Testimony to the United States Senate Committee on the Judiciary Hearing "Oversight of the Bureau of Prisons and Cost-Effective Strategies for Reducing Recidivism"

Matt DeLisi, Ph.D.
Iowa State University

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Overall Assessment: Although reducing the costs of the BOP is important, the policy recommendations significantly neglect the antisociality of criminal offenders, and the likely recidivism that would result from a large-scale release of BOP inmates. This testimony attests to the antisociality and behavioral risks denoted by the modal federal prisoner, with estimates of additional crimes that various policy recommendations could produce. These estimates are emphasized in bold.

Responses to the Urban Institute's Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System

1. Overcrowding. Despite the intuitive idea that crowding makes prisons more dangerous, crowding has little impact on inmate misconduct. Meta-analytic research (Franklin *et al*., 2006) reported a very small effect size (r = .025). Thus, while crowding is not viewed favorably, the notion that crowding inexorably increases inmate violence and misconduct is empirically not supported. Moreover, projections of operating capacity of prisons produce estimates that are often incorrect, and retorted by observed data.

2. Drug Offenders. The report promulgates the notion that drug offenders are somewhat innocuous and that their antisocial behavior is limited to drug use/sales. In fact, criminal offenders are overwhelmingly versatile in their offending patterns, and their criminal histories contain violent, property, drug, nuisance/public-order, and traffic offenses and various indicators of noncompliance with the justice system, such as failure to appear violations, probation violations, parole violations, etc. (DeLisi, 2003). More recent research using a sample of habitual offenders found that juvenile drug use was the best predictor of chronic offending, extreme chronic offending (1 SD above mean career arrests), and arrest rate per year (DeLisi *et al*., 2013). Meta-analytic research (Bennett *et al*., 2008) indicates that drug users offend at levels 3-4 times greater than persons not convicted of drug crimes. Thus, although BOP inmates could be sentenced for drug-oriented offenses, their antisocial behavioral repertoire extends beyond drug use or sales.

3. Reduction of Crack Cocaine Sentences. The report cites a USSC memo, not empirical research from a refereed journal regarding the recidivism outcomes of released crack offenders. Meta-analytic research indicates that crack users have the highest recidivism scores (Bennett *et al*., 2008). Such a policy also counters research which has shown that sentencing enhancements increase the deterrent and incapacitative effects of prison (Kessler & Levitt, 1998). Moreover, enhanced penalties for crack cocaine were based on criminogenic effects associated with crack use/trafficking and collateral social problems (Fryer et al., 2005), not race/ethnicity as is sometimes asserted. However, reduced crack sentences are likely to disproportionately burden the African American community since crime is overwhelmingly intraracial.

4. Safety Valve for Judicial Discretion. Current law permits judges to waive mandatory minimum sentencing for drug offenders with little to no criminal history, thus the extant policy is adequate to avoid unnecessary confinement of lowest risk offenders. The suggestion to apply the safety valve to all offenders—including those with extensive criminal histories—is not advised. The entire criminal career research paradigm has shown tremendous continuity in antisocial behavior among those with extensive arrest and convictions histories (DeLisi & Piquero, 2011;

Moffitt, 1993). Prison is an important interruption of their criminal careers, but the preponderance of offenders continue to commit crime upon release.

Releasing these types of offenders would likely produce more crime. For instance, research has shown that a one-prisoner reduction in the prison population is associated with a 15 Part I Index offense increase per year (Levitt, 1996). To put this in perspective, releasing 1% of the current BOP population would result in approximately 32,850 additional murders rapes, robberies, aggravated assaults, burglaries, thefts, auto thefts, and incidents of arson.

Similarly, Marvell and Moody (1994) pooled 19 years of state prisoner data and found that 17 Index crimes are averted each year per additional prisoner. To put this in perspective, releasing 1% of the current BOP population would result in approximately 37,230 additional murders, rapes, robberies, aggravated assaults, burglaries, thefts, auto thefts, and incidents of arson. That independent research teams produced such similar estimates of Index offenses prevented per year lends confidence to their findings.

Safety Valve 1: The Urban Institute proposal to release 2000 offenders under new criminal history category II guidelines would produce an estimated 30,000 to 34,000 new Index crimes per year.

Safety Valve 2: The Urban Institute proposal recommends the creation of new safety valve procedures to "extend judicial discretion in reducing mandatory minimum sentences beyond drug offenders with minimal criminal histories *to drug offenders with more extensive criminal histories, some weapons offenders, armed career criminals, sex abuse offenders, child pornography offenders, and identity theft offenders*" (2013, p. 23, italics added). **The release of offenders with extensive antisocial histories would be potentially disastrous to public safety.**

To illustrate, Figures 1-3 demonstrate the sheer criminal offending differences between "average" criminal offenders—who in this sample were nonetheless relatively chronic offenders, and career criminals (similar to those who are sentenced under habitual offender statutes). DeLisi *et al.* (2011) calculated differences in magnitude of offending between career offenders and other offenders for various age ranges (likely to be the age of offenders released from BOP per the proposal). The arrest differentials are: ages 32-38 (8.4), ages 39-45 (14.6), ages 46-52 (18.1), and ages 53-59 (14.2). Over the life-course, these differences are large.

Figure 1 shows observed arrest differentials by offender type across seven age ranges. Figure 2 shows observed arrest activity for murder across seven age ranges. Figure 3 shows observed arrest activity for robbery across seven age ranges.

The salient conclusion from these data is that offenders with extensive criminal histories, which would include weapons offenders, armed career criminals, sex abuse offenders, child pornography offenders, and identity theft offenders, among others, continue to offend at alarmingly high rates even at relatively advanced ages which in the criminal justice domain is beyond age 35.

Another critical point is that unlike the Urban Institute's projected data, which are inherently prone to error, these arrest data are based on observed offending patterns.

Figure 1: Observed Arrest Differences (Non Career/Career Criminals)

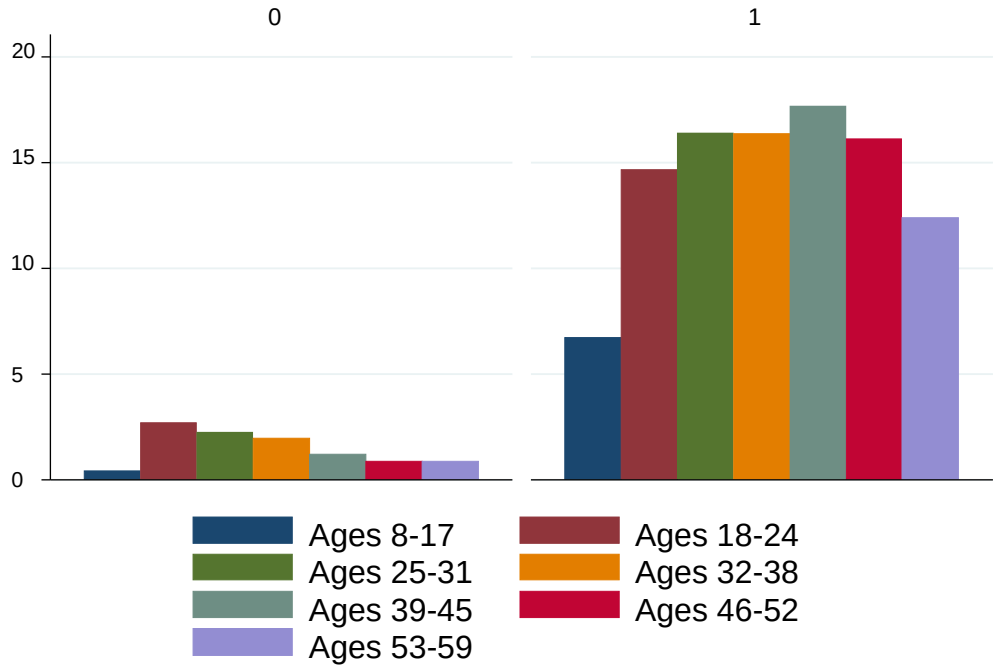


Figure 2: Observed Arrest Differences for Murder (Non Career/Career Criminals)

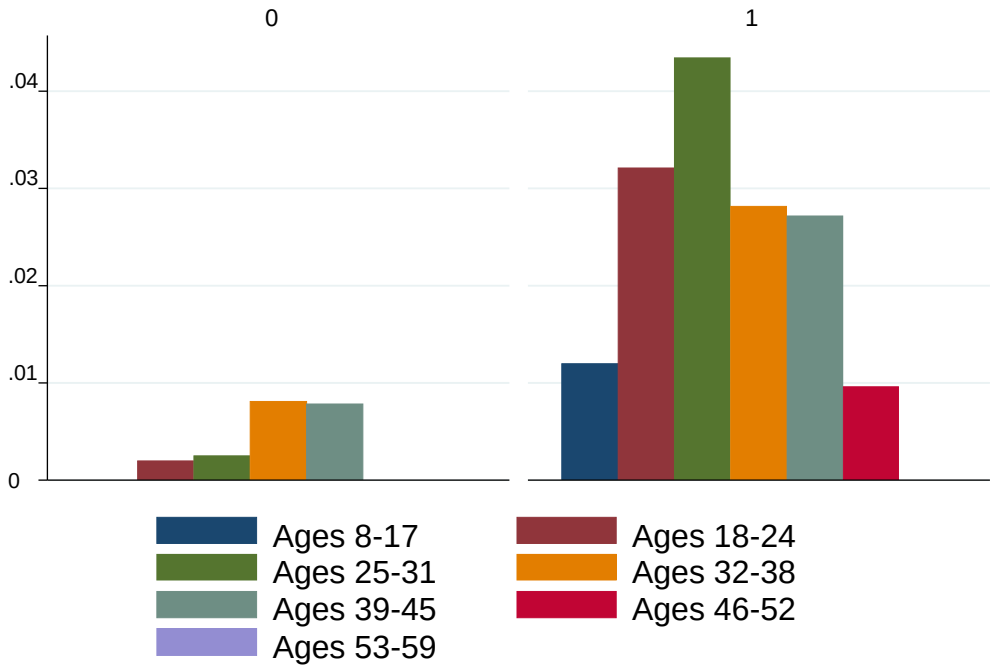
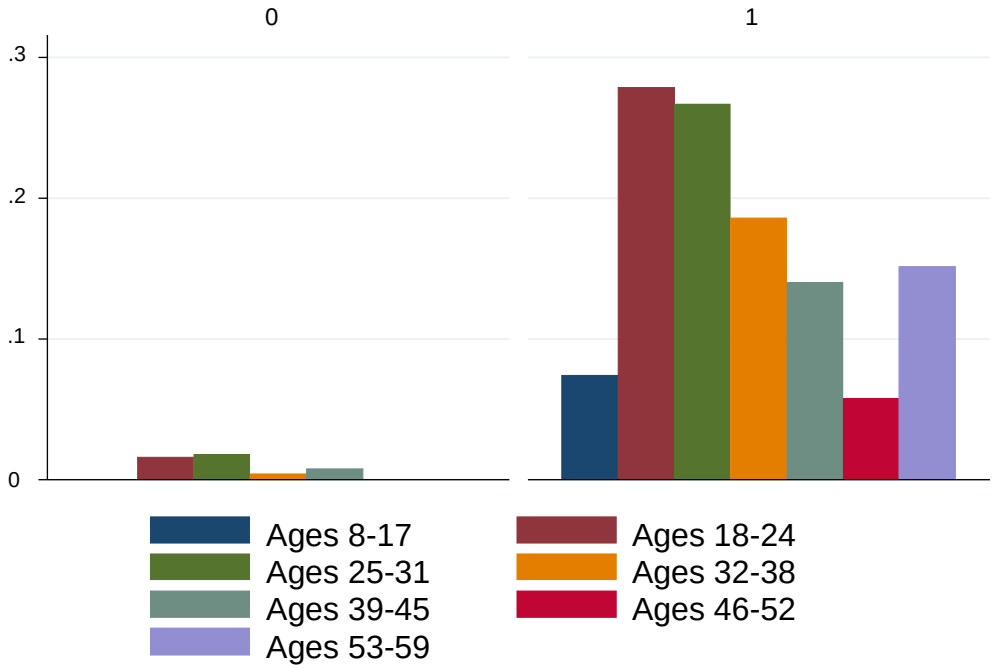


Figure 3: Observed Arrest Differences for Robbery (Non Career/Career Criminals)



Sources: DeLisi *et al.,* 2011

5. BOP Cost Reductions. Although meta-analytic research indicates that private prisons are no more cost-effective than state/federal prisons (Pratt & Maahs, 1999), prisoners released from private prisons are similar in terms of recidivism outcomes for released offenders (Bales et al., 2005). Thus, transferring inmates to private prisons would reduce BOP expenditures without commensurate public-safety risks.

6. Foreign Nationals in the BOP. The report indicates that 25% of BOP inmates are not US-Nationals, and that less than 1% of foreign prisoners are transferred to their home nation through the International Prisoner Transfer Program. With the exception of prisoners with known terrorism connections, it is unacceptable for the BOP to house so many criminal foreign nationals. The transfer of these inmates (criminals, not terrorists) to their home nation should be exponentially increased. The report indicates that conditions in the treaty with Mexico have precluded the transfer of many of these inmates—if addressed, this mechanism could reduce the BOP population dramatically. **More importantly from a crime control perspective, only 3% of prisoner transfers were rearrested in the United States** according to the Urban Institute report.

7. Expansion of Earned and Good Conduct Credit. Prisoners should **not** receive sentence-reduction credits for simply abstaining from misconduct and other forms of noncompliance. To do so is tantamount to rewarding prisoners for not continuing to commit crime behind bars. The early-release of a single offender can have disastrous consequences. The most illustrative example is the parole of Texas inmate Kenneth McDuff in 1989. McDuff had been sentenced to death in 1966 for three murders, but later had his sentence commuted as a result of *Furman v. Georgia* (1972). His ultimate parole release was based on the same logic of the Urban Institute's report (good conduct credits, lengthy amount of time served, advanced offender age, etc.). After release, McDuff continued to offend, and was ultimately sentenced to death again for five new homicides, and was executed in 1999.

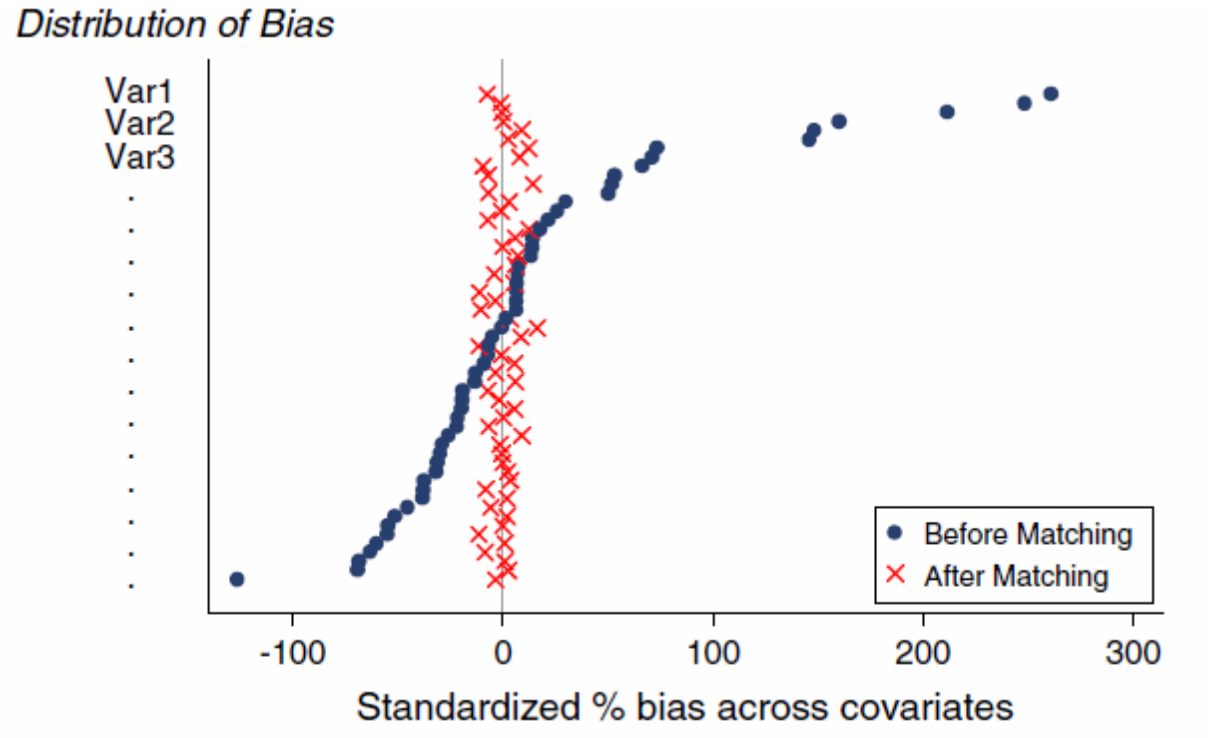
Determinations of good conduct credit also relate to participation in various educational, work, and treatment programs. **It is important to note that the effectiveness of treatment programs has been inflated by methodologies that were unable to control for baseline differences in criminal propensity.** For example, a recent study (Kim & Clark, 2013) found that treatment effects are likely overestimated by 50% or more due to selection problems in the samples. This means that the putative crime-reduction effects of prison programming—and the potential for use for early release—are rife with error (see Figure 4).

Expand and Incentivize Programming 1: The Urban Institute proposal to potentially release 36,000 inmates over the next 10 years would produce an estimated 540,000 to 612,000 new Index crimes.

Expand and Incentivize Programming 2: The Urban Institute proposal to release 12,000 offenders in 1 year would produce an estimated 180,000 to 204,000 new Index crimes.

Expand and Incentivize Programming 3: The Urban Institute proposal to transfer 34,000 inmates to home confinement over the next 10 years release would produce an estimated 510,000 to 578,000 new Index crimes.

Figure 4: Error in Prison Treatment Effects as a Function of Propensity Score Matching



Source: Kim & Clark, 2013

Finally survey research has shown that nearly 60% of prisoners themselves feel that rehabilitation comes from within and is not the result of programming efforts of prisons (Kolstad, 1996). Unfortunately, prison is most effective at producing desistance from crime.

8. Early Release for Special Populations (Elderly)
The data provided on page 34 about the dearth of offenders eligible under the Second Chance Act of 2007 provides evidence that counters the widely-held notion that prisons are packed with elderly prisoners. These policies also intimate that elderly offenders are low-risk merely because of their age. For instance, an 85-year old Iowa sex offender was recently charged with sexually abusing a 95-year old victim in a nursing home setting. The offender has a decades-long criminal history involving sex offenses against children (http://www.iowasexoffender.com/registrant/6810/), thus the instant offense against an adult females reinforces the notion that offenders are versatile as described in point 2.

Other Concerns

1. The Urban Institute relies on media sources that do not substantiate claims made in the report. For example, Mississippi's reduction from truth in sentencing from 85% to 25% was touted as not compromising public safety, but no data are reported to substantiate it. Moreover, the report indicates that victim and victim advocates' perspectives were not compromised by such a policy, it is unclear how this could be true.

2. Does the Urban Institute have any data about the livelihood and prosperity of persons released by the reduction of crack sentences in terms of rearrest, reconviction, and re-confinement? Also, compared to members of the community population, ex-prisoners have significantly lower educational attainment, significantly lower incomes and wealth, significantly lower social support, significantly higher psychiatric comorbidity, significantly greater substance abuse problems, worse victimization experiences, and are more likely to utilize public assistance. What are the associated costs with these forms of governmental assistance that would offset reduced BOP costs?

3. The report contains no mention of the various antisocial conditions relating to criminal propensity of federal prisoners. For instance, the prevalence of psychopathy in correctional populations is at least *25-fold* higher than its prevalence in the general public. Psychopathy is one of the most pernicious and stable antisocial conditions, and among the strongest predictors of serious recidivism (Hare, 1996; Hare & Neumann, 2008). Thus, proposed BOP releases would include (depending on the size of the policy recommendation) hundreds to thousands of clinically psychopathic offenders.

Another important criminological construct is sexual sadism, the prevalence of which is also dramatically higher in correctional samples than the general public. Even after decades of confinement, offenders who are sexually sadistic pose significant risks to the community as exemplified by current federal death row inmate Alfonso Rodriguez Jr., who was condemned for the murder of Dru Sjodin in 2003. What screening mechanisms are in place that measure these constructs?

It is important to note that psychopathy and sexual sadism are not exclusive to prisoners convicted of homicide and sexual offenses, but are also found in offenders convicted of other crimes, including drug-based offenses.

Questions for the Committee to Consider

1. What is the crime-saving value of prison?
The greatly expanded use of incarceration since 1980 is among the best explanations for the dramatic declines in crime from its peak in 1993 to 2011 (Levitt, 2004). There is compelling evidence that **prison is the only sanction that reduces criminal offending because of incapacitation**. A recent large-scale analysis of over 100,000 offenders from seven birth cohorts (MacLeod *et al.,* 2012) found that the offending behavior of criminals is assumed to remain the same throughout their active careers, and only is reduced when offenders cease offending after repeated confinement. Declines in offending reflect the proportion that have ceased offending, and do not reflect intrinsic reductions in the predilection toward offending. *Put another way, prison wears down offenders to the point where they ultimately desist from crime*—they do not necessarily transform their antisocial mindset.

Although the BOP population continues to grow, the much larger state prisoner population has declined for three consecutive years (Glaze & Parks, 2012). According to the National Crime Victimization Survey (NCVS), the violent crime and property crime rates have increased for two consecutive years. Although quantitative study has not been published (the results from the NCVS were released October 24, 2013), these unusual trends of declining prison usage and increasing crime support the notion that prison reduces crime (primarily by incapacitation). Prison and crime are reciprocally related, such that greater use of imprisonment is associated with less crime.

2. What are the costs of career criminals to society?
Estimates of the victimization, lost productivity, and criminal justice system costs of one career criminal exceed $1 million (Cohen, 1998; DeLisi & Gatling, 2003) and the individual costs of one murderer have been estimated at $24 million (DeLisi *et al*., 2010). To put this into perspective, the release of just 100 career offenders from BOP custody would potentially produce $100,000,000 in fiscal costs in addition to the incalculable human toll of criminal victimization.

3. Prisons and Punishment Rationales
BOP inmates were sentenced for a combination of reasons, including retribution, incapacitation, deterrence, and rehabilitation. The incapacitative effects of prison cannot be overemphasized because they preclude offender access to the general public and thus neutralize offending opportunity. Although criminologists and policy makers quibble about the relative deterrent value of prison, careful quantitative estimates indicate that 15 to 17 serious crimes are averted per prisoner, and these estimates withstood strenuous peer review.

4. The Rights and Efficacy for Crime Victims Should Not Be Ignored
The proposed policies provide zero efficacy for crime victims, and would only exacerbate the notion that criminal justice policies favor fiscal exigencies over the pain and suffering of the victims of crime. Moreover, since criminal offending and victimization are constrained by social interaction patterns (and thus crime is mostly intraclass and intraracial), more disadvantaged communities would bear the brunt of the widespread release of BOP inmates.

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