

FAIR PRACTICES AFTER SENTENCING: A PROPOSAL FOR REFORMING GOOD TIME, EARNED TIME, AND COMPASSIONATE RELEASE IN THE DISTRICT OF COLUMBIA



PRISONER & REENTRY CLINIC
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL



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ABOUT THE CONTRIBUTORS

This report was prepared at the request of the Council for Court Excellence and in consultation with the Public Defender Service of the District of Columbia by Professor Jessica Steinberg and student attorneys in The George Washington University Law School's Prisoner & Reentry Clinic, including Alexandra Brill, Lily Bullitt, Gabrielle Fortunato, Emalie Herberger, Garrett Kroll, Michaela Lovejoy, Blaire Martinez, and Alexandra North.

ABOUT THE PRISONER & REENTRY CLINIC

Directed by Professor Jessica Steinberg, and co-taught by Friedman Fellow Maya Lentz, the Prisoner & Reentry Clinic represents people navigating the lifelong ramifications and collateral consequences of the criminal justice system. The clinic follows an experiential education model in which students are trained to provide client-centered representation to justice-involved individuals with legal needs. The Clinic's cases sit at the intersection of the civil and criminal justice systems and tackles issues related to mass incarceration, prisoner reentry, and the long-term impact of criminal convictions. The Clinic's case docket spans issues related to parole, expungement, clemency, early termination of parole and supervised release, and petitions to reduce clients' minimum sentences. Students also advocate before the D.C. Council and work on criminal justice reform policy issues with organizational clients.

ABOUT THE COUNCIL FOR COURT EXCELLENCE

Founded in 1982, the Council for Court Excellence (CCE) is a nonprofit, nonpartisan civic organization that envisions a justice system in the District of Columbia that equitably serves its people and continues to be a model for creating stronger and more prosperous communities. CCE identifies and proposes solutions by collaborating with diverse stakeholders to conduct research, advance policy, educate the public, and increase civic engagement.

EXECUTIVE SUMMARY

The United States has the highest per capita incarceration rate in the world—a staggering statistic that requires a hard look at reform.¹ At the local level, approximately 6,743 District of Columbia residents are imprisoned, 4,700 of whom are at Bureau of Prisons (BOP) facilities across the country.² Long prison sentences are a primary driver of these high incarceration rates.³ At the same time, it is increasingly clear that many individuals remain in prison long after their rehabilitation or after they are likely to be an active threat to public safety.

To understand the basis for the systemic problems in the D.C. prison system, the Prisoner & Reentry Clinic researched a complex web of statutory and regulatory sources, including archival research into historical sources related to good time, earned time, and compassionate release programs. Our research also included review of all relevant BOP policy guidance, an examination of judicial opinions, and an analysis of federal laws, including the recently enacted First Step Act. The Public Defender Service contributed to the research and development of this proposal, a process that took more than six months. Based on this research, we identify two ways to reduce the length of incarceration for people who are not a risk to the community and to bring fairness to the criminal justice system: (1) reform the District’s good time and earned time laws; and (2) expand the District’s compassionate release program.

We offer three proposals regarding good time and earned time. First, we suggest that the District offer good time to individuals convicted of offenses between June 22, 1994 and August 5, 2000—the only D.C. Code prisoners⁴ who are not currently eligible to earn it. Second, we propose that the District create retroactive eligibility for good time during service of the mandatory minimum portion of a sentence—a right that federal prisoners already have. Third, we recommend that the District adopt the new federal earned time program included in the First Step Act to compensate for the loss of D.C.’s earned time program, which was suspended as of August 5, 2000.

¹ PRISON POLICY PROJECT, STATES OF INCARCERATION: THE GLOBAL CONTEXT 2018 (noting that D.C. incarcerates its residents at a higher rate than anywhere else in the world).

² WASHINGTON LAWYERS’ COMMITTEE FOR CIVIL RIGHTS, RESTORING CONTROL OF PAROLE TO D.C. 3 (2018).

³ THE SENTENCING PROJECT, CRIMINAL JUSTICE FACTS, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Jan. 24, 2020).

⁴ As a general matter, the organizations working on this effort try to use person-first language (like “individual in custody,” “incarcerated person,” or “person with a mental illness”) unless quoting a direct source or referring to an official or legal term. However, because this paper is addressing statutory reforms, we chose to use consistent terminology when necessary. Here, the relevant parts of the D.C. Code generally use the term “prisoner,” except when referring to parole, in which case the Code uses the term “inmate.” The one other major deviation to this principle is the distinction between individuals who have been convicted of crimes under the laws of the District and those who have been convicted under federal law; this report occasionally uses “D.C. Code prisoners” and “federal prisoners,” as they are commonly used terms and are significantly simpler short-hand than the person-first alternatives.

Finally, we offer a proposal to reform the District's compassionate release laws. There are more than 750 D.C. Code prisoners serving life sentences in the BOP who are ineligible to earn good time off their maximum term of imprisonment.⁵ As they age or grow sick, these men and women should have an accessible and transparent process for seeking compassionate release. We propose that the District expand eligibility criteria for compassionate release and provide an avenue for prisoners to petition the court directly. Our compassionate release proposal is based, in part, on the First Step Act's expansion of the federal compassionate release program and is more in keeping with today's prevailing sentencing norms.

The report that follows traces the evolution of D.C.'s good time and earned time laws and sets forth our three proposals for reform. The report then provides an overview of D.C.'s current compassionate release laws and recommends a proposal to reform that program.

⁵ D.C. Code prisoners with indeterminate life sentences (for example 35 years to life) are eligible to earn good time and earned time off their minimum prison term, but not off their maximum term. D.C. Code prisoners with determinate life sentences are not eligible to earn any good time or earned time at all.

DEFINITIONS

The definitions below provide an overview of the distinctions among three different methods used to reduce lengths of incarceration. These definitions are based on a variety of sources to provide a general survey of the relevant terminology.

Good Time. “Good time” is a system of automatically accruing credits that can reduce the amount of time served in prison.⁶ In D.C., good time is also referred to as “Institutional Good Time.”⁷ The credit is applied to one’s sentence on either a monthly or yearly basis, depending on the governing statute. Good time can be taken away for failure to comply with institutional rules and is therefore viewed as a “stick” in prison administration.⁸

Earned Time. “Earned time” is a system of credits that a prisoner can earn by participating successfully in certain prison programs.⁹ Once earned, the credits reduce the length of incarceration. In D.C., earned time is referred to as “Educational Good Time,” and in the federal system it is referred to as “Time Credits.” No matter the moniker, earned time incentivizes productive programming, and is therefore considered a “carrot” in prison administration. Earned time and good time are related but distinct programs.¹⁰

Compassionate Release. “Compassionate release” programs are a means of providing early release to prisoners who are elderly, terminally ill, or otherwise demonstrate a compelling need.¹¹ Compassionate release is an umbrella term referring to a range of state-level programs. In D.C., compassionate release is available through medical or geriatric parole or suspension of sentence.¹² The First Step Act greatly expanded opportunities for compassionate release for individuals convicted under the U.S. Code.¹³

⁶ Nora V. Demleitner, *Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code*, 61 FLA. L. REV. 777, 781 (2009).

⁷ 34 DCR 484, D.C. Code § 24–201.05 (repealed by 34 DCR 484).

⁸ PRISON FELLOWSHIP, *Earned Time Credit* (2019), <https://www.prisonfellowship.org/resources/advocacy/release/earned-time-credit/> (last visited Apr. 5, 2019).

⁹ Demleitner, *supra*, note 5 at 781.

¹⁰ Earned time “is usu[ally] awarded for taking education or vocation courses, working, or participating in certain other productive activities...[and] is distinct from good time, which is awarded simply for refraining from misconduct.” *Earned Time*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹¹ MARY PRICE, FAMILIES AGAINST MANDATORY MINIMUMS, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES 10-11 (June 2018).

¹² D.C. Code § 24-461 *et seq.*

¹³ Pub. L. No. 115-391 § 403(b) (2018).

I. INTRODUCTION TO GOOD TIME AND EARNED TIME

Good time and earned time are essential aspects of sound correctional policy. These related programs incentivize compliance with prison rules, promote rehabilitation, and reduce the length of sentences in appropriate circumstances. Current D.C. law on good time and earned time is complex, opaque, and non-uniform. As illustrated in table 1, individuals convicted of felonies under the D.C. Code have vastly different opportunities to access good time or earned time based on nothing more than the year of the offense. Furthermore, individuals convicted under the D.C. Code receive less good time in many instances than do individuals convicted under the U.S. Code, despite sharing the same BOP facilities and being obligated to follow the same institutional rules. Finally, it appears that certain D.C. Code prisoners receive almost no good time or earned time, in part because of restrictive laws and in part because BOP does not appear to have an appropriate process in place for administering the existing earned time program.

Table 1

Overview of Current Good Time and Earned Time Eligibility

	1987	1994	2000	
	Old Law (189 people)	GTCA (407 people)	Omnibus (519 people)	Sentencing Reform Act
Good Time	✓	✓		✓
Earned Time		✓	✓	

The D.C. Council has the power to promote consistent, transparent, and fair sentencing practices by reforming the District’s good time and earned time credit laws. The proposed amendments would equalize access to good time and earned time credit, thus incentivizing rehabilitation and reducing recidivism rates.¹⁴

¹⁴ See Dora Schriro, *Is Good Time a Good Idea? A Practitioner’s Perspective*, 21 FED. SENT’G REP. 179, 180 (2009); CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS, TRANSFORMING PRISONS, RESTORING LIVES 42 (Urban Institute 2016); CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS, TRANSFORMING PRISONS, RESTORING LIVES 29 (Urban Institute 2016).

II. OVERVIEW OF GOOD TIME AND EARNED TIME LAW IN THE DISTRICT OF COLUMBIA

The D.C. Code implements a complex and uneven regime of good time and earned time laws that have undergone numerous, significant changes over the span of 30 years. To learn the governing law for any individual sentenced under these regimes, one must stitch together three dozen different bills, statutes, regulations, BOP policy manuals, and judicial opinions. It is therefore not surprising that the incarcerated individuals we spoke to as part of our research for this project had little to no understanding of the good time and earned time to which they were entitled.

We present below four distinct statutory regimes governing D.C. good time and earned time law that create vastly different consequences for incarcerated individuals depending on their date of offense. The historical statutory and regulatory scheme is highly complex. Both the substance and the process for implementing the law need reform.

A. Law Prior to April 11, 1987

Prior to April 11, 1987, inmates' good time credits were controlled by what the BOP calls Old Law.¹⁵ No earned time was available in this period. In large part, Old Law is no longer relevant because the Good Time Credits Act of 1986 (GTCA) replaced Old Law with a new good time regime that was made retroactive.¹⁶ However, prisoners subject to Old Law continue to remain ineligible for any type of earned time.

B. Law from April 11, 1987 to June 22, 1994

The GTCA, effective April 11, 1987 until June 22, 1994,¹⁷ provided a means for receiving both good time and earned time credits off of an inmate's indeterminate sentence. The GTCA's good time program, called Institutional Good Time Credit (IGT), deducted 10 days of credit each month from both the minimum and maximum terms of the sentence, contingent on good behavior.¹⁸ The GTCA's good time program was made retroactive, and therefore anyone

¹⁵ BOP Program Statement 5880.33 § 11; 11.2(a) (referring to specific manual for sentence calculation prior to April 11, 1987 as "Sentence Computation Manual–Old Law.")

¹⁶ BOP Program Statement 5880.33 at § 12.1.

¹⁷ 34 DCR 484. Technically, the GTCA was effective until 2000, but substantial amendments were made in 1994 that eliminated its good time program completely. 41 DCR 2608.

¹⁸ 34 DCR 484, 484–85. The amount credited depends on the sentence imposed; only sentences of 10 years or more receive 10 days per month. *Id.*

convicted of an offense prior to June 22, 1994 may receive good time off both the maximum and minimum terms of incarceration.

The earned time program, called Educational Good Time Credit (EGT), awarded 3–5 days of credit for each month an individual was enrolled in particular educational programs.¹⁹ The EGT program was not made retroactive.

There are significant limitations in the awarding of good time and earned time credit. First, if the offense carries a statutory mandatory minimum term, no IGT or EGT credits are awarded to the inmate during the mandatory portion of the sentence.²⁰ This differs substantially from federal law, where good time is available during the entirety of the sentence.²¹ Second, no IGT or EGT can be accrued against a maximum sentence of “life,” meaning that nearly 750 D.C. residents in BOP custody may never receive a reduction in their prison term, even if they maintain decades of excellent institutional conduct and participate in relevant programming.²² Finally, BOP has narrowly administered the EGT program. Although the D.C. Code only calls for “participation” in an educational course, the BOP has imposed a requirement of “successful completion” to receive earned time credit.²³ Additionally, the BOP has decreed that few educational offerings are eligible for EGT,²⁴ despite the D.C. Code authorizing credit for any vocational program.²⁵

C. Law from June 22, 1994 to August 4, 2000

On June 22, 1994, the Omnibus Criminal Justice Reform Amendment Act²⁶ (Omnibus Act) repealed D.C.’s good time program (IGT), making only earned time (EGT) available for individuals who committed an offense after this date.²⁷ For people convicted of crimes of

¹⁹ 34 DCR 484, 486; BOP Program Statement 5884.02 § 8. What counts for educational credits varies by institution, and the awarding of good time credits requires a multi-step application process. BOP PS 5884.02 § 11. Furthermore, the program must be completed before an application can be submitted. *Id.*

²⁰ BOP Program Statement 5880.33 at § 16.14.

²¹ 18 U.S.C. § 3624(b).

²² BOP data, provided to the Public Defender Service (as of 2018, 746 individuals convicted under the D.C. Code were serving indeterminate life sentences).

²³ Bureau of Prisons Program Statement, No. 5884.02 at § 6(d) (2002).

²⁴ Bureau of Prisons Program Statement, No. 5884.02 at § 6(d)(1) (2002) (designating that Occupational with Market Completion courses are awarded EGT, but exploratory or apprenticeship occupational programs and correspondence courses are excluded).

²⁵ D.C. Code § 24-221.01.

²⁶ 41 DCR 2608.

²⁷ 41 DCR 2608.

violence, the Omnibus Act limited the ability to accrue EGT to a maximum of 15% per year.²⁸ EGT also cannot be earned to reduce a mandatory minimum term that is required by law. This class of prisoners (convicted of offenses occurring between June 1994 and August 2000) does not receive any good time credit at all. Additionally, it is unclear whether these prisoners are accruing the earned time to which they are entitled, due to the complex and opaque process implemented by BOP.

D. Law from August 5, 2000 to present

On August 5, 2000, the Sentencing Reform Amendment Act (SRAA) became effective.²⁹ The SRAA was enacted in response to the National Capital Revitalization and Self-Government Improvement Act of 1997, which imposed determinate sentencing on D.C. Code offenses and mandated federal control over much of D.C.'s sentencing policy, including good time and earned time.³⁰ The SRAA effectively eliminated D.C.'s earned time program³¹ and tethered D.C.'s good time program to federal law. Since August 5, 2000, D.C. has awarded good time pursuant to 18 U.S.C. 3624(b), the federal good time statute.³² All BOP inmates, including D.C. Code prisoners, with an offense after this date—except those sentenced to life without parole—receive up to 54 days of good time credit at the end of each year contingent upon good behavior.³³ There are no exclusions for the mandatory minimum portion of the sentence. Moreover, since only 18 individuals have been sentenced to life in D.C. since August 5, 2000,³⁴ almost every D.C. Code inmate with a determinate sentence can apply good time credits toward an early release from prison.

²⁸ D.C. Code § 24–208 (now codified as D.C. Code § 24–221.01b). This was likely done to receive funding that was offered by the federal government through the year 2000. *See* Pub L. No. 103-322, *Violent Crime Control and Law Enforcement Act of 1994*, at § 20102.

²⁹ 47 DCR 7249.

³⁰ Pub L. No. 104–33 (1997).

³¹ While the SRAA itself did not expressly eliminate the D.C. EGT program, BOP Program Statement 5884.02 § 6(b) interpreted it as such.

³² D.C. Code § 24–403.01(d).

³³ 18 U.S.C. § 3624(b). The D.C. Code expressly incorporates 18 U.S.C. § 3624(b), and therefore automatically incorporates any amendments to federal good time law, such as when the First Step Act increased the amount of good time credit from 47 to 54 days per year. H.R. 5682, 115 Cong. § 102(b) (2018).

³⁴ BOP data provided to the Public Defender Service (demonstrating that as of August 25, 2018, of the approximately 3,600 D.C. Code inmates currently serving determinate sentences in the BOP, only 18 were ineligible for good time).

III. PROPOSAL #1: GOOD TIME FOR THE EXCLUDED “OMNIBUS CLASS” OF D.C. CODE PRISONERS

Alone among all BOP prisoners, D.C. Code prisoners with offenses between June 22, 1994 and August 4, 2000 *receive no good time at all.*³⁵ In addition, as detailed below, it appears that this class of prisoners receives far less than the 15% earned time to which they are entitled to earn under the Omnibus Act.³⁶

A. Proposed Legislative Change

D.C. law should be amended to allow the 519 members of the “Omnibus class”³⁷ to receive good time in the amount of 54 days a year, the minimum amount to which all other BOP prisoners are entitled. We recommend incorporating federal law, as is done for D.C. prisoners with determinate sentences. The legislative language might read:

Notwithstanding any other provision of law, each prisoner sentenced for an offense committed from June 22, 1994 until August 4, 2000 shall be awarded good time credits as designated under 18 U.S.C. § 3624(b). The credits shall be retroactively provided for the time spent in custody as a result of the offense for which the sentence was imposed.

B. Why this Legislative Change is Justified

Creating good time eligibility for the Omnibus class is good policy for two reasons: (1) it rectifies a long-persisting “good time gap” for Omnibus inmates; and (2) it mitigates the impact of BOP’s failure to administer the District’s earned time program effectively.

i. Rectifying the Good Time Gap

The Omnibus class—convicted of offenses between June 22, 1994 and August 5, 2000—is the only population of BOP prisoners categorically ineligible for any good time, with the exception of inmates sentenced to life without parole. Individuals convicted under the D.C. Code for offenses prior to June 22, 1994, receive good time through the IGT program (subject to the restrictions listed above).³⁸ Individuals convicted under the U.S. Code, as well as individuals who received determinate sentences under the D.C. Code on or after August 5, 2000, receive 54 days of good time per year—roughly a 15% sentence reduction.³⁹ This unequal treatment arbitrarily excludes the Omnibus class—0.025% of the BOP population—from earning good

³⁵ See 41 DCR 2608 § 802(a) (1994) (repealing D.C.’s good time program, known as IGT).

³⁶ 24 DCR 2608 § 802(c) (1994).

³⁷ BOP data, on file with the Public Defender Service.

³⁸ D.C. Code § 24-201.29 (1987).

³⁹ D.C. Code § 24-403.01(d).

time, a gap that should be corrected. This is especially critical given BOP's deficient administration of the earned time program for which the Omnibus class is purportedly eligible.

ii. Deficiencies in the Administration of the District's Earned Time Program

While the "good time gap" alone creates sufficient justification for reforming the law, the Omnibus class is also prejudiced by the current statutory regime due to several deficiencies in the administration of D.C.'s earned time program, known as Educational Good Time (EGT). Since the Omnibus class is only entitled to EGT currently, they are particularly harmed by the program's deficiencies, as described below.

1. BOP's Narrow Interpretation of EGT Eligibility

BOP has narrowly interpreted the eligibility criteria for EGT. While the D.C. Code merely requires "participation" in an EGT-eligible course,⁴⁰ BOP requires "successful completion."⁴¹ In addition, while the D.C. Code makes any vocational or academic programming eligible for earned time, BOP excludes exploratory and apprenticeship programs from EGT eligibility and requires inmates to take vocational courses of at least 100 hours in length that qualify as "occupational (non-college) with marketable completion."⁴²

2. Lack of Transparency Regarding EGT-Eligible Programming

Moreover, BOP has no centrally administered process for determining which occupational courses are EGT-eligible. While the BOP Inmate Occupational Training Directory offers a comprehensive listing of occupational education programs available at each BOP facility, it is unclear which programs satisfy the 100-hour "marketable completion" criterion that would trigger eligibility for EGT.⁴³ The Prisoner & Reentry Clinic submitted a FOIA request to BOP on February 28, 2018, seeking information on EGT-eligible programs at BOP institutions, among other items, but received a response on March 7, 2018, indicating that the request was "complex" and required retrieval of off-site documents, and therefore would take up to 9 months to process.⁴⁴ In addition, we contacted BOP administrators at the Grand Prairie, Texas sentence computation office to inquire about EGT-eligible programs, but were informed that each institution makes this designation independently. However, in an interview about the EGT program with a Prisoner & Reentry Clinic client incarcerated at a BOP facility, we learned that

⁴⁰ D.C. Code § 24-221.01(a).

⁴¹ BOP Program Statement 5884.02 § 6(d).

⁴² BOP Program Statement 5884.02 § (8)(d)(1) (2002).

⁴³ The directory appears to distinguish between "apprenticeships," which are not EGT eligible and "Occ Ed Classes," some of which *may* be EGT-eligible if they satisfy particular additional criteria. It is unclear from the directory which "Occ Ed Classes" are eligible to earn EGT credit. BOP Inmate Occupational Training Directory (March 31, 2017).

⁴⁴ BOP FOIA response, on file with GW Law's Prisoner & Reentry Clinic. NOTE: The Clinic still has not received a response to its request.

he could not obtain information on qualifying programs from the case management team at his facility. Finally, we asked a case manager at a BOP facility how to discern which prison programming would qualify for EGT but learned that the case manager had never heard of the EGT program. As a result of these efforts, we conclude that BOP has no adequate or transparent system in place to determine the eligibility of BOP occupational programs for EGT credit. While this negatively impacts all individuals convicted under the D.C. Code, the Omnibus class is particularly disadvantaged because they cannot accrue good time.

3. Limited EGT-Eligible Offerings

Even without adequate information about which occupational education courses are eligible for EGT credit, we can safely assert that very few such programs are available. Even if every single occupational education course offered at BOP was EGT-eligible—which is certainly an overestimation—the numbers are few. Indeed, at least twelve BOP facilities offer zero occupational education courses, while another ten facilities offer just one.⁴⁵ And, in ten of the facilities with the highest number of D.C. Code prisoners, an average of only 2.1 occupational education courses are offered.⁴⁶

4. Opaque Process for Obtaining EGT

Last, the process for obtaining EGT is opaque and complex. Prisoners are required to undergo a “preapproval” process with their unit team prior to enrolling in a qualifying occupational education course. In addition, after the program has been completed, the prisoner must apply for EGT credits; they are not automatically awarded.⁴⁷ While this skeletal procedure is outlined in the relevant BOP Policy Statements,⁴⁸ many critical details are not explained well and BOP sentence computation staff was unable to offer illuminating information. For instance, how does a prisoner request initial enrollment in an EGT-eligible course? Is there a written application for placement consideration? What process is used to determine whether a prisoner receives 3, 4, or 5 days of EGT credit for each month of participation in a course? In speaking with an incarcerated client, he reports that BOP staff are not familiar with the process and have been unable to provide guidance on how to take the formal steps necessary to obtain earned time.

In sum, D.C.’s earned time program lacks transparency and accessibility. In our research, we reviewed at least a dozen sentence computation data forms, and although all of them make visible the amount of good time (IGT) earned, none indicated that earned time (EGT) had been awarded. As such, it is nearly impossible to determine whether any inmate is accruing EGT. The Council should consider taking any steps within its authority to monitor BOP’s administration of

⁴⁵ BOP Inmate Occupational Training Directory (March 31, 2017).

⁴⁶ *DC Population by Facility*, DC Corrections Information Council (Jan. 1, 2019) (on file with GW Law’s Prisoner & Reentry Clinic) (for purposes of computing the average number of occupational education courses in the 10 BOP facilities most populated with D.C. Code offenders, we excluded a halfway house and Rivers—a private prison that is not captured in the BOP’s directory of occupational education courses).

⁴⁷ BOP Program Statement 5884.02 at § 11 (2002).

⁴⁸ See BOP Program Statement 5353.01 § 7(a), (b)(2) (2003) and BOP Program Statement 5884.02.

the EGT earned time program and should add a good time program for the Omnibus class to ensure they are not excluded from opportunities to reduce their prison terms.

IV. PROPOSAL #2: ALLOW ALL D.C. CODE PRISONERS TO RETROACTIVELY RECEIVE 54 DAYS PER YEAR OF GOOD TIME OFF THEIR MANDATORY MINIMUM SENTENCES

For any individual convicted of a D.C. offense before June 22, 1994, good time may only be earned once the mandatory minimum portion of the sentence has been served.⁴⁹ With many prisoners serving harsh mandatory minimum sentences, such a rule severely restricts eligibility for good time credits.⁵⁰ For example, one of the Prisoner & Reentry Clinic's clients was sentenced to a term of 47 years and 4 months to life, with a 30-year mandatory minimum. Although the client has been incarcerated for 27 years and has been a model inmate with no disqualifying disciplinary infractions, *he has not received a single day of good time credit*. By contrast, an individual incarcerated for the same offense today would be eligible to earn 54 days per year, for a total of 1,458 days—approximately four years—deducted off the sentence over a 27-year period.

A. Proposed Legislative Change

We propose that the Council amend D.C. law to allow retroactive accrual of good time while a prisoner serves the mandatory minimum portion of his *indeterminate* sentence.⁵¹ Modeled after the good time system currently in place for individuals sentenced under the D.C. Code and U.S. Code, we suggest that all D.C. Code prisoners with an offense date prior to August 5, 2000 should be retroactively eligible to receive 54 days of good time per year for each year served pursuant to a mandatory minimum. If earned, the 54 days should be deducted off both the minimum and maximum terms of incarceration, with life sentences exempted.

Working in conjunction with proposal #1, this amendment would make all D.C. Code prisoners eligible for a minimum of 54 days of good time credit during each year of their incarceration, including the mandatory minimum period. The legislative language might read:

Notwithstanding any other provision of law, a prisoner who is serving a term of imprisonment for an offense committed prior to August 5, 2000 shall be awarded retroactive good time credits in the amount of 54 days per year [the amount authorized under 18 U.S.C. § 3624(b)] for the time spent in custody pursuant to a

⁴⁹ Individuals sentenced for offenses that occurred between 1994 and 2000 currently receive no good time at all, so the mandatory minimum issue is not highlighted with respect to them.

⁵⁰ See BOP Program Statement 5880.33 § 16.14.

⁵¹ An indeterminate sentence is a parole-eligible sentence with both a minimum and maximum term. All individuals convicted of a D.C. Code offense prior to August 5, 2000 received indeterminate sentences. Individuals convicted of D.C. Code offenses on or after August 5, 2000 are already permitted to earn good time while serving the mandatory minimum sentence.

mandatory minimum term statutorily required for the offense for which the sentence was imposed. In the event of a maximum term of life, only the minimum term shall receive retroactive good time credits pursuant to this paragraph.

B. Why this Legislative Change is Justified

This amendment promotes uniformity in good time accrual among BOP prisoners. Currently, individuals convicted of D.C. Code offenses on or after August 5, 2000 receive 54 days of good time off of their sentence each year, including the mandatory minimum portion.⁵² Federal offenders also receive 54 days of good time each year, again inclusive of the mandatory minimum. Of the approximately 180,000 prisoners housed at BOP, only 1,100 individuals—those convicted of D.C. Code offenses committed prior to August 5, 2000—do not accrue good time while serving their mandatory minimum sentences. These 1,100 individuals serve longer sentences than their counterparts and complicate BOP’s administration of the good time program.

The legislative amendment we propose must be made retroactive to have benefit, as many D.C. Code prisoners convicted for offenses prior to August 5, 2000 have already served all or most of their mandatory minimum sentences. We argue that retroactivity can be implemented without a negative impact on public safety. In the 2012 case of *State v. Unger*,⁵³ the Maryland Court of Appeals vacated all convictions reached by jury trial prior to 1981, resulting in the negotiated release of nearly 200 prisoners in their 50s, 60s, and 70s. As of July 1, 2018, only three of the released individuals have been re-incarcerated—a recidivism rate of 1.58%.⁵⁴ This demonstrates that older prisoners—such as the D.C. Code prisoners that would be impacted by our mandatory minimum proposal—are a low risk to the community.

Furthermore, in D.C., retroactively applying good time credits to the mandatory minimum term of the sentence would, in the large majority of cases, simply advance a prisoner’s eligibility for parole—it would not result in early release. This is because 750 of the 1,100 individuals excluded from good time due to a mandatory minimum are serving sentences that have a top number of life; therefore, the change would not automatically max out their sentences. Instead, those individuals would become eligible for a parole grant hearing.⁵⁵ To illustrate, consider a prisoner who has been sentenced to 25 years to life, with a 20-year mandatory minimum. Under our proposal, that prisoner would receive good time against the 20-year mandatory minimum sentence in the amount of 54 days per year—thus advancing his parole eligibility date by approximately 3 years. He would not, however, receive any good time off the maximum term of life, and the United States Parole Commission would retain the ability to deny him parole.

⁵² See BOP Program Statement 5880.33 § 16.14.

⁵³ *State v. Unger*, 427 Md. 383 (2012).

⁵⁴ See Michael Millemann, Rebecca Bowman Rivas, and Elizabeth Smith, *Digging Them Out Alive*, CLINICAL L. REV. 5 (forthcoming Sept. 2019).

⁵⁵ BOP data, on file with the Public Defender Service.

V. PROPOSAL #3: CREATE A NEW EARNED TIME PROGRAM FOR D.C.

As detailed above, D.C.'s EGT program has numerous deficiencies. What is more, since August 5, 2000, it has ceased to exist, with individuals convicted under the D.C. Code on or after that date having no access to earned time.⁵⁶ Until recently, no earned time was available for federal offenders, either. However, the First Step Act changed that, creating an earned time program called "time credits" for all individuals convicted under the U.S. Code and incarcerated in BOP facilities.⁵⁷ Unlike the federal good time program specified in 18 U.S.C § 3624(b), through which eligible inmates automatically accrue good time credit for compliance with prison rules, the "time credits" program allows inmates to earn credits for affirmative participation in vocational and rehabilitative programs.⁵⁸ Time credits can be earned by any non-exempted prisoner regardless of the date of the offense, but only for programming completed after the enactment of First Step. Notably, a long list of offenses are excluded from federal earned time eligibility. In large part, the exempted offenses are uniquely federal in nature, including crimes committed with biological or chemical weapons,⁵⁹ threats against the President,⁶⁰ and use of weapons of mass destruction.⁶¹

A. Proposed Legislative Change

It is not clear whether the First Step Act's earned time program will be interpreted to apply to individuals with D.C. Code offenses. A prudent course to ensure that individuals with D.C. Code offenses receive the new benefits afforded to all other prisoners in the BOP would be to enact specific legislation incorporating the First Step Act.

We propose that the D.C. Council adopt First Step's earned time program by incorporating 18 U.S.C. §3632(d)(4)(A), which reads:

A prisoner, except for an ineligible prisoner...who successfully completes evidence-based recidivism reduction programming or productive activities, shall earn time credits as follows:

⁵⁶ BOP Program Statement 5884.02 § 6(d).

⁵⁷ First Step Act of 2018, Pub. L. No. 115-391, § 3632(d)(4) (2018).

⁵⁸ 18 U.S.C. § 3632(d)(4)(A) (2018).

⁵⁹ 18 U.S.C. § 3632(d)(4)(D)(x)-(xi).

⁶⁰ 18 U.S.C. § 3632(d)(4)(D)(xx).

⁶¹ 18 U.S.C. § 3632(d)(4)(D)(xvii).

A prisoner shall earn 10 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.

A prisoner determined by the Bureau of Prisons to be at a minimum or low risk for recidivating, who, over 2 consecutive assessments, has not increased their risk of recidivism, shall earn an additional 5 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.

As noted above, certain prisoners are ineligible based on a list of federal offenses, which do not correspond to any enumerated offenses under the D.C. Code. We propose exempting individuals convicted under the D.C. Code only after hearing testimony on the proposed legislation. As an initial consideration, time credits should apply broadly to all individuals.

B. Why This Legislative Change is Justified

i. Fairness, Uniformity and Ease of Administration

Individuals convicted under the D.C. Code for offenses committed on or after August 5, 2000 may now be the only incarcerated BOP inmates who cannot accrue earned time. This disparate treatment should be rectified. In addition, we also recommend explicitly extending First Step's time credit program to D.C. Code prisoners with offense dates prior to August 5, 2000. Although most of these prisoners are already technically eligible for earned time through the EGT program, BOP's deficient administration of the EGT program makes clear that a supplementary program is needed.⁶² BOP is likely to administer First Step's time credits program more effectively, since it applies to a broad swath of federal inmates. It therefore makes eminent sense to make this program available to D.C. Code prisoners as well.⁶³

⁶² It is worth noting that the EGT program likely cannot be repealed because of Ex Post Facto concerns. EGT is available to individuals convicted of violent offenses, while time credits are not. Therefore, it is still important to advocate for better administration of the EGT program, in addition to offering time credits as a supplementary earned time program.

⁶³ In order to allow individuals to receive earned time credit similar to that provided in the First Step Act, the Council may need to repeal D.C. Code 24-221.01b. The language of D.C. Code § 24-221.01b may not apply to future First Step Act time credits, but it provides that "educational and meritorious good time credit shall not reduce the minimum sentence of any inmate convicted of a crime of violence as defined by § 22-4501 by more than 15%." Currently, given the real barriers to earning educational good time and the inability to earn good time or EGT during the mandatory minimum period of the sentence, this language is academic. However, it could be interpreted to narrow the applicability of time credits under the First Step Act.

ii. The Revitalization Act Allows D.C. to Adopt an Earned Time Program

The National Capital Revitalization and Self-Government Improvement Act of 1997 required the D.C. Council to adopt the federal good time program codified at 18 U.S.C. § 3624.⁶⁴ The Council complied with this mandate, enacting D.C. Code § 24-403.01(d) which expressly incorporated the federal good time statute.⁶⁵ As a result, all individuals convicted of D.C. Code offenses committed on or after August 5, 2000 are subject to the good time provisions of 18 U.S.C. § 3624(b).⁶⁶

Notably, the Revitalization Act is silent on the issue of earned time. It does not require D.C. to adopt any particular earned time program and nor does it constrain the D.C. Council's ability to legislate in this sphere. Indeed, the Truth in Sentencing Commission created by the Revitalization Act was express in preserving the discretion of the D.C. Council to modify sentencing policy on any issue not specifically dictated by Congress.⁶⁷ In other words, although the Revitalization Act ties D.C.'s *good time* program to 18 U.S.C. § 3624, it does not require any particular action on the related but distinct issue of *earned time*.⁶⁸ Therefore, insofar as the First Step Act may not fully apply to D.C., the D.C. Council can and should adopt the First Step Act's time credits program and award earned time to prisoners who participate in recidivism-reducing programs.

⁶⁴ The process by which this requirement was imposed is quite circuitous. The Revitalization Act mandated the creation of a Truth and Sentencing (TIS) Commission to make recommendations on sentencing policy in D.C. Per the Revitalization Act, the TIS Commission was required to recommend that D.C. adopt the federal good time program. In turn, the D.C. Council was required to adopt the recommendations set forth by the Truth in Sentencing Commission. Balanced Budget Act of 1997, Pub. L. No. 105-33 § 11211(a) (1997); *Id.* at § 11212(b)(2)(B); *Id.* at § 11214.

⁶⁵ The statute states: "A person sentenced to imprisonment, or to commitment pursuant to § 24-903, under this section may receive good time credit towards service of the sentence only as provided in 18 U.S.C. § 3624(b)." D.C. Code § 24-403.01(d) (2017).

⁶⁶ The federal good time statute provides that "a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations." 18 U.S.C. § 3624(b).

⁶⁷ DISTRICT OF COLUMBIA SENTENCING COMMISSION, TRUTH IN SENTENCING COMMISSION, <https://scdc.dc.gov/page/truth-sentencing-commission> (last visited Apr. 2, 2019) ("The TIS Commission proceeded from the premise that the Council of the District of Columbia, a locally elected body, is the appropriate entity to make significant changes to sentencing policy in all areas where Congress did not mandate TIS Commission action. For this reason, the TIS Commission limited its proposal to the absolute minimum necessary to comply with the Revitalization Act...").

⁶⁸ *See, supra*, note 9 (noting that Black's Law dictionary separately defines good time and earned time).

VI. INTRODUCTION TO COMPASSIONATE RELEASE

Compassionate release is a program that allows prisoners facing health troubles such as imminent death, advancing age, or debilitating medical conditions to be eligible for early release when their medical diagnoses affect the morality of their continued imprisonment.⁶⁹ The First Step Act recently overhauled the federal compassionate release program, making it more expansive and accessible. By contrast, the District’s compassionate release program is restrictive and out of step with today’s prevailing norms. The D.C. Council should expand the compassionate release program to allow individuals convicted under the D.C. Code to benefit from the same opportunities afforded to federal prisoners.

VII. OVERVIEW OF COMPASSIONATE RELEASE LAW IN THE DISTRICT OF COLUMBIA

Currently, for individuals with indeterminate sentences,⁷⁰ D.C. offers compassionate release by means of medical or geriatric parole. To earn release by medical parole, a prisoner convicted under the D.C. Code must either (1) be diagnosed with an incurable illness with a life span of *no more than six months*, or (2) be permanently and irreversibly physically incapacitated.⁷¹ To earn release by geriatric parole, a prisoner must (1) be at least 65 years of age, and (2) suffer from chronic infirmity, illness, or disease and pose a low risk to the community.⁷² Individuals convicted under the D.C. Code for offenses “while armed” are ineligible for compassionate release.⁷³ The U.S. Parole Commission administers both the medical and geriatric parole programs and appears to maintain exclusive authority to determine whether D.C. Code prisoners have met the criteria for release.⁷⁴

⁶⁹ MARY PRICE, FAMILIES AGAINST MANDATORY MINIMUMS, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES 10-11 (June 2018).

⁷⁰ Indeterminate sentences were imposed for all offenses prior to August 5, 2000.

⁷¹ D.C. Code §§ 24-461, 464.

⁷² D.C. Code §§ 24-461, 465.

⁷³ 28 C.F.R. § 2.77(g)(1); *Id.* § 2.78(g)(1).

⁷⁴ D.C. Code §§ 24-464, 465.

VIII. PROPOSAL #4: EXPAND DC’S COMPASSIONATE RELEASE PROPOSAL

The District’s compassionate release program for those with determinate sentences⁷⁵ is nearly identical in terms of eligibility criteria.⁷⁶ However, in lieu of parole, eligible prisoners may receive a “suspension of sentence” coupled with a “period of probation to follow release equal to the period of incarceration that was suspended.”⁷⁷ The Bureau of Prisons has discretion to determine whether a D.C. Code prisoner has met the criteria for compassionate release, in which case the BOP will forward the prisoner’s petition to the appropriate court for review.⁷⁸ D.C. Code prisoners are not currently able to petition a judge directly.

A. Proposed Legislative Change

D.C.’s compassionate release program should be revised to more closely mirror the federal compassionate release program, as amended by First Step. The federal program is more accessible and expansive in several respects. First, individuals convicted of federal offenses may apply for compassionate release based on a catch-all category of “extraordinary and compelling” circumstances.⁷⁹ Per BOP policy guidance, these circumstances include debilitating medical conditions, death or incapacitation of the caregiver of the prisoner’s children, and incapacitation of the prisoner’s spouse.⁸⁰ Second, eligibility for federal compassionate release on the basis of terminal illness is defined as an illness with an “end of life trajectory”⁸¹—a more generous standard than in D.C., where a life expectancy of no more than six months must be shown. Third, First Step enacted very specific notice requirements in the event of a terminal diagnosis, obligating BOP to contact immediate family, provide for a visit, and offer assistance with preparation of a compassionate release petition.⁸² Fourth, federal offenders may petition the court directly for compassionate release; BOP does not have exclusive authority to render decisions.⁸³ And finally, there are no exclusions for compassionate release based on the type of offense; all prisoners are eligible to apply.

D.C. law should be amended to enshrine the compassionate release provisions set forth in 18 U.S.C. § 3582 and BOP Program Statement 5050.50, as follows:

⁷⁵ Determinate sentences have been imposed for all offenses on or after August 5, 2000.

⁷⁶ D.C. Code § 24-468.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 18 U.S.C. § 3582(c)(1)(A)(i).

⁸⁰ BOP Program Statement 5050.50 (2019).

⁸¹ 18 U.S.C. § 3582(d)(1).

⁸² 18 U.S.C. 3582(d)(2).

⁸³ 18 U.S.C. § 3582(1)(A).

The BOP or the prisoner, after the prisoner exhausts his administrative remedies or 30 days lapses from the time of the application to the BOP, whichever is earlier, can apply to court to reduce a term of imprisonment. The BOP or the court may reduce a prisoner's sentence if:

(A) The prisoner has a terminal illness, defined as a disease or condition with an end-of-life trajectory;

(B) The prisoner is 65 years or older, has served 30 years in prison, and the BOP or the Court determines the prisoner is not a danger to the community as provided by 18 U.S.C. § 3142(g);

(C) Extraordinary and compelling reasons warrant such a reduction, including but not limited to: (1) A debilitating medical condition, involving an incurable, progressive illness or a debilitating injury from which the prisoner will not recover; (2) elderly age, defined as prisoners age 65 or older who suffer from chronic or serious conditions related to aging and have served at least 20 years in prison, or have served the greater of 10 years or 75% of their sentence; (3) death or incapacitation of the family member caregiver of the prisoner's biological or legally adopted children; or (4) incapacitation of a spouse or a registered partner where the prisoner would be the only available caregiver for the spouse or registered partner.

In the case of a prisoner diagnosed with a terminal illness, the prisoner is entitled to the protections designated under 18 U.S.C. § 3582(d)(2) [requiring BOP to notify the family of the diagnosis, provide for a visit, and offer assistance in preparing a compassionate release petition where needed.]

B. Why the Legislative Change is Justified

i. Increasing Access to Compassionate Release

As detailed above, there are many ways in which federal compassionate release law is more compassionate. Under federal law, compelling circumstances beyond terminal illness and old age may justify compassionate release, prisoners who are near death receive special protections, and there are no exclusions from the program based on type of offense. The Prisoner & Reentry Clinic has represented numerous D.C. Code offenders who are at least 65 years old, have been incarcerated for decades, and have been denied parole on five or six prior occasions. Many of these individuals are slated to die in prison, when a more compassionate alternative is available.

Following enactment of the First Step Act, BOP has created an administrative policy for the implementation of the federal compassionate release program⁸⁴ and it makes little sense for D.C. Code prisoners to be excluded from the benefit of these policies. To promote uniform and fair administration of compassionate release, individuals convicted under the D.C. Code should be eligible for the same substantive and process protections offered to other BOP prisoners.

ii. More Transparent Procedures

First Step created a right to judicial review of compassionate release petitions upon a finding that BOP had granted only 6% of federal offenders' requests in recent years.⁸⁵ While we have not reviewed comparable data related to D.C. Code offenders, there is no doubt that enabling direct judicial petitions would result in a more transparent process. The U.S. Parole Commission's review of compassionate release petitions, as well as the BOP's review process, might be likened to a black box—it is unclear what factors are taken into account and how they are weighed. By contrast, judicial review is public and gives rise to a written body of case law that will further develop compassionate release doctrine.

The D.C. Council is entitled to yearly reporting on compassionate release petitions from the U.S. Parole Commission,⁸⁶ and we recommend requesting a review of how many compassionate release petitions have been received and granted in the past several years. If the number is low, our proposal for direct court access is further bolstered.

⁸⁴ BOP Program Statement 5050.50.

⁸⁵ Christie Thompson, *Old, Sick, and Dying in Shackles*, N.Y. TIMES (Mar. 7, 2018).

⁸⁶ D.C. Code § 24-463(f).