration

By remaining out of carceral facilities, people with health concerns and disabilities will hopefully be able to maintain their community connections, leading to improvements in community reintegration and reduced recidivism.²⁸² People with mental illness remain incarcerated for longer terms because they frequently face disciplinary action for conduct that arises due to their illness, and they seldom qualify for early release because they are not able to participate in rehabilitative programming such as

²⁷⁹ See Phil Helsel, *Daniel Harris Shooting: Mourners Remember Deaf Man Killed by Police—as Questions Remain*, NBC NEWS (Aug. 23, 2016), <https://www.nydailynews.com/2016/08/22/shaun-king-column-from-2016-north-carolina-police-kill-unarmed-deaf-man-who-was-using-sign-language/> [<https://perma.cc/EH5A-5Y63>]. (Recounting an incident in which police's fatal shooting of an unarmed Deaf individual highlighted potential negative reactions on the part of law enforcement to the suspect failing to heed verbal commands or attempting to communicate in sign language).

²⁸⁰ *Id.*

²⁸¹ Erin J. McCauley, *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender*, 107 AM. J. OF PUB. HEALTH 1977, 1979–80 (2017).

²⁸² Johanna Folk, Debra Mashek, June Tagney, Jeffrey Stuewig, & Kelly Moore, *Connectedness to the Criminal Community and the Community at Large Predicts 1-Year Post-release Outcomes among Felony Offenders*, 46 EUR. J. SOC. PSYCHOL. 341 (2016) (Maintaining connections with one's community is correlated with reduced recidivism).

educational or vocational classes.²⁸³ Similarly, those with disabilities can face barriers to accessing rehabilitative programming due to the nature of their disability.²⁸⁴ By allowing MVIPs to remain outside of carceral facilities, they will instead have the increased opportunity to take advantage of community resources that are better able to meet their needs than those provided by the facility, offering an escape from the cycle of recidivism.²⁸⁵

Additionally, by allowing MVIPs to remain at home, existing economic stress will not be worsened by their inability to work or receive benefits while incarcerated.²⁸⁶ Furthermore, there will not be an automatic loss of health insurance—as is the case with Medicaid recipients, for example—because suspension only occurs when the offender is sentenced to incarceration in a facility.²⁸⁷ Allowing MVIPs to maintain access to care options not available within the carceral system will improve population health and further reduce stressors such as economic struggles which create difficulty with reintegration and promote recidivism.

²⁸³ ACLU, LOOKING INSIDE A SMART JUSTICE PROFILE OF WASHINGTON STATE'S PRISON SYSTEM 16 (2019), <https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-WA.pdf> [<https://perma.cc/YM25-S9QV>].

²⁸⁴ *Wasted Time: Lack of Access to Programming for Inmates with Disabilities in Washington State's County Jails*, DISABILITY RTS. WASH. (Feb. 2017), https://www.disabilityrightswa.org/reports/wasted-time/#Inmates_lack [<https://perma.cc/73LA-YTCE>].

²⁸⁵ Laurin Bixby, Stacey Bevan, & Courtney Boen, *The Links Between Disability, Incarceration, And Social Exclusion*, 41 HEALTH AFFAIRS 1460, 1468 (2022).

²⁸⁶ SOCIAL SECURITY ADMINISTRATION, BENEFITS AFTER INCARCERATION: WHAT YOU NEED TO KNOW (2023) <https://www.ssa.gov/reentry/benefits.htm#:~:text=We%20generally%20do%20not%20pay,or%20certain%20other%20public%20institutions> [<https://perma.cc/9HY8-TGMS>].

²⁸⁷ ALEXANDRA GATES ET AL., HEALTH COVERAGE AND CARE FOR THE ADULT CRIMINAL JUSTICE-INVOLVED POPULATION (2014). (Medicaid benefits are suspended for many traditionally covered health care services under the “inmate exclusion” policy when the recipient is incarcerated).

IV. CONCLUSION

To care for the vulnerable means caring even when someone has been convicted of a crime. To subject the vulnerable to incarceration and the horrific consequences that result is at odds with principles of law and justice as well as moral and ethical inclinations. It is time to recognize that a person does not lose their right to dignity or become less worthy of protection when they are convicted. It speaks volumes about society that it has not yet adopted a new path forward, and the existence of the several alternatives this article proposes demonstrates that the incarceration of vulnerable people is not the only path forward. The author hopes that by sharing these contrasting solutions these suggestions of expanding judicial discretion, implementing new sentencing alternatives, and considering the health and safety of the convicted individual when determining their sentence may bring forth changes in the carceral system and inspire lawmakers to think critically about how, and whether, to incarcerate vulnerable offenders.