

## **When Prison Gets Old: Examining New Challenges Facing Elderly Prisoners In America**

by Benjamin Pomerance

*“The degree of civilization in a society can be judged by entering its prisons.”*

*-- Russian author Fyodor Dostoyevsky*

John H. Bunz will celebrate his ninety-second birthday in November.<sup>1</sup> Described by observers as “feeble-looking” after the death of his wife in 2010, he requires a walker to take even a couple of steps, and needs a wheelchair to travel any distance of significant length.<sup>2</sup> Yet he still is in better health than George Sanges, age 73, who suffers from cerebral palsy, has sagging skin that is listed as “sallow,” takes multiple medications twice a day, and has recently been rushed to the emergency room for heart problems.<sup>3</sup> And both of them are far more alert than Leon Baham, a 71-year-old man who has dementia and goes into delusional bouts of yearning for the company of his now-dead wife.<sup>4</sup>

On the surface, all of these elderly, ailing men have extremely sympathetic profiles. All three need intensive medical care.<sup>5</sup> All three have unique physical and emotional needs that are inherent to growing older.<sup>6</sup> All three appear to be the type of “grandfatherly” figures to whom our society is historically taught to show the utmost compassion and concern. Yet all three of these individuals also have a huge component of their lives which would naturally tend to turn all thoughts of sympathy and care upside-down. They are all prisoners.<sup>7</sup> Not low-level criminals, either, but violent felony offenders with significant sentences. The wife for whom Baham so plaintively pines was also his murder victim, killed in Baham’s attack that allegedly left “blood everywhere.”<sup>8</sup> Bunz is also a murderer.<sup>9</sup> At age 90, he beat his 89-year-old wife with a hammer until she was dead, then tried to kill himself immediately after his violent attack was over.<sup>10</sup>

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<sup>1</sup> See Stephen T. Watson & Matt Gryta, *At 90, What Does 17 Years in Prison Mean?*, BUFFALO NEWS, Sept. 9, 2010, <http://www.buffalonews.com/city/police-courts/courts/article185122.ece>.

<sup>2</sup> *Id.*

<sup>3</sup> See Stephanie Chen, *Prison Health-Care Costs Rise As Inmates Grow Older and Sicker*, CNN, Nov. 13, 2009, [http://articles.cnn.com/2009-11-13/justice/aging.inmates\\_1\\_prison-inmate-largest-prison-systems-medical-costs?\\_s=PM:CRIME](http://articles.cnn.com/2009-11-13/justice/aging.inmates_1_prison-inmate-largest-prison-systems-medical-costs?_s=PM:CRIME).

<sup>4</sup> See Pam Belluck, *Life, With Dementia*, N.Y. TIMES, Feb. 28, 2012, <http://www.nytimes.com/2012/02/26/health/dealing-with-dementia-among-aging-criminals.html?pagewanted=all>.

<sup>5</sup> Watson & Gryta, *supra* note 1; Chen, *supra* note 3; Belluck, *supra* note 4.

<sup>6</sup> Watson & Gryta, *supra* note 1; Chen, *supra* note 3; Belluck, *supra* note 4.

<sup>7</sup> Watson & Gryta, *supra* note 1; Chen, *supra* note 3; Belluck, *supra* note 4.

<sup>8</sup> See Belluck, *supra* note 4.

<sup>9</sup> See Watson & Gryta, *supra* note 1.

<sup>10</sup> *Id.*

Sanges, while not a murderer, hardly qualifies for sainthood, imprisoned in Georgia for aggravated assault against his wife of 48 years.<sup>11</sup>

Add these essential details into the mix, and suddenly the picture changes. These men are convicted criminals, people who have killed and assaulted other human beings. No longer do they seem worthy of our empathy and assistance. They seem fit only for the severest punishment after committing some of the most hideous acts imaginable. The concern for such people diminishes dramatically, regardless of their age and medical status, when we learn about the horrid crimes that they have committed and the victims that they have left in their wake.<sup>12</sup> In the words of highly regarded sociologist Ronald Aday, “prison inmates are not a group that evokes a great deal of compassion. We look at the crimes they have committed, and we say, ‘Why should we help them, these people who have harmed others?’ We don’t care about them as long as they are being locked up far away from us.”<sup>13</sup>

Yet there is another side to this coin. Just for a moment, return to the opening paragraph of this introduction. Read it again, and try to return to a mindset before the criminal records of these men were revealed. Three old, sick men. People for whom others would typically feel pangs of sympathy, people to whom others would typically want to provide comfort and aid and acts of kindness. And in reading this first paragraph before following it up with a synopsis of their heinous criminal acts — the classic “before” and “after” picture — a profound tension of opposites emerges. On one hand, these are the type of people whom we generally want to help. On the other hand, these are the type of people whom we generally want to punish harshly for what they have done.

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<sup>11</sup> See Chen, *supra* note 3.

<sup>12</sup> In a letter to the editor of a Florida newspaper, the writer worried that reforms for elderly prisoners were going to cause significant harm to the general population — particularly the elderly population in free society. “Where do you think elderly convicts, sex predators and drug addicts go?” she asked. “They are mixed in with the frail, elderly handicapped, mentally and physically.” The writer also talks about elderly offenders perpetrating “abuses” when released into the community, although she does not cite any source for this claim, which goes against what most of the research about early release of elderly inmates suggests. See Carolyn Caldwell, Letter to the Editor, *Nursing Homes No Longer Proper Places for Elderly*, BRADENTON HERALD, July 9, 2012, <http://www.bradenton.com/2012/07/09/4105711/nursing-homes-no-longer-proper.html#storylink=cpy>. This is a classic example of the generalized fears that many people have toward individuals with a criminal record, even when they become aged and infirm. See also Blair McPherson, *Pensioners in Prison . . . Who Cares?*, PUBLIC SERVICE UK, Aug. 4, 2011, [http://www.publicservice.co.uk/feature\\_story.asp?id=17183](http://www.publicservice.co.uk/feature_story.asp?id=17183) (describing similar levels of apathy toward elderly prisoners in the U.K.).

<sup>13</sup> Telephone Interview with Dr. Ronald H. Aday, Professor of Sociology, Middle Tennessee State University (Jan. 27, 2012). Dr. Aday is one of the most widely published authorities on issues facing elderly prisoners, having studied these issues in depth since the mid-1970s.

It is a paradox with which more correctional institutions must grapple than ever before. The number of elderly inmates in American prisons is at an all-time high.<sup>14</sup> Since 1995, the elderly incarcerated population in the United States has grown by an astonishing 282%.<sup>15</sup> And recent data shows that the graying of American prisons will only increase during the upcoming decades.<sup>16</sup> As elderly individuals continue to occupy a larger and more noticeable proportion of the nation's prison profile, a system designed for security and safety<sup>17</sup> must develop new methods to deal with the unique needs of an aging population.<sup>18</sup> Constitutional standards demand a particular level of care administered within the prison system<sup>19</sup>, a threshold which becomes more challenging to meet as an individual grows older.<sup>20</sup> And in an era when state and federal budgets are already facing substantial challenges and pressures, the basic care of an elderly inmate leaves a tremendous additional financial imprint — as much as nine times greater than the daily healthcare costs for a younger prisoner.<sup>21</sup> Blueprints for early release of elderly inmates who are deemed to no longer pose a societal threat have emerged in many states and on the federal level, but implementing these plans also provokes more questions, ranging from strenuous objections by victims' advocates groups to concerns about where, exactly, these elderly and ill people will go when released from the prison environment.<sup>22</sup> Furthermore, there are plenty of political pressures which often make new developments in this area difficult to achieve.<sup>23</sup> "It's a tough situation for politicians to be in," Aday explained. "The reality is that in

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<sup>14</sup> See, e.g., HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 18–23 (2012); ELDERLY INMATES IN CALIFORNIA PRISONS 1 (CA LEGIS. ANALYST'S OFFICE 2010); ELISSA KOZLOV, AGING WHILE INCARCERATED: A QUALITATIVE STUDY OF GERIATRIC PRISONERS IN AMERICA 5 (WESLEYAN UNIV. 2008); Carrie Abner, *Graying Prisons: States Face Challenges of an Aging Inmate Population*, STATE NEWS, Nov./Dec. 2006, at 8–11; Timothy Williams, *Number of Older Inmates Grows, Stressing Prisons*, N.Y. TIMES, Jan. 26, 2012, <http://www.nytimes.com/2012/01/27/us/older-prisoners-mean-rising-health-costs-study-finds.html>; Ashby Jones & Joanna Chung, *Care for Aging Inmates Puts Strain on Prisons*, WALL ST. J., Jan. 27, 2012, <http://online.wsj.com/article/SB10001424052970203363504577185362318111898.html>. See generally RONALD H. ADAY, AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS (2003); Nadine Curran, *Blue Hairs in the Bighouse: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 N.E. J. ON CRIM. & CIV. CONFINEMENT 225 (2000).

<sup>15</sup> OLD BEHIND BARS, *supra* note 14, at 20.

<sup>16</sup> See Part IA, *infra*.

<sup>17</sup> See Interview with Ronald Aday, *supra* note 13. Dr. Aday spoke at length about the conflicts that can arise between the traditional mission of correctional facilities — security and safety — and the unique care needs of many elderly inmates.

<sup>18</sup> See Part II, *infra*.

<sup>19</sup> See Part IC, *infra*.

<sup>20</sup> See *id*.

<sup>21</sup> See Williams, *supra* note 14.

<sup>22</sup> See Part IIIB, *supra*.

<sup>23</sup> See, e.g., Telephone Interview with Mr. Justin Jones, Director, Oklahoma Dep't of Corr. Mr. Jones spoke about the political pressures that too often lead to a "stalemate" in discussions about prison reforms. See also Part III, *infra*.

an era when ‘tough on crime’ is a buzzword, it is very difficult for a politician who promotes reforms for prison inmates to get re-elected.”<sup>24</sup>

This article examines many of the “tough situations” — not only for politicians, but also for state and federal correctional leaders, prison medical departments, institutional security personnel, nursing home directors, judges and attorneys, victims’ advocates, prison watchdog groups, and, of course, the elderly inmates themselves — that have emerged from the increase in elderly prisoners in American facilities. It looks at a variety of law and policy matters, combined with concerns expressed by various stakeholders in this area, with an eye toward a fundamental truth arising from the core of this issue: Prisons are designed to punish the crime, not to extinguish all hope of humane treatment for the person.<sup>25</sup> Thus, it follows that in the paradox described above, it is morally and legally right to feel compassion and provide all necessary care for the elderly individual, while still administering a reasonable punishment for the crime. Not only standards of law, but also standards of human decency, demand that we determine how we can do this better.

Part I provides an overview of the situation, looking at why the number of elderly prisoners has increased so greatly in recent years, why the cost of caring for elderly inmates needs to be so high, what existing legal standards apply to the care of elderly prisoners, and why fundamental public policy goals demand proper care of the aging incarcerated population. Part II focuses on questions “on the inside” of prisons, starting with medical concerns of aging prisoners and the challenge of geriatric care in a prison environment, and then moving to accessibility issues, adequate and safe housing for elderly prisoners, and end-of-life care within prison systems. Part III looks at questions “on the outside” of the prison walls, including the issue of whether unduly long sentences is causing this increase in the aging incarcerated population and whether compassionate release programs can provide an effective model for dealing with older inmates who no longer pose a threat to society. Lastly, Part IV provides a brief summation of some common threads running through these concerns, and offers some ideas for future best practices regarding elderly prisoners.

## **I The Scope And Scale Of The Issue: How America’s Growing Population Of Elderly Prisoners Became A Growing Concern In Need Of Solutions**

*“This is the 500-pound gorilla of corrections policy.”*

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<sup>24</sup> Interview with Ronald Aday, *supra* note 13.

<sup>25</sup> See generally ADAY, *supra* note 14. The distinction between a just punishment and an act of inhumane vengeance, as Dr. Aday and many other correctional scholars have pointed out, is an important balance. Imprisonment as punishment for a crime is acceptable. Neglecting the basic human needs of a prisoner as he or she ages, however, does not meet any valid aims of the criminal justice system, and indeed contradicts the basic values on which America’s criminal justice system was founded. See also Part ID, *infra*; Part IV, *infra*.

-- Florida State University criminologist describing the challenges presented by the elderly incarcerated population<sup>26</sup>

### A. The Scope Of The Issue

On January 4, 1989, a man from the Bronx wrote a letter to the editor of The New York Times.<sup>27</sup> The author of the letter was Jacob Reingold, Executive Vice-President of the Hebrew Home for the Aged in Riverdale, N.Y.<sup>28</sup> Reingold's letter concerned an article published by the Times on December 24, 1988, regarding the aging of state and federal prison populations, an issue which apparently concerned Reingold deeply.<sup>29</sup> Many prisoners who have grown old behind bars fear freedom more than continued imprisonment, he wrote, and the astonishing costs of custodial care for elderly inmates made the notion of building new prisons exclusively for older inmates politically unpopular.<sup>30</sup> Because of this, Reingold said, creative thinking was necessary for the problem to be solved.<sup>31</sup> He advocated for the transformation of facilities such as "nearly empty" psychiatric hospitals and underused military bases into spaces where geriatric inmates could be safely housed and receive specialized medical care and programming.<sup>32</sup>

"A commission of government officials and experts in corrections and geriatrics should investigate these options," Reingold wrote. "We need more effective methods of caring for elderly prisoners, most of them no longer a threat to society. Avoiding the problem now will lead to costly — or inhumane — 'solutions'."<sup>33</sup>

Twenty-three years later, the rise of elderly inmates in American prisons is frequently described as a new phenomenon that emerged within the last six or seven years.<sup>34</sup> Yet Reingold's letter — and the New York Times article that it referenced — demonstrates that this issue has existed for a longer time period than many recent reports indicate.<sup>35</sup> And this was far from the only time that the aging prison population was referenced in an American publication. Indeed, an issue of *Corrections Magazine* published in March of 1979 featured an article titled *Growing Old in Prison*, discussing a rise in the elderly inmate population and emphasizing that many older

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<sup>26</sup> Diane Jennings & Bruce Tomaso, *Society to Face Rising Costs of Aging Prison Population*, DALLAS MORNING NEWS, Aug. 19, 1998, at 1A.

<sup>27</sup> Jacob Reingold, Letter to the Editor, *Making Facilities Available for Elderly Prisoners*, N.Y. TIMES, Feb. 1, 1989, available at <http://www.nytimes.com/1989/02/01/opinion/1-making-facilities-available-for-elderly-prisoners-668889.html>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Reingold, *supra* note 27.

<sup>34</sup> *See, e.g.,* Chen, *supra* note 3.

<sup>35</sup> *See* Reingold, *supra* note 27.

inmates did not receive the specialized, age-appropriate attention that they needed.<sup>36</sup> “The elderly prisoner,” the article stated, “is forgotten in the majority of U.S. prisons.”<sup>37</sup>

Yet while the issue is not a new one, the scale of the issue has transformed dramatically since those early reports were written. Since 1979, the year when *Growing Old In Prison* was published in *Corrections Magazine*, the number of elderly inmates in the U.S. increased by more than 1,300%.<sup>38</sup> During that time, elderly inmates have gone from a relatively small niche in the inmate population<sup>39</sup> to the most-rapidly growing prison demographic in America.<sup>40</sup> A report released in 2012 by Human Rights Watch stated that the number of state and federal prisoners age 65 and over increased by 63 percent from 2007 to 2010.<sup>41</sup> Inmates age 55 and older — the classification used for “elderly” in many states — nearly quadrupled between 1995 and 2010, a statistic that becomes even more surprising when considering that the total number of prisoners grew by less than half in that same time period.<sup>42</sup> Perhaps most astonishing, though, are the predictions for the future of America’s correctional institutions. With one in every ten state inmates currently serving a life sentence,<sup>43</sup> and with an additional 11% of state inmates currently serving a sentence of more than 20 years,<sup>44</sup> experts estimate that *one-third of all prisoners in American correctional facilities will be 50 or older by 2030.*<sup>45</sup>

There is no doubt that the American prison population is aging, and will continue to age at a rapid rate for at least the next couple of decades. And there is also no doubt that while concerns about elderly prisoners are not unprecedented, the rapid proportional increase of elderly prisoners in correctional facilities is rather new, occurring primarily within the past 10 or 15 years.<sup>46</sup> This “silver tide behind bars”<sup>47</sup> puts correctional institutions in a unique position because

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<sup>36</sup> See K. Krajick, *Growing Old in Prison*, 5 CORRECTIONS MAGAZINE 33–46 (Mar. 1979). For other early reports warning of the growing elderly incarcerated population, see, e.g., Ann Goetting, *The Elderly In Prison: Issues and Perspectives*, 20 J. RESEARCH IN CRIME AND DELINQUENCY 291 (1983); Gennaro F. Vito & Deborah G. Wilson, *Forgotten People: Elderly Inmates*, 49 FED. PROBATION 18 (1985).

<sup>37</sup> Krajick, *supra* note 36, at 33.

<sup>38</sup> See AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY (ACLU 2012) (noting that the elderly incarcerated population has risen by 1,300% since the 1980s).

<sup>39</sup> In 1979, New York State housed only approximately 180 prisoners over the age of 60. Michigan housed only 120 inmates above age 50. See Krajick, *supra* note 36

<sup>40</sup> See, e.g., Abner, *supra* note 14, at 8; Williams, *supra* note 14.

<sup>41</sup> OLD BEHIND BARS, *supra* note 14, at 18.

<sup>42</sup> See *id.* at 20. The statistics showing the aging of the prison population are equally stunning when considered on a state-by-state basis. For instance, in California, the number of inmates age 55 and above grew by more than 500% between 1990 and 2009. *Id.* at 22.

<sup>43</sup> See *id.* at 33–36; see also Solomon Moore, *Number of Life Terms Hits Record*, N.Y. TIMES, July 22, 2009, <http://www.nytimes.com/2009/07/23/us/23sentence.html?pagewanted=all>. See also Part IIIA, *infra*.

<sup>44</sup> OLD BEHIND BARS, *supra* note 14, at 32.

<sup>45</sup> See, e.g., Inimai Chettiar & Will Bunting, *Keeping Low-Risk Elderly Prisoners Behind Bars is a Budget-Buster*, CTR. FOR AMERICAN PROGRESS, June 13, 2012, [http://www.americanprogress.org/issues/2012/06/elderly\\_prisoner.html](http://www.americanprogress.org/issues/2012/06/elderly_prisoner.html).

<sup>46</sup> See note 14, *supra*.

prison, historically, has been a young person's game.<sup>48</sup> It also inspires questions about why this rapid increase of elderly inmates has occurred when it did, and whether a better understanding of the causes might eventually limit the effects.

### 1. "Types" Of Elderly Prisoners

In general, elderly individuals end up behind bars in one of three ways.<sup>49</sup> Some elderly prisoners are long-term guests of the government, sentenced to life without parole or to a term of years that will last most (if not all) of their life.<sup>50</sup> These are the people who grow old in prison, who spend so long in the prison environment that it becomes a bona fide home to many of them.<sup>51</sup> Some of them take on the status of prison sages as they grow older, the wise old men and women to whom younger inmates will come for advice.<sup>52</sup> Often, younger inmates can become protective of these long-term prisoners, protecting them from harm as they grow older and lose the ability to fend for themselves in a prison environment.<sup>53</sup> Typically, these are also the inmates who face the greatest difficulties if released from prison.<sup>54</sup> After living behind prison walls and under prison rules — both written and unwritten — for so long, acclimation to life in free society is a tremendous challenge, one which requires a significant amount of mental and emotional support.<sup>55</sup>

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<sup>47</sup> Phrase used by Karen Drucker in the title of her article *A Silver Tide Behind Bars: The High Cost of Living and Dying in Prison*. See Karen Drucker, *A Silver Tide Behind Bars: The High Cost of Living and Dying in Prison*, CALIFORNIA PROGRESS REPORT, <http://www.californiaprogressreport.com/site/comment/reply/10026>.

<sup>48</sup> See, e.g., ROBERT KASTENBAUM, ENCYCLOPEDIA OF ADULT DEVELOPMENT 183 (1993) (asserting that "the elderly" are less likely to commit crimes because they are less capable to cope with a criminal lifestyle); Timothy Curtin, *The Continuing Problem of America's Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15 ELDER L.J. 473, 477 (2007) (stating that most older inmates are serving sentences "for crimes committed in their youth" and that recidivism among older individuals is extremely low). However, within the past couple of years, the number of elderly first-time offenders has increased, although the number of older criminals is still much lower than the number of younger offenders. See OLD BEHIND BARS, *supra* note 14, at 36.

<sup>49</sup> See CORRECTIONAL HEALTHCARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 10 (Jayne Anno, Camelia Graham, James E. Lawrence, Ronald Shansky, eds., U.S. Dep't of Justice 2004); see also JEREMY L. WILLIAMS, THE AGING INMATE POPULATION: SOUTHERN STATES OUTLOOK 6–7 (2006).

<sup>50</sup> See CORRECTIONAL HEALTHCARE, *supra* note 49, at 10.

<sup>51</sup> See *id.*

<sup>52</sup> See Telephone Interview with Keith Davis, Warden of Deerfield Correctional Facility in Virginia (July 11, 2012). Deerfield Correctional Facility primarily houses elderly prisoners. Mr. Davis described several situations where he observed the few younger inmates that are housed at Deerfield clearly being "mentored"—in a positive way — by the older inmates in the prison.

<sup>53</sup> See *id.*; see also Part II, *infra*.

<sup>54</sup> See CORRECTIONAL HEALTHCARE, *supra* note 49, at 10; see also Interview with Ronald Aday, *supra* note 13.

<sup>55</sup> Interview with Ronald Aday, *supra* note 13; interview with Keith Davis, *supra* note 52.

On the other end of this spectrum are the new arrivals. These are individuals like the above-mentioned John Bunz, experiencing his first taste of prison at age 90.<sup>56</sup> This is a categorical group that is on the rise, with the number of state and federal prisoners age 55 and above at the time of sentencing doubling between 1995 and 2010.<sup>57</sup> For these elderly prisoners, the adjustment to prison life often is a tremendous shock.<sup>58</sup> Commonly, they are at a heightened risk of exploitation at the hands of younger prisoners, who recognize the new arrival not only as a “newbie” but also as somebody who is typically too frail or ill to defend himself or herself.<sup>59</sup> The new arrival also lacks the understanding of the “prison game” and the connections that the long-term prisoners have formed and acquired.<sup>60</sup> Under these pressures of a first stint in prison at an advanced age, they can pose a heightened risk of self-harm, including suicide.<sup>61</sup>

In the middle between the long-term guests and the new arrivals are the frequent visitors. These are the repeat offenders, the people who receive a short or medium-length sentence, serve their time, receive their freedom, and then later commit another crime that brings them back to prison.<sup>62</sup> This group also includes people who receive longer-than-usual sentences for relatively low-level felonies through “three-strikes laws” and other statutes aimed at punishing recidivism.<sup>63</sup> Sometimes, these individuals will wind up in prison at various stages of their lives — as a young person, as a middle-aged person, and as an elderly person.<sup>64</sup> Other times, they will commit a low-level offense as a younger person, receive a relatively short prison term, gain release, and then commit a higher-level offense that lands them a longer term, one that will keep them in prison well into their old age.<sup>65</sup> Quite rare, though, is the elderly individual who is released from prison and then commits another crime.<sup>66</sup> In general, the repeat offenders do not experience the culture shock that first-time elderly offenders receive, but also lack the degree of knowledge and security that many long-term inmates have.<sup>67</sup>

Comparing these three general varieties of elderly prisoners, one truth becomes evident: not all elderly inmates are equal. This is a reality which echoes throughout many areas regarding

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<sup>56</sup> See Watson & Gryta, *supra* note 1.

<sup>57</sup> OLD BEHIND BARS, *supra* note 14, at 36–38.

<sup>58</sup> WILLIAMS, *supra* note 49, at 7.

<sup>59</sup> *Id.* (“First-time offenders are less likely to adapt to prison life and typically are in greater threat of victimization”).

<sup>60</sup> See *id.*; see also Curtin, *supra* note 48, at 484 (“Prisoners who enter prison for the first time when they are middle-aged or older encounter . . . a type of culture shock.”).

<sup>61</sup> See CORRECTIONAL HEALTHCARE, *supra* note 49, at 10. Elderly inmates in general pose an increased risk of clinical depression and other forms of “psychiatric morbidity.” See Serena Fazel et al., *Hidden Psychiatric Morbidity in Elderly Prisoners*, 179 BRITISH J. OF PSYCHIATRY 535, 539 (2001).

<sup>62</sup> See CORRECTIONAL HEALTHCARE, *supra* note 49, at 10; WILLIAMS, *supra* note 49, at 6.

<sup>63</sup> See Part IIIA, *infra*.

<sup>64</sup> See RONALD ADAY, AGING PRISONERS: NEW FRONTIER FOR RESEARCH & PRACTICE 3 (PowerPoint Presentation 2004); Interview with Ronald Aday, *supra* note 13.

<sup>65</sup> See Interview with Ronald Aday, *supra* note 13.

<sup>66</sup> See, e.g., Curtin, *supra* note 48, at 477.

<sup>67</sup> WILLIAMS, *supra* note 49, at 7 (“[L]ong term offenders are more institutionalized than recidivists.”).

the aging prison population, as this article will demonstrate. It also is a factor which makes policies regarding elderly inmates difficult for correctional institutions and political bodies.<sup>68</sup> This is an area where one size clearly does not fit all.<sup>69</sup> As a consequence, seeking uniformity in determining what should be done about and for elderly prisoners can often become a daunting task.

## 2. Defining “Elderly” In The Prison Context

One of these challenging policy areas is one of the most fundamental to this area: what precisely indicates that a particular inmate is “elderly”?<sup>70</sup> There is little doubt that the term “elderly” carries with it an understanding that a person must have reached a particular age. In American society, this is typically understood to be 65 years of age, the criteria used by the United States Census Bureau.<sup>71</sup> Yet very few states today require an inmate to reach the age of 65 before classifying him or her as elderly.<sup>72</sup> Instead, many states, as well as the National Institute of Corrections, define “elderly” in the prison system to be 50 years old.<sup>73</sup>

The discrepancy exists because the physiological age of inmates tends to be substantially older than their chronological age.<sup>74</sup> The National Institute of Corrections has determined that inmates over the age of 50 tend to have the body and mind of a person 11.5 years older than his or her chronological age.<sup>75</sup> Thus, a prisoner who is 55 years old would, on average, possess the physical and psychological functioning of somebody who is 66.5 years old.

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<sup>68</sup> See Part ID, *infra*.

<sup>69</sup> See OLD BEHIND BARS, *supra* note 14, at 17 (“Individual men and women in prison, as in the community, age at different rates and in different ways. In prison, there are prisoners who, at 75 years old, are more active, independent, and healthy than some who are much younger but who struggle with even the simplest of activities because of the burdens of disease and impairment.”); Curtin, *supra* note 48, at 482 (“Observers should remember elderly inmates constitutes a group with a wide range of physical and mental abilities.”). See also Part II and III, *infra*.

<sup>70</sup> See generally VERA INST. OF JUSTICE, IT’S ABOUT TIME: AGING PRISONERS, INCREASING COSTS AND GERIATRIC RELEASE 4 (2010) (noting the wide range of definitions of “elderly” utilized by the individual states); AGING OUT IN PRISON: AGE DISTRIBUTION OF THE COLORADO PRISON SYSTEM 2 (2011) (describing the different definitions that states use when determining whether an inmate is “elderly”); Helen Rippier Wheeler, *Senior Power: ‘Graying Prisons,’ Early Release, and ‘Assisted Living’*, BERKLEY DAILY PLANET, Jan. 3, 2011, <http://www.berkeleydailyplanet.com/issue/2011-01-05/article/37048?headline=Senior-Power-Graying-prisons-early-release-and-assisted-living->.

<sup>71</sup> 2010 Census Definitions of Subject Characteristics, U.S. Census Bureau, available at <http://www.census.gov/main/www/glossary.html>.

<sup>72</sup> See IT’S ABOUT TIME, *supra* note 70; see also WILLIAMS, *supra* note 49, at 1 (noting that out of the 16 “Southern States” surveyed, 12 had a definition of “elderly” under the age of 65).

<sup>73</sup> IT’S ABOUT TIME, *supra* note 70, at 4; Wheeler, *supra* note 70.

<sup>74</sup> IT’S ABOUT TIME, *supra* note 70, at 4–5; AGING OUT IN PRISON, *supra* note 70, at 3.

<sup>75</sup> Jaime Shimkus, *Corrections Copes with Care for the Aged*, NAT’L COMM’N ON CORRECTIONAL HEALTH CARE, Summer 2004, available at [http://www.ncchc.org/pubs/CC/aging\\_inmates.html](http://www.ncchc.org/pubs/CC/aging_inmates.html).

Often, a history of substance abuse or other high-risk behaviors before incarceration is a primary contributor to this gap between chronological and physiological age.<sup>76</sup> The general stress of day-to-day prison life — confrontations with other inmates and staff, fear of abuses by other inmates and by staff, loss of self-esteem, lack of privacy, separation from family and friends, financial pressures related to imprisonment, fear of becoming sick or dying behind bars, lack of hope for the future — also exacerbates this increased aging process in prison.<sup>77</sup> Prisons can also be “hotbeds” for the transmission of infectious diseases and for lifestyles that are, in general, unhealthy.<sup>78</sup> Combine all of these factors, and the results can be debilitating. Multiple first-hand accounts describe inmates who are only in their mid-50s, but who have the appearance and limitations characteristic of somebody much older.<sup>79</sup>

Still, states do vary widely in the way that they define “elderly” in their prison populations.<sup>80</sup> Fifteen states use age 50 as a benchmark.<sup>81</sup> Others use age 55, the threshold that is also used by the National Commission on Correctional Health Care.<sup>82</sup> As of 2010, one state even set the bar for “elderly” as late as age 70.<sup>83</sup> Some states avoid using a chronological age at all, instead relying on the degree to which the inmate is disabled and unable to provide personal care to himself or herself.<sup>84</sup>

Given the lack of homogeneity among elderly prisoners, this last option appears to be the most attractive in many ways. As longtime prison health care consultant and former New York State Department of Corrections Chief Medical Officer Robert Greifinger pointed out, “the biggest problem here really isn’t somebody’s age. When you talk about problems with elderly prisoners, you’re really focusing on people with functional disabilities. Those disabilities tend to get worse as people age. But it’s not as if every elderly prisoner is disabled. Some are severely

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<sup>76</sup> IT’S ABOUT TIME, *supra* note 70, at 5. *See also* Telephone Interview with Dr. Carl J. Koenigsmann, Deputy Commissioner and Chief Medical Officer for the New York State Dep’t of Corrections and Community Supervision (July 3, 2012).

<sup>77</sup> *See* Telephone Interview with Dr. Robert B. Greifinger, noted medical consultant and author about correctional health care policy and quality management, and Distinguished Research Fellow at John Jay College of Criminal Justice (Apr. 14, 2012); Interview with Carl Koenigsmann, *supra* note 76; Interview with Keith Davis, *supra* note 52.

<sup>78</sup> *See, e.g.*, Theodore M. Hammett, Patricia Harmon & William Rhodes, *The Burden of Infectious Disease Among Inmates*, 92 AM J. PUB. HEALTH 1789–94 (2002); BARBARA BERKMAN & SARA D’AMBRUOSO, *HANDBOOK OF SOCIAL WORK IN HEALTH AND AGING* 234 (2006).

<sup>79</sup> *See* Interview with Ronald Aday, *supra* note 13; Interview with Keith Davis, *supra* note 52; Interview with Carl Koenigsmann, *supra* note 76.

<sup>80</sup> *See* note 70, *supra*.

<sup>81</sup> IT’S ABOUT TIME, *supra* note 70, at 4.

<sup>82</sup> *Id.*; *see also* Shimkus, *supra* note 75.

<sup>83</sup> IT’S ABOUT TIME, *supra* note 70, at 4.

<sup>84</sup> CORRECTIONAL HEALTHCARE, *supra* note 49.

disabled, some are partially disabled but can still perform most essential functions for themselves, and some are still in surprisingly good health for their age.”<sup>85</sup>

In addition to this, elderly individuals also experience certain changes and phenomena that cannot all be classified under formal heading of “disability.”<sup>86</sup> For instance, generally speaking, an older person — even if not medically diagnosed as disabled — will still typically move slower and have less physical strength and a more limited range of motion than a younger person.<sup>87</sup> Another common example is the person who does not have a specific cognitive impairment, but who simply has become a little more forgetful or a little more disoriented as they have grown older.<sup>88</sup> In a prison, where a person’s chronological age can easily lead an evaluator to believe that they must be in better shape than they really are,<sup>89</sup> an approach based strictly on disability evaluations appears to potentially be problematic.

Thus, it seems that the best practice for the states and the federal government regarding the prison definition of “elderly” would be to focus on disability status, but to also have an age-based cutoff point. For instance, statutes could be written such that an inmate of any age with certain disabilities or other medical issues would be considered “elderly” for care purposes, but that all inmates age 55 and older would automatically be considered elderly, regardless of disability status. Given that a 55-year-old inmate will, on average, have the physiological age of somebody in their mid-60s — the common age for defining “elderly” in America — this would be a reasonable way to structure a definition that is challenging to pinpoint.

### **3. Factors Leading To The Recent Rapid Increase Of Elderly Prisoners In America**

An entire book could easily be devoted to speculating what political, legal, and cultural factors have caused the sudden spike in America’s elderly prison population. When an old, nagging issue suddenly becomes a rapidly growing matter of national concern, questions naturally abound as to why. Overall, though, observers seem to agree on at least two factors that are core causes of this trend’s recent sharp upward swing: the aging of America’s “Baby Boomer” generation and the more frequent administration of longer prison sentences.

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<sup>85</sup> Interview with Robert Greifinger, *supra* note 77.

<sup>86</sup> *See id.*

<sup>87</sup> OLD BEHIND BARS, *supra* note 14, at 45 (“Older prisoners, even if they are not suffering illness, can find the ordinary rigors of prison particularly difficult because of a general decline in physical and often mental functioning which affects how they live in their environments and what they need to be healthy, safe, and have a sense of well-being.”).

<sup>88</sup> *Id.*

<sup>89</sup> In working with an aging prison population, corrections officers and other prison personnel must realize that an inmate who is only 50 or 55 years old in chronological years will commonly have the physical and mental limitations of a much older human being. *See* note 70, *supra*.

The aging of the “Baby Boomers” — individuals born between 1945 and 1964, a period when 76 million children were born in the United States<sup>90</sup> — has attracted nationwide media attention in recent years.<sup>91</sup> By 2020, the population of Americans age 55 to 64 will have grown 73% since 2000, and the number of people over age 65 will have increased 54% — an aging trend that is unprecedented in this country.<sup>92</sup> Naturally, it follows that a percentage of these “Baby Boomers” are in prison, particularly given the extremely high incarceration rates in the United States.<sup>93</sup> Just as this large segment of the national population is aging in free society, the “Boomers” behind bars are beginning to turn gray, too.

The second of these factors, the rise in longer prison sentences, has become a national controversy.<sup>94</sup> The United States incarcerates a higher share of its total population than any other nation in the world.<sup>95</sup> As of 2008, the United States contained only 5% of the world’s population, yet housed more than 20% of the world’s prison population.<sup>96</sup> Between 1980 and 2010, the total number of people incarcerated in the United States increased by a whopping 400%.<sup>97</sup> Surprisingly, many of the men and women kept in American prisons and jails are not there for

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<sup>90</sup> See The Older Population: 2010, U.S. Census Bureau, Nov. 2011, *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf>.

<sup>91</sup> See, e.g., *Few Cities are Ready for Aging Baby Boomer Population*, AP WIRE, Mar. 25, 2012, *available at* <http://www.usatoday.com/news/health/story/health/story/2012-03-25/Few-US-cities-are-ready-for-aging-baby-boomer-population/53765292/1>; Julie Lasky, *On Aging Baby Boomers, and the Question of Where to Live*, N.Y. TIMES, Nov. 23, 2011, <http://www.nytimes.com/2011/11/24/garden/qa-authors-on-aging-boomers-and-housing-options.html>; *Growing Old, Baby Boomer Style*, CBS NEWS, Jan. 10, 2006, [http://www.cbsnews.com/2100-500368\\_162-1195879.html](http://www.cbsnews.com/2100-500368_162-1195879.html).

<sup>92</sup> See, e.g., *Healthy Living and Aging Facts*, NORTH CASTLE PARTNERS, <http://www.northcastlepartners.com/hlafacts.php>.

<sup>93</sup> See Abner, *supra* note 14, at 9; Interview with Ronald Aday, *supra* note 13.

<sup>94</sup> See, e.g., PEW CTR. FOR THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008); JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, THE HIGH BUDGETARY COST OF INCARCERATION (Ctr. for Econ. And Policy Research 2010); OLD BEHIND BARS, *supra* note 14, at 87–95; AT AMERICA’S EXPENSE; *supra* note 38; Lisa Bloom, *When Will the U.S. Stop Mass Incarceration?*, CNN, July 3, 2012, <http://www.cnn.com/2012/07/03/opinion/bloom-prison-spending/index.html>.

<sup>95</sup> See INT’L CTR. FOR PRISON STUDIES, PRISON BRIEF: HIGHEST TO LOWEST RATES (2010) (listing the United States as having the highest rate of incarceration out of the 216 countries surveyed); SCHMITT ET AL., *supra* note 94, at 3 (stating that the U.S. “incarcerates a higher share of its population than any other country in the world.”).

<sup>96</sup> Sasha Abramsky, *Toxic Persons: New Research Shows Precisely How the Prison-to-Poverty Cycle Does Its Damage*, SLATE, Oct. 8, 2010, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/10/toxic\\_persons.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/10/toxic_persons.html). Criminal justice leaders of other nations have said that they are “mystified and appalled” by the American incarceration rate. Adam Liptak, *Inmate Count in the U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, [http://www.nytimes.com/2008/04/23/us/23prison.html?\\_r=2&ref=american\\_exception](http://www.nytimes.com/2008/04/23/us/23prison.html?_r=2&ref=american_exception).

<sup>97</sup> See AT AMERICA’S EXPENSE; *supra* note 38, at i.

violent crimes.<sup>98</sup> As of 2010, 60 percent of the United States prison and jail population were non-violent offenders, a significant increase from just three decades earlier.<sup>99</sup>

The trend toward longer sentences began in the 1980s, with the federal pronouncement of the “war on drugs” and the general belief that criminals were not penalized harshly enough for the crimes they committed.<sup>100</sup> A “tough on crime” era began, with legislatures imposing mandatory minimum sentences for a number of crimes and greatly limiting judges’ discretion in sentencing.<sup>101</sup> The use of life sentences without the possibility of parole became a more frequently wielded sentencing tool.<sup>102</sup> Laws designed to severely punish repeat offenders, such as “three strikes” laws, also became more prevalent, particularly in the 1990s.<sup>103</sup> At the same time, the use of alternatives to prison incarceration as forms of punishment decreased.<sup>104</sup>

Proponents of these new sentencing measures argue that the harsher sentences have a significant positive impact on public safety in America.<sup>105</sup> Opponents of the longer sentences

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<sup>98</sup> See NGA CTR. FOR BEST PRACTICES, STATE EFFORTS IN SENTENCING AND CORRECTIONS REFORM 3 (Oct. 2011); Editorial, *Sensible Sentences for Nonviolent Offenders*, N.Y. TIMES, June 14, 2012, <http://www.nytimes.com/2012/06/15/opinion/sensible-sentences-for-nonviolent-offenders.html>; SCHMITT ET AL., *supra* note 94, at 1. Importantly, however, not all non-violent offenders are created equal. Some pose an obvious risk of recidivism, and should not be let loose upon the public while they are still clearly a threat to commit further crimes. See David Griffith, *The Fallacy of the Nonviolent Offender*, POLICE MAGAZINE, Sept. 17, 2009, <http://www.policemag.com/channel/patrol/articles/2009/09/the-fallacy-of-the-nonviolent-offender.aspx>. As already noted, however, elderly inmates tend to pose a very low risk of recidivism, making non-violent offenders who are elderly or who have grown old in prison due to long sentences a prime candidate for early release programs, or even for shorter sentences at the outset. See Part III, *infra*.

<sup>99</sup> SCHMITT ET AL., *supra* note 94, at 1.

<sup>100</sup> See, e.g., PAULA M. DITTON & DORIS JAMES WILSON, TRUTH IN SENTENCING IN STATE PRISONS (U.S. Dep’t of Justice 1999) Maureen Cavanaugh & Pat Finn, *Prison Crisis: Long Sentences, More Prisoners*, KPBS, Oct. 7, 2009, available at <http://www.kpbs.org/news/2009/oct/07/prison-crisis-long-sentences-more-prisoners/>.

<sup>101</sup> See DITTON & WILSON, *supra* note 100, at 1 (“Pressure for longer sentences and uniform punishment led to mandatory minimums and sentencing guidelines in the 1980s.”).

<sup>102</sup> See OLD BEHIND BARS, *supra* note 14, at 33–36.

<sup>103</sup> See DORIS LAYTON MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21<sup>ST</sup> CENTURY: SETTING THE STAGE FOR THE FUTURE 22 (Nat’l Inst. Of Justice 2000); Ahmed A. White, *The Judicial Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705 (2006) (describing the effects that three-strikes laws and similar polices have on increasing the American prison population); Chris Megerian, *Three-Strikes Law Costly and Ineffective, Study Says*, L.A. TIMES, Feb. 24, 2012, <http://latimesblogs.latimes.com/california-politics/2012/02/prison-california-three-strikes.html>; ONE IN 100, *supra* note 94, at 3. See also Part IIIA, *infra*.

<sup>104</sup> See generally SHANE PTAK, ALTERNATIVES TO INCARCERATION 7–8 (Sept. 19, 2003) (describing the decreased use of alternatives to imprisonment during the height of the “war on drugs” in the 1980s and beyond).

<sup>105</sup> These claims do have some support in the literature regarding criminal justice practices. See, e.g., DANIEL KESSLER & STEVEN LEVITT, USING SENTENCE ENHANCEMENTS TO DISTINGUISH BETWEEN DETERRENCE AND INCAPACITATION (Nat’l Bureau of Econ. Research Mar. 1998) (showing that one

argue that too many people are being locked up for comparatively minor non-violent crimes, and that prisons have turned into overcrowded warehouses that are more focused on punishment than rehabilitation.<sup>106</sup> Yet one fact cannot be denied by either side in this debate: the longer sentences are keeping more people in prison for longer periods of time than ever before.<sup>107</sup> With more people staying in prison for longer periods of time, it logically follows that more people than ever will be growing older behind bars.<sup>108</sup> In the words of New York State Department of Corrections and Community Supervision Commissioner Brian Fischer: “Right now, I look at the number of people serving life without parole here. They’re not going anywhere. I know that they’re going to grow old in New York State prisons. Some will become sick. And I know that they’re going to be with us until they die. That automatically raises the number of elderly people who we have in our prisons.”<sup>109</sup>

There is no doubt that the aging of America’s prison population is caused by a confluence of factors, including elements beyond the discussions in this article. As a whole, however, the combination of the aging “Baby Boomers” and the trend toward longer prison terms clearly appears to be the engine that is driving this recent rise of elderly prisoners in America.

#### **4. The Rise Of Elderly Prisoners On A Global Scale**

The contemporary increase in the number of elderly individuals behind prison walls is not unique to the United States. On the contrary, several other nations have recently expressed concern about what to do with the growing number of elderly people in their prison systems. These nations include Australia, Canada, Great Britain, and Japan.<sup>110</sup> In Australia, a 2007 prison

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California law reduced targeted crimes by 20 percent within seven years after the law was passed). *See also* Part IIIA, *infra*.

<sup>106</sup> These claims also have support in the literature regarding criminal justice practices. *See, e.g.*; JOHN IRWIN, VINCENT SCHIRALDI & JASON ZIEDENBERG, AMERICA’S ONE MILLION NON-VIOLENT PRISONERS 9–12 (showing that between 1980 and 1991, a period when America’s prison population increased significantly, 11 of the 17 states that had the lowest increases in their prison population experienced decreases in their crime rates, while only 7 of the 13 states that had the greatest increases in their prison population experienced decreases their crime rates); RYAN S. KING, MARC MAUER & MALCOLM C. YOUNG, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 1 (The Sentencing Project 2005) (“Increasing incarceration while ignoring more effective approaches will impose a heavy burden upon courts, corrections and communities, while *providing a marginal impact on crime.*”) (emphasis added); Dan Feldman, *Longer Sentences Do Not Deter Crime*, N.Y. TIMES, Oct. 3, 1987, <http://www.nytimes.com/1987/10/03/opinion/longer-sentences-do-not-deter-crime.html?pagewanted=all&src=pm> (citing studies showing that despite the United States’ high incarceration rate, the nation still has one of the highest violent-crime rates in the world).

<sup>107</sup> *See* notes 94, 95, and 96, *supra*.

<sup>108</sup> *See* notes 94, 95, and 96, *supra*. *See also* Part IIIA, *infra*.

<sup>109</sup> Interview with Brian Fischer, Commissioner of the New York State Dep’t of Corrections and Community Supervisions (June 25, 2012). Commissioner Fischer has worked in various corrections positions since 1968. He oversees the nation’s fourth-largest state correctional system.

<sup>110</sup> *See* SHELLEY TURNER & CHRIS TROTTER, GROWING OLD IN PRISON? A REVIEW OF NATIONAL AND INTERNATIONAL RESEARCH ON AGEING OFFENDERS (2009); VIVIEN STERN, DEVELOPING

census report states that “[g]rowth in overall numbers has almost entirely been amongst older offenders.”<sup>111</sup> Canadian corrections officials note that one in four offenders is over age 50, and their country’s proportion of federal inmates above the age of 50 has increased 50% in the last decade.<sup>112</sup> Great Britain, which reportedly incarcerates more people than any other European nation,<sup>113</sup> states that its number of inmates age 60 and above tripled between 1996 and 2006.<sup>114</sup> And Japan, with a national population that is aging faster than anywhere else in the world,<sup>115</sup> reports that its number of prisoners age 60 and older doubled between 2000 and 2010.<sup>116</sup>

Like the United States, these nations are also scrambling — and, in some cases, are still scratching their collective heads — to find ways to cope with this demographic shift. For instance, Japan’s Onomichi Prison opened a new geriatric ward in 2010, and the Japanese government has invested \$100 million for the construction of larger geriatric facilities at other prisons throughout the country.<sup>117</sup> Officials at Corrections Canada are pushing for funding to hire more staff with geriatrics training and experience in end-of-life care, and to develop more age-appropriate programs for elderly inmates.<sup>118</sup> In Great Britain, the Chief Inspector of Prisons published a national review of older inmates in 2004, recommending a phased program of providing sufficient geriatric accommodation and care for elderly inmates in each prison.<sup>119</sup> The Elderly Lifer Unit at Her Majesty’s Prison Norwich in England provides a place where geriatric

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ALTERNATIVES TO PRISON IN CENTRAL AND EASTERN EUROPE AND CENTRAL ASIA 12 (Correctional and Legal Policy Inst. 2002); Allison Crawford, *Canada Urged to Segregate Elderly Prisoners*, CBC NEWS, Mar. 19, 2012, <http://www.cbc.ca/news/world/story/2012/03/19/f-crawford-aging-inmates.html>; Erwin James, *No Place to Grow Old*, THE GUARDIAN, July 5, 2009, <http://www.guardian.co.uk/society/2009/jul/06/elderly-prisoners-british-jails/print>; Jack Rodolico, *UK Prisoners ‘Dying Inside’*, LATITUDE NEWS, Jan. 11, 2012, <http://www.latitudenews.com/story/uk-prisoners-dying-inside/>; *Japanese Prisoners Facing Swelling Elderly Population*, AP WIRE, Dec. 3, 2010.

<sup>111</sup> See TURNER & TROTTER, *supra* note 110, at 4 (describing the results of a study conducted in 2007 by the Australian Institute of Criminology).

<sup>112</sup> Crawford, *supra* note 110.

<sup>113</sup> See Rodolico, *supra* note 110.

<sup>114</sup> See James, *supra* note 110. James’s detailed newspaper article on this topic describes a number of issues that are equivalent to concerns which elderly inmates in the U.S. currently experience, including victimization by younger prisoners (“Those with limited mobility are automatically vulnerable and tend to avoid association with younger prisoners”), accessibility problems (“I can’t get my wheelchair through the door of my room and I have to try and get from the entrance to my bed”), and general lack of compassion for aging inmates (“[I]n an environment where everybody knows that it’s every man for himself, such inhumanity becomes acceptable to all.”) *Id.*

<sup>115</sup> See *Japanese Prisoners*, *supra* note 110.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Crawford, *supra* note 110. An attempt in 2000 to establish an “older offender division” was abandoned and “none of its recommendations ever saw the light of day.” *Id.*

<sup>119</sup> See *Prisons Accused Over Elderly Care*, BBC, Aug. 12, 2008, [http://news.bbc.co.uk/2/hi/uk\\_news/7556543.stm](http://news.bbc.co.uk/2/hi/uk_news/7556543.stm). Unfortunately, however, the Chief Inspector has more recently stated that she is disappointed in the overall response to her report. *See id.*

inmates can receive enhanced attention, although this unit is small compared with similar units in the United States.<sup>120</sup>

The details of programs implemented by other nations regarding elderly inmates are beyond the scope of this article. Yet the existence of these challenging situations abroad shows that the United States is certainly not alone in this present-day issue. While the scale of the problem appears to be larger in the United States — at least from a sheer numbers perspective — the concerns are the same globally. As the U.S. wrestles with dilemmas regarding its aging incarcerated population, stakeholders in this debate can at least take comfort in the fact that they have plenty of company with similar struggles around the world.

## **B. The Cost Of The Issue**

When Jacob Reingold wrote his letter to *The New York Times* in 1989, he cited a startling monetary statistic. Caring for elderly inmates, he wrote, was incredibly costly for New York State.<sup>121</sup> While custodial care for younger prisoners costs an average of \$23,000 per year, Reingold stated, the cost of care for older inmates averaged \$69,000 annually.<sup>122</sup>

Today, although the dollar figures are higher, the principle that Reingold expressed in his letter remains the same. Of all of the paradoxes surrounding elderly inmates, the most frustrating is probably this one: Elderly prisoners are generally recognized as the least-dangerous group in the correctional system, but they are by far the most expensive to incarcerate.<sup>123</sup> Nationwide, custodial care of elderly inmates costs taxpayers approximately \$16 billion per year.<sup>124</sup> In Arizona, where prison health care allocations increased by 78 percent between 1995 and 2005,<sup>125</sup> experts have warned that the rise in elderly inmates could potentially bankrupt the state's correctional system.<sup>126</sup> Louisiana estimates that it costs approximately \$80,000 per year to house an elderly prisoner, up from a \$19,888 average annual cost of housing a younger inmate.<sup>127</sup> Pennsylvania approximates an annual cost of \$100,000 to care for the average elderly inmate.<sup>128</sup>

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<sup>120</sup> *See id*; *see also* Jamie Doward, *OAP Convicts Get Special Prison Wing*, *THE OBSERVER*, Sept. 7, 2003, <http://www.guardian.co.uk/politics/2003/sep/07/ukcrime.prisonsandprobation>.

<sup>121</sup> *See* Reingold, *supra* note 27.

<sup>122</sup> *Id.*

<sup>123</sup> *See, e.g.*, *AT AMERICA'S EXPENSE*, *supra* note 38; *OLD BEHIND BARS*, *supra* note 14, at 72; Curtin, *supra* note 48, at 477; Interview with Ronald Aday, *supra* note 13.

<sup>124</sup> *AT AMERICA'S EXPENSE*, *supra* note 38, at 28.

<sup>125</sup> Judi Villa, *Aged Inmates' Care Puts Stress on State*, *ARIZONA REPUBLIC*, May 8, 2005, <http://www.azcentral.com/arizonarepublic/news/articles/0508prisonaging01.html>.

<sup>126</sup> *Id.*

<sup>127</sup> Press Release, American Civil Liberties Union, *ACLU Hails Louisiana Legislature for Passing Bill Aimed at Reducing Elderly Prisoner Population* (June 20, 2011).

<sup>128</sup> Christopher Moraff, *Graying of America's Prison Population*, *PHILADELPHIA TRIBUNE*, Feb. 19, 2012, <http://www.phillytrib.com/newsarticles/item/2840-graying-of-america%E2%80%99s-prison-population.html>.

The difference in costs between housing a younger inmate and housing an older inmate arises primarily from medical expenses. Depending on the state, according to Human Rights Watch, medical expenditures for older prisoners are between three and nine times greater than they are for younger inmates.<sup>129</sup> For example, in Michigan, the annual average health care cost for an inmate is \$5,800. For inmates between the ages of 55 and 59, the medical cost rises to an average of \$11,000 annually.<sup>130</sup> For prisoners age 80 and above, the health care expenses grow to an average of \$40,000 per year.<sup>131</sup> In Georgia, incarcerated individuals under age 65 have an average yearly medical cost of \$961.<sup>132</sup> Inmates age 65 and above have average annual medical expenditures of \$8,565.<sup>133</sup>

Other surprising costs can arise from simply following the security procedures of a particular prison system. In the 2006 report *Elderly Prisoners Are Literally Dying For Reform*, Tia Gubler described her observations of Helen Loheac, a frail 82-year-old non-violent offender housed in a California prison.<sup>134</sup> Three times a week, Gubler wrote, Loheac would be shackled and placed in waist chains for the trip to a hospital where she received dialysis for kidney failure.<sup>135</sup> Two armed corrections officers, each of them making \$24.75 per hour, would accompany Loheac on every trip.<sup>136</sup>

Similarly, a Missouri newspaper article notes that Missouri prisoners made approximately 12,500 trips to outside medical facilities in 2008, guarded by between one and three corrections officers at all times.<sup>137</sup> The trips, according to the article, cost the state a tidy sum in transportation bills and overtime payments to the officers.<sup>138</sup> In California, a 2010 audit found that the state paid \$132 million each year on overtime for guards charged with transporting and watching ill prisoners.<sup>139</sup>

The key question, of course, is where these costs can be cut. In the face of such numbers, it is a fundamental query, particularly in today's challenging economic climate, and subsequent parts of this article will discuss the financial impact of implementing potential changes in prison

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<sup>129</sup> OLD BEHIND BARS, *supra* note 14, at 73.

<sup>130</sup> *Id.* at 76.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> TIA GUBLER, *ELDERLY PRISONERS ARE LITERALLY DYING FOR REFORM 2* (Jan. 2006).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Jessica Pupovac, *Missouri's Aging Inmate Population Straining State Budget*, COLUMBIA MISSOURIAN, Jan. 27, 2011, <http://www.columbiamissourian.com/stories/2011/01/27/caring-old-cons-missouris-aging-inmate-population-straining-state-budget/>.

<sup>138</sup> *Id.* (corrections officials did not disclose a precise figure for the cost of these trips).

<sup>139</sup> Marisa Lagos, *Small Group of Ill Inmates Costs State Plenty*, SAN FRANCISCO CHRONICLE, May 19, 2010, <http://www.sfgate.com/health/article/Small-group-of-ill-inmates-costs-state-plenty-3264058.php>. See also Williams, *supra* note 14 (quoting spokeswoman from California Correctional Health Care Services who noted that "We have guys who are comatose shackled to beds with a guard in the room.").

systems. Yet there are also certain financial cuts that cannot be made without violating state and federal laws. We now turn to a brief discussion of the standards required by some of these laws, standards of care aimed at ensuring humane care and treatment in prisons — and, inherently, keeping the cost of care for elderly inmates high.

### **C. Why The Issue *Must* Be Addressed — Key Legal Standards Affecting Elderly Prisoners**

In a nation which declares cruel and unusual punishment to be unconstitutional, issues regarding the treatment of prison inmates frequently appear in legislative bodies and in courts. Through the years, American courts have decided a number of cases which define what the minimum thresholds of in-prison care must be in order to comply with the federal Constitution. Here, we look at two areas which are of paramount importance to elderly inmates: (1) requirements for medical care and protection in prison systems, and (2) obligations owed to inmates with physical or mental disabilities.

#### **1. Legal Standards For Prison Medical Care And Inmate Protection**

Prisoners in the United States have a constitutional right to adequate health care.<sup>140</sup> Denying inmates this right to health care constitutes a violation of the Eighth Amendment prohibition of cruel and unusual punishment.<sup>141</sup> As one court described the necessity of this guarantee, “[i]t is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself.”<sup>142</sup>

Pinpointing precisely what this constitutional right entails, however, is not as clear-cut as one might imagine. The issue of the degree of medical care to which inmates are constitutionally entitled came to a boiling point in the 1970s, a decade in which court cases and investigative journalism revealed horrible medical abuses within prisons.<sup>143</sup> A Fifth Circuit case from 1974, for instance, provided a ghastly picture of inmates dying in their cells without a doctor on hand, covered in maggots and lying in their own excrement.<sup>144</sup>

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<sup>140</sup> See *Estelle v. Gamble*, 429 U.S. 97 (1976); see also Curtin, *supra* note 48, at 475 (“[P]risoners are the only people in the United States who have a constitutional right to health care.”).

<sup>141</sup> See *Estelle*, 429 U.S. at 104.

<sup>142</sup> *Spicer v. Williamson*, 132 S.E. 291, 293 (N.C. 1926).

<sup>143</sup> See, e.g., *Greg v. Georgia*, 428 U.S. 153 (1976) (holding that the Eighth Amendment prohibits “unnecessary and wanton infliction of pain”); *Newman v. Alabama*, 503 F.2d 1320 (5th Cir. 1974) (certain deplorable conditions of confinement inherently violated the letter and spirit of the Eighth Amendment). This was a departure from the *laissez-faire* approach that most state and federal courts had taken toward confinement conditions up to this point. See, e.g., *Ruffin v. Commonwealth of Va.*, 62 Va. (21 Gratt) 790 (1871) (establishing that a prisoner is “a slave, in a condition of penal servitude to the State, and subject to such laws and regulations as the State may choose to prescribe.”).

<sup>144</sup> See *Newman*, 503 F.2d at 1323–24.

In 1976, the United States Supreme Court heard the case of *Estelle v. Gamble*, rendering a decision which still remains the legal standard in prison medical care cases today.<sup>145</sup> “Deliberate indifference to serious medical needs of prisoners,” Justice Thurgood Marshall wrote in the Court’s majority opinion, “constitutes the ‘unnecessary and wanton infliction of pain’, proscribed by the Eighth Amendment.”<sup>146</sup> On the surface, the decision appeared to be a resounding victory for the rights of prisoners.

Yet the picture continues to be clouded by other language that the Court included in its majority opinion. “This conclusion does not mean, however, that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment,” Justice Marshall wrote. “An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain.”<sup>147</sup> Under this standard, the prisoner plaintiff actually lost this case.<sup>148</sup> His claims focused on medical malpractice, not deliberate indifference.<sup>149</sup> Thus, the Court made it clear that a medical mistake in the nature of care or in the outright denial of care — no matter how egregious — is not enough to prove an Eighth Amendment violation.<sup>150</sup> An element of intent, a showing that the improper care or lack of care actually was *deliberate*, also is necessary.<sup>151</sup>

Other cases regarding prison standards of care have helped to define the boundaries of the *Estelle* “deliberate indifference” standard. Courts have held that the notion of “deliberate indifference” demands an inquiry into the defendant’s state of mind.<sup>152</sup> To reach the level of “cruel and unusual punishment,” prison officials must know of and disregard a substantial risk to

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<sup>145</sup> See Human Rights Watch, *Statement to the House of Representatives on the Department of Homeland Security’s New Immigration Detention Standards*, Mar. 28, 2012, available at <http://www.hrw.org/news/2012/03/28/us-statement-house-representatives-department-homeland-security-s-new-immigration-de> (calling *Estelle v. Gamble* “the landmark case defining custodial responsibility for medical care”).

<sup>146</sup> *Estelle*, 429 U.S. at 104 (citing *Greg v. Georgia*, 428 U.S. 153, 173 (1976)).

<sup>147</sup> *Id.* at 105.

<sup>148</sup> *Id.* at 107.

<sup>149</sup> *Id.* at 107–08 (“A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice . . .”).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*; see also Cathleen A. Cerny & Stephen Noffsinger, *Prisoner Rights and Suicide*, 34 J. AM. ACAD. PSYCHIATRY & LAW 549, 550 (Dec. 2006); Sue Woolf Brenner, *The Parameters of Cruelty: Application of Estelle v. Gamble to Sentences Imposed on the Physically Fragile Offender*, 12 AM. J. CRIM. L. 279 (1984).

<sup>152</sup> See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Wilson v. Seiter*, 501 U.S. 294, 302 (1991) (“Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind”); *Graham v. Connor*, 490 U.S. 386, 398 (1989) (“The Eighth Amendment terms “cruel” and “punishments” clearly suggest some inquiry into subjective state of mind”); *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (“It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause”).

the inmate's essential safety and well-being.<sup>153</sup> Yet courts frequently will not require that the defendant show an *express* intent to inflict pain and suffering on the inmate.<sup>154</sup> Instead, this knowledge can be inferred from the surrounding facts where the defendant's failure to respond to a clear risk to the inmate was unreasonable and reckless.<sup>155</sup>

Importantly, the Eighth Amendment protections against deliberate indifference also apply when outside medical practitioners are assigned to treat an inmate.<sup>156</sup> Private contractors with state and local governments who provide services to prisoners are deemed "state actors" for Eighth Amendment purposes.<sup>157</sup> Furthermore, the state or federal government remains liable for failing to provide adequate health care.<sup>158</sup> This prevents correctional institutions from avoiding Eighth Amendment liability simply by contracting out medical services to outside organizations.

Overall, *Estelle* and surrounding caselaw has established that prison inmates have three basic constitutional rights regarding their medical needs: the right to reasonable access to both emergency and routine medical care, the right to a professional medical judgment, and the right to receive care when it is ordered by a medical professional.<sup>159</sup> Thus, prisoners have a constitutional right to see a medical professional in a timely manner when they request it, as well as the right to receive the prescribed medical care in a timely fashion once the medical professional prescribes a course of treatment.<sup>160</sup> This includes receiving prescription medications under the dosage and schedule prescribed by the medical professional<sup>161</sup> and having follow-up appointments for evaluations and/or treatments by the medical professional, including necessary

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<sup>153</sup> See *Farmer*, 511 U.S. at 837 ("A prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.").

<sup>154</sup> See, e.g., *Whitley*, 475 U.S. at 319 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)) ("An express intent to inflict unnecessary pain is not required."); see also *Berry v. City of Muskogee*, 900 F.2d 1489, 1495–96 (10th Cir. 1990) (determining that "deliberate indifference" is a standard above negligence, but does not need to involve intentional and malicious infliction of injury or pain).

<sup>155</sup> See *id.*; see also *Brown v. Plata*, 131 S.Ct. 1910, 1923 (holding that egregious and persistent problems with overcrowding, lack of adequate medical care, and failure to institute adequate provisions for inmates with mental illnesses constituted deliberate indifference under the *Estelle* standard, even though none of these acts were direct acts of malice by prison officials). Deliberate indifference is judged on the "attitudes and conduct" of prison officials "at the time suit is brought and persisting thereafter." See *Farmer*, 511 U.S. at 845.

<sup>156</sup> *West v. Atkins*, 487 U.S. 42, 57 (1989).

<sup>157</sup> *Id.* at 57. Importantly, this permits an inmate to sue these outside health care providers for deliberate indifference under 42 U.S.C. §1983, a civil action for the deprivation of constitutional rights. See *id.*

<sup>158</sup> *Id.* at 56–57.

<sup>159</sup> See Craig A. Conway, *A Right of Access to Medical and Mental Health Care for the Incarcerated*, U. HOUSTON HEALTH LAW PERSPECTIVES, Oct. 19, 2010, <http://www.law.uh.edu/healthlaw/perspectives/2009/%28CC%29%20Prison%20Health.pdf>.

<sup>160</sup> See *id.* at 3.

<sup>161</sup> See *id.*

visits to specialists outside the prison walls.<sup>162</sup> Still, the threshold for “deliberate indifference” remains a high bar — perhaps even too high — to meet.<sup>163</sup> Courts have rejected plenty of situations where the defendant appeared to be extraordinarily negligent toward the prisoner on the grounds that the inmate could not prove anything beyond mere negligence, falling short of the deliberate indifference requirement in *Estelle*.<sup>164</sup>

Issues can also arise from the fact that the Constitution requires that prison officials provide medical care only for “serious medical needs.”<sup>165</sup> Defining “serious” can produce as many pitfalls as defining “deliberate” for the *Estelle* standard. Notably, though, courts have consistently held that a condition does not always need to be life-threatening to qualify as “serious.”<sup>166</sup> Medical conditions can be deemed “serious” if they “cause pain, discomfort, or threat to good health.”<sup>167</sup> It can also be a condition that “has been diagnosed by a physician as mandating treatment or . . . is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.”<sup>168</sup> A medical problem which is “a condition of urgency, one that may produce death, degeneration, or extreme pain” is likewise considered “serious.”<sup>169</sup> Furthermore, the fact that a medical professional would classify a particular procedure as “elective” does not automatically preclude that procedure from being a “serious medical need.”<sup>170</sup>

To comply with the Eighth Amendment, prisons are expected to recognize “evolving standards of decency that mark the progress of a maturing society.”<sup>171</sup> Prison practices that lead to “torture or a lingering death” are seen as Eighth Amendment violations,<sup>172</sup> as are policies that

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<sup>162</sup> *See id.*

<sup>163</sup> This concern has been raised multiple times by many observers . . . including justices of the U.S. Supreme Court, the very body which established this standard in the first place. *See, e.g.,* *Wilson v. Seiter*, 501 U.S. 294, 311 (1991) (White, J., dissenting) (“The majority’s approach . . . is unwise. It leaves open the possibility, for example, that prison officials will be able to defeat a §1983 action challenging inhumane prison conditions simply by showing that the conditions are caused by insufficient funding from the state legislature rather than by any deliberate indifference on the part of the prison officials . . . The ultimate result of today’s decision, I fear, is that “serious deprivations of basic human needs” will go unredressed due to an unnecessary and meaningless search for “deliberate indifference.”).

<sup>164</sup> *See* note 152, *supra*.

<sup>165</sup> *See* A JAILHOUSE LAWYER’S MANUAL Ch. 23 (COLUM. HUM. RTS. L. REV, eds., 8th ed. 2009).

<sup>166</sup> *See id.*

<sup>167</sup> *Dean v. Coughlin*, 623 F.Supp 392, 404 (S.D.N.Y. 1985).

<sup>168</sup> *Brown v. Johnson*, 387 F.3d 1344, 1350–52 (11th Cir. 2004).

<sup>169</sup> *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994) (holding that an inmate with a degenerative hip condition who “registered complaints of hip pain on almost seventy occasions” clearly qualified as having a serious medical condition).

<sup>170</sup> *See, e.g.,* *Johnson v. Bowers*, 884 F.2d 1053, 1056 (8th Cir. 1989) (ruling that a hospital’s classification of a particular surgery as “elective” did not inherently mean that the surgery was not a serious medical need for the plaintiff).

<sup>171</sup> *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>172</sup> *See In re Kemmler*, 136 U.S. 436, 447 (1890).

lead to the “unnecessary and wanton infliction of pain.”<sup>173</sup> Likewise, a condition of confinement which deprives prisoners of “a single, identifiable human need” demonstrates cruel and unusual punishment in violation of the Eighth Amendment.<sup>174</sup> “Human needs” under this requirement include food, shelter, exercise, clothing, adequate medical care, and reasonable safety, according to the U.S. Supreme Court.<sup>175</sup> Violations of these identifiable human needs can also include “prospective violations” — the obvious threat of a future constitutional harm.<sup>176</sup> Therefore, prison administrators cannot “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.”<sup>177</sup> Again, of course, the *Estelle* standard of “deliberate indifference” rather than pure negligence is the governing rule in situations where these “human needs” have been denied to inmates.<sup>178</sup>

Surprisingly, the caselaw regarding medical concerns of elderly inmates is rather limited. It is unclear why, given the level of concern about the medical treatment of older inmates in prisons, more cases about these issues do not exist. Perhaps it is because some elderly inmates may lack the level of energy — and, in the cases of individuals suffering from dementia, the intellectual capacity — required to file a lawsuit *pro se* or to explain their situation to an outside attorney.<sup>179</sup> Older prisoners may also be fearful of retaliation by staff if they bring a case against a particular staff member or against the correctional institution as a whole.<sup>180</sup> Given that many elderly prisoners are estranged from their family,<sup>181</sup> it is also not surprising (although quite unfortunate) that very few family members seem to enter the legal arena on behalf of elderly inmates.

Still another potential barrier to elderly inmates bringing a suit for deliberate indifference against prison officials is the existence of the Prisoners’ Litigation Reform Act, which requires prisoners to exhaust all of their “administrative remedies” before they are even eligible to file a lawsuit against prison officials in federal court.<sup>182</sup> This means that an inmate must work through

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<sup>173</sup> *Greg v. Georgia*, 428 U.S. 153, 173 (1976).

<sup>174</sup> *Wilson v. Seiter*, 501 U.S. 294, 304.

<sup>175</sup> *DeShaney v. Winnebago Cnty. Dep’t of Correctional Servs.*, 489 U.S. 189, 200 (1989) (citing *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976)) (“[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs— *e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”); *Wilson*, 501 U.S. at 304 (1991) (describing deliberate indifference as ignoring a condition “that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise”).

<sup>176</sup> *See Helling v. McKinney*, 509 U.S. 25 (1993) (citing *Hutto v. Finley*, 437 U.S. 678, 682 (1978)).

<sup>177</sup> *Id.* (“That the Eighth Amendment protects against future harm is not a novel proposition.”).

<sup>178</sup> *See id.* at 34.

<sup>179</sup> *See* Interview with Ronald Aday, *supra* note 13.

<sup>180</sup> *See id.*

<sup>181</sup> *See id.*; *see also* Interview with Robert Greifinger, *supra* note 77.

<sup>182</sup> *See* 42 U.S.C. §1997e (a) (2011) (“No action shall be brought with respect to prison conditions under (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”).

every possibility in his or her prison's entire administrative system (i.e., writing, filing, and appealing grievances to prison administrators) before that inmate even has a chance to get a case into federal court.<sup>183</sup> For obvious reasons, this presents some significant barriers to elderly inmates, particularly older prisoners suffering from significant health problems that are not being properly addressed.<sup>184</sup>

Of the cases that have been decided regarding medical problems of elderly inmates, the hurdle of "deliberate indifference" has often proven to be too high to surmount. For instance, in *Stewart v. Murphy*, the Fifth Circuit held that clearly negligent conduct by prison doctors regarding an elderly inmate's bedsores did not rise to the level of an Eighth Amendment violation.<sup>185</sup> Similarly, in *Edney v. Kerrigan*, the Southern District held that placing elderly inmate in a housing area with inmates known to regularly attack older prisoners did not constitute deliberate indifference.<sup>186</sup>

Yet with elderly inmates more prevalent and more visible in prison systems than ever before, and with more information about issues facing elderly prisoners in common circulation, there should be every likelihood that this trend will change soon. Today, elderly prisoners are (or at least should be) well-known to prison officials as being the most vulnerable demographic segment of the prison population in many ways.<sup>187</sup> Failure by prisons to take these vulnerabilities

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<sup>183</sup> See generally MARCO SCHLANGER & GIOVANNA SHAY, PRESERVING THE RULE OF LAW IN AMERICA'S PRISONS: THE CASE FOR AMENDING THE PRISON LITIGATION REFORM ACT 2, 7–9 (2007) (explaining that while the PLRA does help keep frivolous litigation out of the courts, it also provides significant obstacles for inmates with legitimate claims, particularly inmates who are disabled or disadvantaged in some way). An inmate's weakened medical state has not been enough to get around the exhaustion requirement of the PLRA. See *Ferrington v. Louisiana Dep't of Corrections*, 315 F.3d 529, 532 (5th Cir. 2002) (blind inmate who missed his prison's deadline for filing a grievance was prevented by the PLRA from bringing a federal lawsuit about the issue at hand); *Washington v. Texas Dep't of Criminal Justice*, 2006 WL 3245741 (S.D. Tex. 2006) (holding that inmate who missed the grievance-filing deadline of his institution because he was hospitalized was barred under the PLRA from filing suit in federal court).

<sup>184</sup> This underscores the need for expedited grievance processes (and grievance appeals processes) at the facility level for elderly inmates. See Part II, *infra*.

<sup>185</sup> 174 F.3d 530, 537 (5th Cir. 1999). *But see contra id.* at 538–41 (Politz, J., dissenting) ("If these appellees are guilty of nothing more than a bit of innocuous medical malpractice, then the barrier to a deliberate indifference claim has been rendered virtually impenetrable . . . At least three different physicians could have prevented this painful death by administering a relatively basic course of treatment — antibiotics and physical therapy. Instead, they looked away as Stewart literally rotted away, his flesh decaying, his body soaked in his own feces, urine, blood, and pus. Even at the final stage, when Stewart's death appeared imminent, a conscious decision was made to postpone his transfer to a hospital for two possibly crucial days."). If Judge Politz's accounting of the facts is anything close to what really occurred, it is very difficult to determine how this did not rise to the level of deliberate indifference.

<sup>186</sup> 2004 WL 2101907 \*7 (S.D.N.Y. 2004).

<sup>187</sup> See note 14, *supra*; see also S. Stojkovic, *Elderly Prisoners: A Growing and Forgotten Group Within Correctional Systems Vulnerable to Elder Abuse*, 19 J. ELDER ABUSE NEGL. 97 (2007) (describing in detail the vulnerabilities of the elderly behind bars to medical problems, victimization by other inmates, and other hazards).

into account and protect elderly prisoners in these various areas certainly seems as if it could constitute deliberate indifference, and thus an Eighth Amendment violation.<sup>188</sup> Clearly, the medical, accessibility, and personal safety requirements of an elderly prisoner are known to be quite unique.<sup>189</sup> Neglecting to provide adequately for such needs would seem to expose prison officials to liability under the Eighth Amendment.<sup>190</sup>

For instance, commentators have paid plenty of attention to the lack of specialized geriatric care in prisons, as well as the ways in which geriatric medical care often differs from standard medical treatments.<sup>191</sup> Thus, if an elderly inmate suffered from an illness which required specialized geriatric training to treat properly, a prison would seem to be in violation of the Eighth Amendment if it did not allow the inmate adequate access to a medical professional with geriatric training, or if it did not properly follow the requests of the medical professional (i.e., not providing the inmate with special privileges described as medically necessary by the prescribing professional). Adequate medical care was identified as a “human need” by the U.S. Supreme Court in *DeShaney v. Winnebago County Department of Social Services*.<sup>192</sup> For certain illnesses or conditions, preventing an elderly inmate from access to a geriatrics specialist or not following the treatment requirements prescribed by the geriatrics specialist puts the elderly inmate at an increased risk of significant harm.<sup>193</sup> If prison staff ignored the plethora of easily accessible information on this topic, and the inmate suffered harm to his or her health as a result, this would certainly seem to constitute deliberate indifference.

Potentially, failure to protect elderly inmates from harm by other inmates could also constitute Eighth Amendment violations under a similar line of reasoning. Publications from newspapers to special reports to corrections journals have described the exploitation risks that elderly inmates face from younger prisoners.<sup>194</sup> Therefore, it appears that if prison staff housed or programmed an elderly inmate with younger inmates known to be “predators,” disregarding

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<sup>188</sup> See *Helling v. McKinney*, 509 U.S. 25 (1993) (holding that failure to prevent an obvious future harm to an inmate violates the Eighth Amendment); *DeShaney v. Winnebago Cnty. Dep’t of Correctional Servs.*, 489 U.S. 189, 200 (1989) (defining “human needs” which prison administrators must protect). See also notes 174–76, *supra*.

<sup>189</sup> See note 187, *supra*.

<sup>190</sup> Deliberate indifference can be a difficult standard to apply to cases involving elderly inmates with chronic medical problems. A bona fide lack of care is more challenging to prove in such cases. See, e.g., Curtin, *supra* note 48, at 487 (“The standard of ‘deliberate indifference’ becomes especially unwieldy in practice when it is applied to elderly prisoners with many chronic complaints.”). Still, it seems that there is enough of a well-established baseline regarding geriatric care today that a gross departure from these accepted standards would reasonably constitute deliberate indifference.

<sup>191</sup> See, e.g., Interview with Robert Greifinger, *supra* note 77; Interview with Carl Koenigsmann, *supra* note 76; OLD BEHIND BARS, *supra* note 14, at 45–48; Abner, *supra* note 14, at 10; WILLIAMS, *supra* note 49, at 6; AT AMERICA’S EXPENSE, *supra* note 38; Stojkovic, *supra* note 187; Williams, *supra* note 14.

<sup>192</sup> 489 U.S. at 200.

<sup>193</sup> See note 191, *supra*.

<sup>194</sup> See, e.g., OLD BEHIND BARS, *supra* note 14, at 57–60; WILLIAMS, *supra* note 49, at 7; Curtin, *supra* note 48, at 483.

the obvious substantial risk of harm to the older inmate, the prison would be liable if the elderly inmate suffered harm at the hands of the younger prisoners. “Reasonable safety” is identified as a “human need” that should be protected under the Eighth Amendment.<sup>195</sup> By disregarding the risk of housing the older inmate with prisoners known to victimize weaker individuals, the prison ignored “a condition of confinement that is sure or very likely to cause . . . needless suffering the next week or month or year” — an argument would sensibly lead to a successful Eighth Amendment claim.

Last year, the U.S. Supreme Court delivered one of its most powerful decisions in years regarding conditions of confinement, holding in *Brown v. Plata* that substandard medical care and living conditions in California prisons — particularly for inmates with mental disabilities — violated the Eighth Amendment.<sup>196</sup> With a number of systemic problems plaguing the California system over a long period of time, and without proper improvements made by the state’s correctional leaders, “needless suffering and death” became the undesirable consequence.<sup>197</sup> In reviewing the state’s overall lack of action to better the situation for the suffering inmates, the Court’s majority pulled no punches. “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,” Justice Anthony Kennedy wrote in the majority opinion.<sup>198</sup> “If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation.”<sup>199</sup>

Corrections officials may have taken notice of the Court’s strong opinion in *Brown*. In Arizona, for instance, the state’s Department of Corrections opted to conduct an extensive internal investigation regarding inmate complaints of systemic medical care deficiencies rather than risk a lawsuit.<sup>200</sup> It would seem that given the growing numbers of elderly prisoners in America, a similar situation dealing with age-specific needs of older inmates would be inevitable. And if the Court followed its rationale in *Brown*, the Eighth Amendment would seem to be on the side of the elderly prisoners if their well-documented care needs had been neglected

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<sup>195</sup> See *DeShaney*, 489 U.S. at 200.

<sup>196</sup> 131 S.Ct. 1910, 1946–47 (2011).

<sup>197</sup> *Id.* at 1923.

<sup>198</sup> *Id.* at 1928.

<sup>199</sup> *Id.*

<sup>200</sup> Bob Ortega, *Prison Inmates in Arizona Crying Foul Over Medical Care*, THE ARIZONA REPUBLIC, Dec. 5, 2011, <http://www.azcentral.com/news/articles/2011/11/22/20111122arizona-prison-inmates-cry-foul-over-care.html>. The inmates asserted that severe neglect had occurred toward sick inmates, particularly chronically ill prisoners, in several instances. *Id.* Allegations included denial of insulin to a diabetic prisoner, causing him to lose sight in one eye; repeated denials of treatment or medication for inmates with end-stage renal disease and emphysema; and an epileptic who was denied his seizure medication for weeks, resulting in him suffering from repeated seizures. *Id.*

by prison officials.<sup>201</sup> A longtime systemic inability to provide for the obvious necessities of certain inmates now clearly “has no place in civilized society.”<sup>202</sup>

Deliberate indifference remains a challenging standard to reach. Yet with the increased attention and information available about medical and safety needs of elderly prisoners, and the sheer number of elderly inmates increasing nationwide, there is a good chance that elderly prisoners could succeed on Eighth Amendment cases in the years to come. Prison systems would be well-advised to avoid this risk by preventing such neglectful situations from occurring.

## 2. Legal Standards For Inmates With Disabilities

A significant number of elderly inmates suffer from physical and/or mental disabilities.<sup>203</sup> Inside the highly regulated prison environment, these inmates depend on the protections of state and federal laws in order to function in day-to-day life.<sup>204</sup> Often, prisons present accessibility problems for inmates who have mobility difficulties.<sup>205</sup> In other instances, prisoners with disabilities have expressed concerns about being excluded from particular programs and opportunities on the basis of their disability.<sup>206</sup> Just as such issues are dealt with by the law in free society, these matters are also of significant legal concern inside the prison gates.

The statute most commonly invoked by inmates with disabilities is the federal Americans With Disabilities Act (ADA).<sup>207</sup> In particular, Title II of the ADA — the portion governing programs, activities, and services of public entities — applies to many issues that arise in prison systems.<sup>208</sup> While the ADA is a federal law, the Supreme Court has held that Title II

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<sup>201</sup> See 131 S.Ct. at 1928, 1946–47.

<sup>202</sup> *Id.* at 1928.

<sup>203</sup> See GUBLER, *supra* note 134, at 2; OLD BEHIND BARS, *supra* note 14, at 47; Curtin, *supra* note 48, at 481; Jones & Chung, *supra* note 14. See also E-mail Interview with Andy Pallito, Commissioner of the Vermont Dep’t of Corrections (July 10, 2012); E-mail Interview with Christopher Epps, Commissioner of the Mississippi Dep’t of Corrections (July 13, 2012); E-mail interview with Gloria Perry, Chief Medical Officer of the Mississippi Dep’t of Corrections (July 13, 2012); E-mail interview with James LeBlanc, Secretary of the Louisiana Dep’t of Corrections (July 19, 2012); Interview with Brian Fischer, *supra* note 109; Interview with Justin Jones, *supra* note 23; Interview with Carl Koenigsmann, *supra* note 76; Interview with Robert Greifinger, *supra* note 77.

<sup>204</sup> See, e.g., PETER E. LEONE, MICHAEL WILSON & MICHAEL P. KREZMIEN, UNDERSTANDING AND RESPONDING TO THE EDUCATION NEEDS OF SPECIAL POPULATIONS IN ADULT CORRECTIONS 5–9 (2008).

<sup>205</sup> See Part IIB, *infra*.

<sup>206</sup> See, e.g., *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999) (dealing with an HIV-positive inmate who was denied equal access to rehabilitative programs); *Martinez v. Calif. Dep’t of Corrections*, 1997 WL 207946 (9th Cir. 1997) (concerning a quadriplegic who was denied equal access to classroom education and vocational training programs in the prison); see also Elaine Gardner, *The Legal Rights of Inmates with Physical Disabilities*, 14 ST. LOUIS U. PUB. L. REV. 175, 188–98 (1994) (noting that many inmates with disabilities are concerned about gaining equal access to opportunities that are made available to non-disabled prisoners).

<sup>207</sup> 42 U.S.C. §§ 12101 *et seq.* (2012).

<sup>208</sup> See 42 U.S.C. §§ 12131–12165. The Office of Fair Housing and Equal Opportunity is charged with enforcing this provision of the ADA.

“unambiguously extends” to *both* federal and state prison inmates, allowing every disabled prisoner in the United States to benefit from its requirements.<sup>209</sup>

Under its standard definition of “disability,” the ADA covers any inmate who has a “physical or mental impairment that substantially limits one or more life activities, a record of such an impairment, or being regarded as having such an impairment,” a category which includes the majority of elderly inmates.<sup>210</sup> This means that every state and federal prison in the United States, like other public entities, must provide reasonable accommodations for inmates with disabilities.<sup>211</sup> These reasonable accommodations can focus on accessibility concerns, such as ensuring that an inmate who uses a wheelchair is housed in a cell block with accessible toilets and showers<sup>212</sup> or providing a sign language interpreter when a deaf inmate appears before the parole board.<sup>213</sup> They can also look at integration issues, such as requiring that reasonable accommodations be made for an inmate excluded from a desired program on the basis of his or her disability.<sup>214</sup>

Unfortunately, courts have not provided particularly clear guidance as to precisely *how* Title II should apply to prison inmates. The body of caselaw regarding the ADA in prison settings is frustratingly inconsistent. Some courts have essentially written new policies into the ADA’s application to inmates. For instance, in *Martinez v. California Department of Corrections*, the Ninth Circuit permitted a prison to deny a quadriplegic prisoner access to the prison’s recreation yard and to certain educational programs on the same terms as similarly classified inmates.<sup>215</sup> Using the U.S. Supreme Court’s holding in *Turner v. Safley*, which held that prison policies were valid if they were “reasonably related to legitimate penological interests,”<sup>216</sup> the Ninth Circuit ruled that the exclusion was permissible because the inmate in question might not be able to defend himself against non-disabled prisoners.<sup>217</sup> The court held that this was a “legitimate penological interest” under *Turner*, and thus Title II of the ADA was not implicated.<sup>218</sup>

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<sup>209</sup> Pa. Dep’t of Corrections v. Yeskey, 524 U.S. 206, 213 (1998); *see also* U.S. v. Georgia, 546 U.S. 151, 159 (2006) (ruling that Title II of the ADA extends to persons with disabilities in state prisons and protects inmates from discrimination on the basis of disability by prison staff).

<sup>210</sup> *See* 42 U.S.C. § 12102(1) (2011).

<sup>211</sup> *See Georgia*, 546 U.S. at 159.

<sup>212</sup> *See, e.g., LaFaut v. Smith*, 839 F.2d 387 (4th Cir. 1987). *See also* *Marquiz v. Romer*, 92-k-1470 (D. Colorado).

<sup>213</sup> *See, e.g., Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996).

<sup>214</sup> *See* note 206, *supra*.

<sup>215</sup> 1997 WL 207946 (9th Cir. 1997).

<sup>216</sup> 482 U.S. 78, 89 (1987).

<sup>217</sup> *Martinez*, at \*1. (“We cannot say the prison’s policy regarding Martinez is not rationally connected to a legitimate concern for his safety. Because the policy is rationally related to the prison’s legitimate security concerns, we need not address whether it is rationally related to Martinez’s medical needs.”).

<sup>218</sup> *See id.*

This rationale allows the burden of proof to be placed on the inmate to demonstrate that the challenged practice is not related to a legitimate penological interest.<sup>219</sup> Unfortunately, this seems to distort Title II's basic purpose of requiring public entities, such as prisons, to show that reasonably accommodating an individual's disability would be unduly burdensome.<sup>220</sup> Placing the onus on the prisoner to explain why the prison is doing something, rather than asking the publically funded facility why it is not doing something, therefore does not seem to hold true to the purposes of the ADA requirements.

Other courts have employed a more traditional interest-balancing test, looking at whether the requested accommodation is reasonable within the prison context.<sup>221</sup> As Judge Richard Posner of the Seventh Circuit wrote, "terms like 'reasonable' and 'undue' are relative to the circumstances, and the circumstances of a prison are different from those of a school, an office, or a factory."<sup>222</sup> As a result, Judge Posner continued, "[t]he security concerns that the defendant rightly emphasizes . . . are highly relevant in determining the feasibility of accommodations that disabled prisoners need in order to have access to desired programs and services."<sup>223</sup>

One court — the Fourth Circuit — even went as far as to argue that Title II of the ADA should not apply to state prison facilities at all.<sup>224</sup> This holding ultimately was overruled by the

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<sup>219</sup> See *id.*; see also *Armstrong v. Davis*, 275 F.3d 849, 874 (9th Cir. 2001) (deciding that the inmate has the burden of showing that the prison administrators' actions were not rationally related to legitimate penological goals). Under *Turner* and its progeny, courts are told to consider four factors in deciding whether a prison policy is rationally related to legitimate penological goals: (1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) the impact that accommodation of the ... right will have on guards, on other inmates, or on the allocation of prison resources; and (4) whether the regulation or policy is an "exaggerated response" to prison concerns. See *Turner*, 482 U.S. at 89; *Gates v. Rowland*, 39 F.3d 1439, 1447 (9th Cir. 1994).

<sup>220</sup> The language of Title II clearly puts the burden on the public entity rather than the individual with disabilities. The law states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity", subject to certain exceptions. 42 U.S.C. § 12132. The rationale that the Ninth Circuit applied stands this objective on its head, requiring the person with disabilities to prove that he or she does not fall into an exception to the rule, rather than requiring the government to prove that an exception is applicable in the case at hand.

<sup>221</sup> See, e.g., *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999) (rejecting the *Turner* framework in ADA prison cases and applying a balancing test that used penological goals as one of several factors); *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996) (deciding that prison violated quadriplegic inmate's rights by effectively denying his access to the prison commissary and to facility work programs); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1030 (S.D.N.Y. 1995) (finding an ADA violation when deaf inmate was denied use of amplified headsets for communication purposes).

<sup>222</sup> *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481 487 (7th Cir. 1997).

<sup>223</sup> *Id.*

<sup>224</sup> *Amos v. Md. Dep't of Pub. Safety*, 126 F.3d 589, 594–95 (4th Cir. 1997).

U.S. Supreme Court’s application of the ADA to state prisons.<sup>225</sup> Still, the Fourth Circuit’s decision clearly demonstrated just how polarizing applying the ADA to state prisons can be.

Thus, it is unclear what the exact standards are regarding when a disabled inmate is denied his or her rights under Title II of the ADA. As with the Eighth Amendment cases, though, it would seem that prisons would be well-served to proceed with some caution in this area, particularly where elderly inmates are concerned. As the aging prison population gains more attention, additional focus will almost certainly be devoted to how elderly prisoners with disabilities are accommodated by correctional institutions. State and federal corrections agencies will avoid plenty of legal battles by ensuring that their treatment of prisoners with disabilities is in full compliance with Title II of the ADA.

#### **D. Why The Issue *Should* Be Addressed — Public Policy Considerations Regarding Elderly Prisoners**

Beyond the law, and beyond the battles that can play out in the nation’s courts, issues concerning elderly prisoners also deserve attention for fundamental public policy reasons. In politics, issues pertaining to prisoners often are “put on the back burner” until they are simply too great to ignore any longer.<sup>226</sup> With elderly prisoners, the early literature was generally ignored until the recent surge of gray-haired men and women behind bars.<sup>227</sup> Now that elderly prisoners are being examined nationally — and internationally — it is evident that the issues presented by elderly inmates have placed policymakers in sort of a Catch-22 situation.

On one hand, voters tend to dislike policies that result in significant public spending (using taxpayer dollars) on prisoners and prison systems.<sup>228</sup> This makes costly measures such as providing improved medical care, age-appropriate programming, and greater disability accessibility for the basic necessities of elderly prisoners politically unpopular. On the other hand, however, Americans also tend to dislike policies that result in prisoners being released

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<sup>225</sup> See Pa. Dep’t of Corrections v. Yeskey, 524 U.S. 206, 213 (1998); U.S. v. Georgia, 546 U.S. 151, 159 (2006) (both specifically applying Title II of the ADA to state prisons).

<sup>226</sup> See Interview with Ronald Aday, *supra* note 13.

<sup>227</sup> Despite the presence of some literature regarding elderly inmates in the late-1970s and during the 1980s, the issues facing America’s aging incarcerated population did not gain significant attention from policymakers and the public until the recent sudden increase in the number of older prisoners. See Part IA, *supra*.

<sup>228</sup> See, e.g., Martha Teichner, *The Cost of a Nation of Incarceration*, CBS NEWS, Apr. 22, 2012, [http://www.cbsnews.com/8301-3445\\_162-57418495/the-cost-of-a-nation-of-incarceration/?tag=contentMain;contentBody](http://www.cbsnews.com/8301-3445_162-57418495/the-cost-of-a-nation-of-incarceration/?tag=contentMain;contentBody); Daniel Weintraub, *Prison Ruling Spotlights Burden of Housing 147,000 Felons*, ORANGE CTY. REGISTER, May 27, 2011, <http://www.oregister.com/news/prison-302291-state-inmates.html> (pointing out that California spends more on prisons than they do on public education); Andrew Yeager, *Alabama’s Prison Problem*, WBHM, Feb. 9, 2012, available at <http://www.wbhm.org/News/2012/prisonovercrowding.html>; see also NORVAL MORRIS, A SNAIL’S PACE OF PRISON REFORM, in Proceedings of the 100th Annual Congress of Corrections of the American Correctional Ass’n 36, 42 (1970) (stating that inmates are “voteless, politically unpopular, and socially threatening.”).

from confinement.<sup>229</sup> This makes policies allowing for the early release of elderly inmates deemed to be non-threatening politically unpopular — even though these policies save substantial amounts of public funds.<sup>230</sup> As a result, when it comes to elderly prisoners, policymakers will be forced to make decisions that will be unpopular to most of the general public: either spend more money on elderly prisoners to better meet their basic needs while in prison or release more elderly prisoners based on the likelihood that they will not recidivate.

Doing nothing is not a viable option. With the attention that elderly prisoners are now receiving in the media, the stakeholders agree that the status quo is not acceptable.<sup>231</sup> Therefore, a politically unpopular choice cannot be avoided here. Decisions that will be disliked by some segment of the population will need to be made. In the process of making these tough calls, policymakers should keep one vital concept in mind at all times: *why* we punish lawbreakers in the first place.

Theories of punishment are plentiful in modern society.<sup>232</sup> Some observers argue that we punish criminals to deter both the offender and other members of society from committing such unlawful acts again.<sup>233</sup> Others focus on rehabilitation of the offender, with the hope that he or she will eventually return as a productive and law-abiding member of society.<sup>234</sup> Still others emphasize the important role that punishment plays for the victim of the crime, assuring the victim(s) that the harm done by the crime is taken seriously by the government and is being addressed to the best of the government’s ability.<sup>235</sup> Another common viewpoint is that of retribution, the notion that the criminal is receiving his or her “just desserts” from society for

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<sup>229</sup> See, e.g., William B. Aldenberg, *Bursting at the Seams: An Analysis of Compassionate-Release Statutes and the Current Problem of HIV and AIDS in U.S. Prisons and Jails*, 24 N.E. J. ON CRIM. & CON. 541, 552–53 (1998) (describing arguments used by opponents of early release programs); Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 ELDER L.J. 173, 188 (1996) (discussing theories used to oppose early release programs for elderly prisoners who are ill and pose a low risk); NPR: Aging Prison Population Poses Unique Challenges (NPR radio broadcast, Oct. 26, 2010) (including several call-in guests voicing their opposition to early release of prisoners, even when they are elderly and infirm).

<sup>230</sup> See Part IIIB, *infra*.

<sup>231</sup> See note 14, *supra*.

<sup>232</sup> See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 313–352 (1993); D.A. Andrews & James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 PSYCHOL. PUB POL’Y & L. 39–55 (2010); Jan Sootak, *Theories of Punishment and Reform of Criminal Law (Reforms as a Change of Mentality)*, 1 JURIDICA INT’L 68–78 (2000); Peter B. Kraska, *Criminal Justice Theory: Toward Legitimacy and an Infrastructure*, 23 JUSTICE QUARTERLY 167, 170–71 (June 2006).

<sup>233</sup> See, e.g., VALERIE WRIGHT, *DETERRENCE IN CRIMINAL JUSTICE* (The Sentencing Project Nov. 2010).

<sup>234</sup> See, e.g., IAIN MURRAY, *MAKING REHABILITATION WORK* (Civitas 2002); Andrews & Bonta, *supra* note 232.

<sup>235</sup> See, e.g., JOHN WILLIAM STICKLES, *VICTIM SATISFACTION—A MODEL OF THE CRIMINAL JUSTICE SYSTEM* (2003), available at <http://repositories.lib.utexas.edu/bitstream/handle/2152/979/stickelsjw039.pdf?sequence=2>.

breaking the law.<sup>236</sup> In reality, the rationale behind the laws punishing criminal offenders is probably a combination of all of these factors, apportioned out in varying amounts.<sup>237</sup>

None of these theories are satisfied by neglecting the basic needs of elderly prisoners. From the monetary figures discussed earlier, it is clear that custodial care of inmates costs money, and that proper care of elderly inmates costs a substantial amount of money. Yet refusing to devote the necessary resources to this issue, and denying elderly inmates age-appropriate care and programming, does not advance any of the reasons why we punish. The knowledge that a criminal is not only in prison, but is suffering as they enter old age in prison, may indeed satisfy some sort of primal urge for revenge. Seeking revenge that inflicts undue suffering on another person, however, is precisely the type of response that our criminal justice system is designed to prevent. When the United States was still a fledgling nation, one of the first governmental acts was to examine the purpose of prisons in this young democracy.<sup>238</sup> Ultimately, these investigations led to the United States becoming one of the world's first criminal justice systems to punish for purposes beyond mere retribution.<sup>239</sup> We must stay true to these broader-minded ideals of criminal justice in the present day.

When we punish a criminal, we are punishing him or her for a crime. We are not punishing him or her for experiencing the natural process of aging. Removing somebody from society and putting them behind bars is the penalty. Lack of care for their basic needs as they age is not an unwritten part of the sentence. Thus, if we are to adhere to the ideals that our criminal justice system is meant to promote, it is important that we establish policies which ensure humane treatment of prisoners. And at a time when the prison population is aging fast, this

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<sup>236</sup> See, e.g., JOEL FEINBURG & HYMAN GROSS, *PHILOSOPHY OF LAW* 587–88; 591 (3d ed. 1986). This theory is grounded in the notion that “it is an end in itself that the guilty should suffer pain.” *Id.* at 588.

<sup>237</sup> See FEINBURG & GROSS, *supra* note 236, at 587 (describing the tension in society between retributive and utilitarian theories of punishment); Posner, *supra* note 232; Andrews & Bonta, *supra* note 232, at 40–41 (discussing the societal push and pull between rehabilitation and “tough on crime” attitudes”); Sootak, *supra* note 232, at 69–70 (discussing the variants of punishment purposes in society); Kraska, *supra* note 232, at 171 (describing the importance of punishment theories on social policies and reforms).

<sup>238</sup> This truth is particularly evident in the astute observations of two Frenchmen, Alexis de Tocqueville and Gustave de Beaumont. In 1831, de Tocqueville and Beaumont received permission from the French government to travel to the United States to study the workings of America's democratic government. During their nine-month visit to the United States, de Tocqueville and Beaumont became particularly intrigued with the fledgling republic's prison system. While the two men are most famous for their book *Democracy In America*, containing detailed reports of the governmental “experiments” in the United States, their meticulously detailed report *On the Penitentiary System in the United States and its Application to France* contains perhaps the earliest thorough look at penological policies in the United States. The report contains an excellent description of the degree of attention that prison policies in the young nation received from its leaders in government. See GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION TO FRANCE* (Carbonale: Southern Illinois University 1964) (1833).

<sup>239</sup> See NPR Broadcast, *supra* note 229 (Statement of Prof. Jonathan Turley that “the United States, however, was one of the first major systems to get away from pure retribution.”).

means devoting resources and expertise toward providing an adequate prison environment in which our nation's elderly inmates will live.

## II Questions On The Inside: Concerns Facing Elderly Inmates In Life Behind The Prison Walls

*“Prisons were never designed to be geriatric facilities. Yet U.S. corrections officials now operate old-age homes behind bars.”*

*-- Jamie Fellner, Human Rights Watch, author of “Old Behind Bars: The Aging Prison Population in the United States”<sup>240</sup>*

### A. Medical Questions

Inmates older than age 55 have an average of three chronic medical conditions.<sup>241</sup> Approximately 20% suffer from at least one mental illness.<sup>242</sup> While elderly prisoners are not a homogeneous group, and thus represent a wide variety of physical and mental abilities, the general trend is for older inmates to be physically and mentally weaker than their younger counterparts in the prison system.<sup>243</sup> In a system that was designed with younger men and women in mind,<sup>244</sup> these physical and mental illnesses often require special treatment plans and accommodations that are typically not readily available in the prison environment.<sup>245</sup>

Additionally, the prison lifestyle can exacerbate existing health problems or lead to new medical issues for elderly inmates.<sup>246</sup> Older prisoners frequently become more isolated and anxious than younger prisoners, tend to end up in situations of inactivity more often than

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<sup>240</sup> Telephone Interview with Jamie Fellner, Senior Advisor in the U.S. Program at Human Rights Watch and author of *Old Behind Bars* (Apr. 12, 2012).

<sup>241</sup> Mike Mitka, *Aging Prisoners Stressing Health Care System*, 292 J. AM. MED. ASS'N 423 (2004).

<sup>242</sup> *Id.*

<sup>243</sup> See, e.g., Graeme A. Yorston & Pamela J. Taylor, *Commentary: Older Offenders — No Place to Go?*, 34 J. AM. ACAD. PSYCH. LAW 333, 336 (2006); OLD BEHIND BARS, *supra* note 14, at 45; WILLIAMS, *supra* note 49, at 6; GUBLER, *supra* note 134, at 2; Abner, *supra* note 14, at 10; Williams, *supra* note 14; Interview with Carl Koenigsmann, *supra* note 76; Interview with Robert Greifinger, *supra* note 77.

<sup>244</sup> See Curran, *supra* note 14, at 225 (“Prisons are designed for the younger inmate because most crime in this country is committed by perpetrators between the ages of fifteen and twenty.”).

<sup>245</sup> See note 243, *supra*.

<sup>246</sup> See CORRECTIONAL HEALTHCARE, *supra* note 49, at 8–10; Abner, *supra* note 14, at 9 (discussing the health consequences of “the stress of incarceration—including lack of support systems and a lack of trust in fellow inmates”); OLD BEHIND BARS, *supra* note 14, at 45 (“Older prisoners, even if they are not suffering illness, can find the ordinary rigors of prison particularly difficult because of a general decline in physical and often mental functioning which affects how they live in their environments and what they need to be healthy, safe, and have a sense of well-being.”); KOZLOV, *supra* note 14, at 8–10 (describing various factors leading to the increased health issues faced by elderly inmates during their confinement).

younger inmates, and are considerably more vulnerable to contracting contagious diseases.<sup>247</sup> To avoid these pitfalls, elderly inmates require closer medical monitoring than what prisons typically offer to a younger population.<sup>248</sup> Elderly prisoners also will benefit from age-appropriate plans for “active treatment” — programs to involve older inmates in meaningful activities aimed at preventing physical, mental, and emotional decline.<sup>249</sup>

To meet their constitutional obligations regarding medical care and accommodations for inmates,<sup>250</sup> correctional bodies have taken a variety of approaches to meeting the medical needs of a growing geriatric population — although the quality of these efforts, as commentators have pointed out, varies greatly from state to state, and from facility to facility.<sup>251</sup> This section looks at some of the key medical issues facing elderly prisoners, and studies some of the measures taken by various correctional systems in an effort to address these issues.

### 1. Common Medical Problems Affecting Elderly Inmates

Many medical issues affecting older prisoners are equivalent to the health care concerns that can affect any elderly individual.<sup>252</sup> The most damaging health problems for elderly inmates include dementia, stroke, liver disease, Parkinson’s disease, respiratory problems, diabetes, and kidney disease.<sup>253</sup> Many older inmates have severe mobility restrictions, often from arthritis or from a form of muscular degeneration.<sup>254</sup> Visual and hearing impairments are common, as is loss of teeth.<sup>255</sup> At times, elderly inmates require the use of oxygen tanks just to perform day-to-day

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<sup>247</sup> See CORRECTIONAL HEALTHCARE, *supra* note 49, at 10 (“Elderly inmates experience a reduction in human interaction and tend to withdraw owing to a lack of privacy and a loss of self-esteem. They are frightened, anxious, and dependent, especially on prison staff.”); Fazel et al., *supra* note 61, at 539; WILLIAMS, *supra* note 49, at 6. However, it is also important to note that there can actually be certain medical benefits for particular prisoners. A study by the Florida Department of Corrections in 2000 revealed that two-thirds of the inmates in their state’s correctional facilities received their first significant health care experience while in prison. Abner, *supra* note 14, at 9.

<sup>248</sup> Several prison systems have already recognized this need and are taking significant steps toward meeting it. See Part II(3)(a), *infra*.

<sup>249</sup> See Part II(3)(g), *infra*.

<sup>250</sup> See Part IC, *supra*.

<sup>251</sup> Interview with Robert Greifinger, *supra* note 77; Interview with Jamie Fellner, *supra* note 240. See also Curtin, *supra* note 48, at 488 (noting that “prison health care workers are often very proud of the level of service they provide and balance concern for safety and regulations with genuine affection for inmates.”).

<sup>252</sup> See Interview with Keith Davis, *supra* note 52; Interview with Carl Koenigsmann, *supra* note 76; Interview with Robert Greifinger, *supra* note 77.

<sup>253</sup> See Interview with Ronald Aday, *supra* note 13; Interview with Carl Koenigsmann, *supra* note 76; Interview with Robert Greifinger, *supra* note 77; CHARLOTTE A. PRICE, AGING INMATE POPULATION STUDY 17 (North Carolina Div. of Prisons 2006); Tara Livengood, *Case Study: The Older Inmate*, 24 AGE IN ACTION 1, 2 (Spring 2009); OLD BEHIND BARS, *supra* note 14, at 45–46; Abner, *supra* note 14, at 10; Chen, *supra* note 3.

<sup>254</sup> See note 253, *supra*.

<sup>255</sup> See note 253, *supra*.

tasks.<sup>256</sup> Urinary or fecal incontinence can create a difficult and embarrassing situation for older prisoners who suddenly cannot control when they “have to go.”<sup>257</sup> High blood pressure, often brought on by the stress of being old and behind bars, is also frequently found in among elderly inmates, and can lead to other forms of physical and mental damage.<sup>258</sup>

Yet not all medical concerns of elderly prisoners can be given precise medical labels. Generally speaking, inmates become slower at performing basic daily functions as they age.<sup>259</sup> They commonly will not be able to eat, shower, or even just move around as quickly as they once could.<sup>260</sup> Elderly inmates also can become more prone to falling, which can contribute to sprains and fractures, as well as more serious injuries.<sup>261</sup> Their diets can grow more restricted, both through medical needs and through new dietary intolerances.<sup>262</sup> Sleep patterns can become erratic.<sup>263</sup> And when an injury occurs or an ailment strikes, elderly inmates will typically require a much longer recovery period than would be expected from a younger individual.<sup>264</sup>

Mental health issues often are just as significant — if not more so — for elderly inmates. As a person ages behind bars, he or she is more likely to experience feelings of hopelessness and severe anxiety, fearing that they will never again experience life beyond the prison.<sup>265</sup> Older

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<sup>256</sup> See GUBLER, *supra* note 134, at 5. Inmates on dialysis machines can also pose difficult issues in a correctional setting. *Id.*

<sup>257</sup> See OLD BEHIND BARS, *supra* note 14, at 47 (stating that incontinence puts elderly inmates “at risk of social isolation, depression, diminished independence, and even harassment and physical confrontations from inmates offended when an older person urinates or defecates in her clothes. Prison bathrooms typically lack privacy; individuals who need to change their soiled clothes or diapers must endure the humiliation of doing so in public. Preserving dignity in this context is difficult.”).

<sup>258</sup> See, e.g., CORRECTIONS 123 (William J. Chambliss, ed. 2011); CORRECTIONAL HEALTHCARE, *supra* note 49, at 126 (describing the need for certain elderly inmates to be issued “slow-walking passes”).

<sup>259</sup> See Interview with Ronald Aday, *supra* note 13; Interview with Justin Jones, *supra* note 23. See also note 260, *infra*; Part IIA(3)(c), *infra*.

<sup>260</sup> See Belluck, *supra* note 4 (noting that in the California Men’s Colony, elderly inmates with dementia are permitted to sit at “Slow Eater” tables, where they are allowed to eat longer than the typical 10 to 12 minutes).

<sup>261</sup> OLD BEHIND BARS, *supra* note 14, at 46 (stating that a California study found that 51 percent of older women inmates age 55 and above reported a fall within the past year).

<sup>262</sup> See, e.g., Interview with Carl Koenigsmann, *supra* note 76 (describing the recent establishment of a higher-fiber, lower-sodium diet in New York prisons to benefit elderly prisoners, as well as the recent availability of other more specialized diets for elderly inmates suffering from certain health problems. These special diets, which are designed by professional dieticians who have experience in working with individuals who have age-related health care problems, include a low-cholesterol diet and a potassium-regulated diet for inmates with kidney problems. “This is constantly being monitored,” Koenigsmann said in the interview.

<sup>263</sup> Livengood, *supra* note 253, at 2.

<sup>264</sup> Curtin, *supra* note 48, at 481 (describing a study comparing elderly men in free society with older male prisoners which revealed a “longer time in bed recovering from injury and illness” for the elderly prisoners).

<sup>265</sup> See Ira R. Byock, *Dying Well In Corrections: Why Should We Care?*, J. CORR. HEALTH CARE (Fall 2002), available at <http://www.dyingwell.org/jchc02.htm>; Yorston & Taylor, *supra* note 243, at 335.

inmates generally are also less likely to engage in social interactions than younger inmates, particularly if they fall into the category of “new arrivals” experiencing their first prison term at an older age.<sup>266</sup> Consequently, elderly inmates can lapse into a dangerous pattern of keeping to themselves, refusing to engage in activities, and, as one commentator put it, “just waiting for the end to come.”<sup>267</sup> This type of behavior frequently puts elderly inmates at a heightened risk of clinical depression, self-harm, and suicide.<sup>268</sup>

## 2. Why These Health Concerns Become Greater Problems In Prison Settings

No elderly person ever wants to experience any of the medical concerns described above. Yet for elderly people in prison, these health issues can be magnified by the nature of the environment in which they are living. Inside a prison, everything must be done with an eye toward the important goal of keeping the facility safe and secure.<sup>269</sup> With this in mind, medical steps that might seem straightforward and simple on the outside can become difficult institutional decisions within a correctional environment.<sup>270</sup>

Consider, for instance, the situation of an older man or woman who is experiencing symptoms of arthritis and needs assistance walking. Typically, this person will have plenty of options at their disposal, such as purchasing a cane or a walker, to aid them in their movement. If the arthritis is causing discomfort, then the person can also purchase an over-the-counter medication in an effort to ease the pain. Place this person in a prison, however, and the situation changes. Now, the walker or the cane becomes a potential weapon.<sup>271</sup> The pain medication becomes a potential pathway to drug abuse.<sup>272</sup> Access to all of these things is strictly controlled

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<sup>266</sup> See CORRECTIONAL HEALTHCARE, *supra* note 49, at 10; Curtin, *supra* note 48, at 484 (“Prisoners who enter prison for the first time when they are middle-aged or older encounter . . . a type of culture shock.”).

<sup>267</sup> See note 266, *supra*; Part IIA(3)(g), *infra*.

<sup>268</sup> Fazel et al., *supra* note 61, at 539; Yorston & Taylor, *supra* note 243, at 335.

<sup>269</sup> See Y. Willmott, *Prison Nursing: The Tension Between Custody and Care*, 6 BRITISH J. NURSING 333–36 (1997) (describing the challenges that healthcare practitioners face in this delicate balance between security goals and medical needs of inmates); SUSAN KOCH, THE TENSION BETWEEN CUSTODIAL CARE AND HUMAN RIGHTS (PowerPoint Presentation to Royal Dist. Nursing Serv. 2011), available at

<http://www.accreditation.org.au/site/uploads/The%20tension%20between%20custodial%20care%20and%20human%20rights.pdf> (“There is a tension experienced by staff, families and residents between protecting the resident by using restraint and recognizing the need to preserve the human rights of residents.”).

<sup>270</sup> See note 270, *supra*; Interview with Ronald Aday, *supra* note 13; Correctional Healthcare, *supra* note 149, at 48 (“Prisons are alien and intimidating to the sensitivities and vulnerabilities of old age and illness.”).

<sup>271</sup> This was described by New York State Department of Corrections and Community Supervision Commissioner Brian Fischer and Deerfield Correctional Facility (Virginia) Warden Keith Davis as a real-life example of the challenges presented by caring for the elderly behind bars. Interview with Keith Davis, *supra* note 52; Interview with Brian Fischer, *supra* note 109.

<sup>272</sup> *Id.*

by prison staff.<sup>273</sup> And the ability to use any of these items could conceivably be limited, or even completely denied, by staff under a justification of institutional safety.<sup>274</sup>

In this way, every medical decision made in prison becomes a balancing act between the individual needs of the inmate and the importance of keeping the correctional facility safe.<sup>275</sup> These decisions can have profound consequences for elderly inmates, whose medical conditions tend to worsen more rapidly and who could be placed at an extreme disadvantage if a necessary medication or a medical aid (i.e., a cane, a wheelchair, a breathing aid, a hearing aid, etc.) is denied for any length of time.<sup>276</sup> At the same time, though, corrections officials cannot simply ignore security needs simply because an inmate is of an advanced age. “It’s not a question of ‘if an older (prisoner) could take a cane and hit somebody on staff,’” New York State Department of Corrections and Community Supervision Commissioner Brian Fischer said. “It happens. It happens more often than you might think. Just because a prisoner is old doesn’t automatically mean that he’s feeble and can’t injure someone else.”<sup>277</sup> Yet Fischer also said that New York prisons do have an often-used procedure in place by which inmates can get a pass to use a cane.<sup>278</sup> “Denying all inmates the right to use a cane just because they might possibly swing it at someone,” he said, “would be wrong in the other direction.”<sup>279</sup>

Access to medical professionals provides another key distinction between health care in free society and health care in a prison. Generally, an individual who is not feeling well possesses the power to visit a doctor, or to call an ambulance, or to take some other step that enables them to be examined and treated by a physician. In prison, of course, this access is much more restricted.<sup>280</sup> An inmate cannot simply leave his or her cell and walk to the infirmary for a

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<sup>273</sup> *Id.*

<sup>274</sup> Remember that under the existing *Turner* standards, prison officials are granted a wide discretion in policymaking as long as the policy is rationally related to a legitimate penological aim. *See* note 219, *supra*.

<sup>275</sup> *See* notes 269–73, *supra*.

<sup>276</sup> *See* OLD BEHIND BARS, *supra* note 14, at 46; GUBLER, *supra* note 134, at 4.

<sup>277</sup> Interview with Brian Fischer, *supra* note 109.

<sup>278</sup> *See id.*

<sup>279</sup> *Id.*

<sup>280</sup> *See, e.g.*, KOZLOV, *supra* note 14, at 8 (stating that one of the greatest challenges for geriatric inmates is accessing adequate health care often enough within the prison environment). This can lead to some significant problems — not only for elderly inmates, but for the younger prisoners as well. *See* Andrew P. Wilper et al., *The Health and Health Care of U.S. Prisoners*, 99 AM. J. PUB. HEALTH 1, 6 (2009); Amanda Gardner, *Many in U.S. Prisons Lack Good Health Care*, U.S. NEWS & WORLD REPORT, Jan. 16, 2009, <http://health.usnews.com/health-news/managing-your-healthcare/articles/2009/01/16/many-in-us-prisons-lack-good-health-care>. Given that prompt delivery of health services increases in importance as people age, this lack of easy access to health care in many prisons can be a severe problem for elderly inmates. *See also* Part IIA(3), *infra*.

checkup. Instead, prisons typically have some sort of “sick call” system through which inmates can access medical services.<sup>281</sup>

Unfortunately, prison sick call has historically suffered the types of inefficiencies which, in the words of a National Institute of Corrections report, “represents a unique challenge to the delivery of primary care to the elderly or chronically ill.”<sup>282</sup> To begin with, an inmate must be well enough and lucid enough to place himself or herself on sick call, an assumption which is not always true for elderly prisoners.<sup>283</sup> Facility health care providers and correctional officers are often skeptical about inmates faking an illness just to gain special privileges, and inmates have been known to abuse the system, further undermining the process for those prisoners who really need it.<sup>284</sup> Most importantly, most sick call visits are episodic in nature, prompted only when the inmate feels ill.<sup>285</sup> For elderly individuals, this is not enough to constitute adequate health care. A greater degree of regular review and preventative medicine is needed.<sup>286</sup>

Several prison systems have recognized this need for more intensive care for elderly inmates, particularly in recent years.<sup>287</sup> Yet barriers still exist for elderly prisoners to receive

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<sup>281</sup> Going on sick call does not mean that the inmate will necessarily see a doctor. Typically, the initial screening of the inmate’s health care concern(s) is conducted by a nurse, similar to the procedure used by most doctors’ offices. However, reports on sick call effectiveness note that prison nursing staff can be an impediment to inmates seeing a doctor, even when they have legitimate health care problems. *See, e.g.*, CORRECTIONAL ASS’N OF N.Y., HEALTH CARE IN NEW YORK STATE PRISONS 37 (2000) (“Problems associated with sick call fall into three categories: impeded access to physicians, superficial screening, and hostile attitudes of nurses . . . Inmates at nearly every prison (in New York) reported impeded access to health care access due to gatekeeping by nurses.”). *See also* CORRECTIONAL HEALTHCARE, *supra* note 49, at 49.

<sup>282</sup> CORRECTIONAL HEALTHCARE, *supra* note 49, at 49.

<sup>283</sup> *See id.*

<sup>284</sup> *See* CORRECTIONAL ASS’N OF N.Y., *supra* note 281, at 38 (“At one prison, inmates reported that nurses who believe inmates are malingering punish them with “medical keeplock,” meaning they issue the inmate a misbehavior report and lock him in his cell for the day.”). These denials of access to a doctor can be valid instances of inmates “faking it” to get attention. *See* CORRECTIONAL HEALTHCARE, *supra* note 49, at 49. Too often, though, the complaints of the inmates are valid, and the denials of care can be arbitrary — leading to serious health consequences for the inmates. *See* CORRECTIONAL ASS’N OF N.Y., *supra* note 281, at 38. This can also discourage usage of the sick call system among inmates, even those with significant medical problems that need attention. *See id.* (quoting an inmate saying that he was so afraid of the sick call system that he “won’t go to sick call unless I’m dying.”).

<sup>285</sup> CORRECTIONAL HEALTHCARE, *supra* note 49, at 49.

<sup>286</sup> Once again, this has been clearly illustrated in the research about geriatric care generally and about geriatric care in the prison environment. *See* Part IIA(1), *supra*.

<sup>287</sup> *See, e.g.*, Interview with Justin Jones (OK), *supra* note 23; Interview with Brian Fischer (NY), *supra* note 109; Interview with Andy Pallito, *supra* note 196; Interview with James LeBlanc (LA), *supra* note 196; Interview with Gloria Perry (MS), *supra* note 196; Bob Salsberg, *Massachusetts Proposes Expanding Facilities For Female, Mentally Ill and Elderly Prisoners*, AP WIRE, Jan. 19, 2012; TONY FABELO, ELDERLY OFFENDERS IN TEXAS PRISONS 3 (Jan 1999); FLA. CORRECTIONAL MEDICAL AUTH., REPORT ON ELDERLY AND AGING INMATES IN THE FLORIDA DEPARTMENT OF CORRECTIONS 1 (2005); CAL. DEP’T OF CORRECTIONS, OLDER INMATES: THE IMPACT OF AN AGING INMATE POPULATION ON THE CORRECTIONAL SYSTEM (1999); PRICE, *supra* note 253 (N.C.); Pupovac, *supra* note 137 (MO); Villa,

proper medical supervision and treatment. Most prison doctors are essentially general practitioners who lack any background in geriatrics.<sup>288</sup> These physicians, well-intentioned though they may be, do not have the specialized training necessary to properly recognize, diagnose, and treat certain medical problems and conditions unique to aging.<sup>289</sup> And visits to outside specialists who do possess this expertise in treating elderly individuals often are not easy to arrange.<sup>290</sup> Medical visits beyond the facility must first be approved by corrections personnel.<sup>291</sup> This process can be delayed or even rejected if the requested appointment is not deemed “medically necessary.”<sup>292</sup> In such situations, the inmate usually has the right to appeal this decision institutionally, but this appeal also takes time.<sup>293</sup> And time is always of the essence for an elderly inmate who is sick.<sup>294</sup>

Lastly, there is a financial component to these medical obstacles for elderly inmates. Today, with a significant and understandable push to constrain government spending, corrections budgets tend to be tight.<sup>295</sup> Thus, even an institution that wants to provide in-house geriatrics

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*supra* note 125 (AZ). See also WILLIAMS, *supra* note 49 (describing specific measures taken by the 16 Southern Legislative Conference states).

<sup>288</sup> In large part, this occurs because corrections officials face a difficult task in recruiting any doctors to work in a prison environment, much less a specialist in gerontology. “We can’t be too choosy,” said Oklahoma Department of Corrections Director Justin Jones. See Interview with Justin Jones, *supra* note 23.

<sup>289</sup> See OLD BEHIND BARS, *supra* note 14, at 74. The type of care required for diseases affecting the elderly is simply different than the type of care demanded for younger prisoners. With older individuals, for instance, recovery is a longer, more continuous process, for instance, rather than an acute episode that can be treated and cured relatively quickly. *Id.* These unique needs of elderly individuals illustrate why gerontology is a specialized subset of medicine. See, e.g., James E. Birren & Phoebe Liebig, *The Andrus Center: A Tale of Gerontological Firsts*, 10 CONTEMPORARY GERONTOLOGY 7–12 (2003). This high level of specialization is why elderly inmates need to have greater access to doctors who have studied in this field.

<sup>290</sup> See CORRECTIONAL ASS’N OF N.Y., *supra* note 281, at 34 (“If it’s not an emergency, you’re not seeing a specialist.”);

<sup>291</sup> Exactly who approves the outside medical visit varies from jurisdiction to jurisdiction. In New York State, for instance, the Facility Health Services Director must approve the meeting between an inmate and an outside specialist, and then submit the request to the specialist, who has the right reject it.

CORRECTIONAL ASS’N OF N.Y., *supra* note 281, at 35.

<sup>292</sup> In New York, for example, the examining prison physician also designates the level of immediacy of the care, listing it as either “emergency” (needs to be seen within 24 to 48 hours), “urgent” (5 to 7 days), “soon” (14 days), or “routine” (30 days). CORRECTIONAL ASS’N OF N.Y., *supra* note 281, at 35.

<sup>293</sup> See, e.g., CORRECTIONAL INSTIT. INSPECTION COMM’N REPORT, EVALUATION OF THE INMATE GRIEVANCE PROCEDURE: TOLEDO CORRECTIONAL INSTITUTION’S INMATE SURVEY 24, 32 (2008) (describing the long delays that inmates can face in the institutional grievance process).

<sup>294</sup> See OLD BEHIND BARS, *supra* note 14, at 43, 74.

<sup>295</sup> See, e.g., David Crary, *Elderly Inmates: Aging Prison Population Strains Tight State Budgets*, AP WIRE, Jan. 27, 2012, [http://www.huffingtonpost.com/2012/01/27/elderly-inmates\\_n\\_1236028.html](http://www.huffingtonpost.com/2012/01/27/elderly-inmates_n_1236028.html); Mike Ward, *Prison Employee Housing, Other Perks Get Scrutiny with Tight Budget*, AUSTIN AMERICAN-STATESMAN, Mar. 7, 2011, <http://www.statesman.com/news/texas-politics/prison-employee-housing-other-perks-get-scrutiny-with-1302582.html?printArticle=y>; Nicholas Riccardi, *Budgets Tight, States Seeking to Reduce Prison Populations*, L.A. TIMES, Sept. 13, 2009,

care for elderly inmates might not be able to do so, because hiring new medical personnel — particularly treatment from a specialist in a given field — comes with a high price tag.<sup>296</sup> Frequent trips to outside hospitals are also expensive.<sup>297</sup> In such difficult economic times, corrections institutions will need to employ some creative solutions to address some of these medical concerns.

### **3. What Can Be Done About These Health Concerns For Elderly Inmates**

Fortunately, while these problems are far from over, they are not being ignored in corrections work today. Interviews with corrections leaders in several states, as well as widespread literature on the topic, demonstrated that providing better health care to older inmates has been a frequent topic of discussion nationwide.<sup>298</sup> Yet the greatest difficulty, according to Oklahoma Department of Corrections Director Justin Jones, is figuring out which method is the best one. “We’re all playing catch-up with this,” Jones explained. “We have all of these elderly inmates in our prisons now, and we are guaranteed to have more soon. We have to figure out best practices of what to do with them and for them, and we have to figure it out quickly.”<sup>299</sup>

With this need for solutions in mind, we now turn to a brief examination of certain efforts being made in state and federal prisons, with a focus on broad areas in which medical services for elderly inmates needs to be improved.

#### **a. “Preventative Maintenance”**

When it comes to medical care for the elderly, the old adage that “an ounce of prevention equals a pound of cure” takes on added significance.<sup>300</sup> Geriatrics experts agree that one of the

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[http://www.boston.com/news/nation/articles/2009/09/13/budgets\\_tight\\_states\\_seeking\\_to\\_reduce\\_prison\\_populations/](http://www.boston.com/news/nation/articles/2009/09/13/budgets_tight_states_seeking_to_reduce_prison_populations/).

<sup>296</sup> See OLD BEHIND BARS, *supra* note 14, at 75, 77; CORRECTIONAL ASS’N OF N.Y., *supra* note 281, at 35 (“Any form of managed care presents the possibility that efforts to control costs will conflict with the delivery of care.”).

<sup>297</sup> See notes 134 & 137, *supra*.

<sup>298</sup> See note 287, *supra*.

<sup>299</sup> Interview with Justin Jones, *supra* note 23.

<sup>300</sup> See, e.g., PETER A. LICHTENBERG, HANDBOOK OF ASSESSMENT IN CLINICAL GERONTOLOGY 684 (2d ed. 2010) (“Early detection of declining health and associated functional abilities among elders can result in opportunities to refer clients for physical medicine and rehabilitation services such as occupational, physical, and speech and hearing therapy.”); Jennifer E. Voorlas, Care Management With Early Onset Alzheimer’s Population, 20 J. GERIATRIC CARE MANAGERS 9, 11 (Winter 2009) (“[W]ithout early detection, time is lost; the quicker the disease progresses.”); Unal Ayranci & Nurten Ozdag, *Health of Elderly: Importance of Nursing and Family Medicine Care*, INTERNET J. OF GERIATRICS AND GERONTOLOGY (2006), <http://www.ispub.com/journal/the-internet-journal-of-geriatrics-and-gerontology/volume-3-number-1/health-of-elderly-importance-of-nursing-and-family-medicine-care.html> (“Early detection of problems and early intervention can prevent more serious complications and enable older adults to maintain the highest possible level of wellness and function.”).

most important aspects of caring for older individuals is catching the problem early.<sup>301</sup> Therefore, while all American prison systems have provisions for periodic medical examinations for inmates, it is important to ensure that elderly inmates are seen more frequently by medical personnel.<sup>302</sup>

For instance, in New York State, inmates automatically are scheduled to receive a full health assessment every two years after reaching the age of 50.<sup>303</sup> In Louisiana, inmates age 50 and above receive complete physical examinations annually.<sup>304</sup> “As you age,” New York State Department of Corrections and Community Services Chief Medical Officer Carl Koenigsmann explained, “the amount of screening you need for basic health maintenance goes up.”<sup>305</sup> For this reason, prisons should also require intermittent medical “check-ups” for elderly inmates, visits which are not as elaborate as the full health assessments but which occur more often. This will provide additional opportunities to spot potential physical and mental problems before they grow too severe.<sup>306</sup>

In these health assessments for older inmates, prison officials should ensure that the examination is performed by a medical professional with a background in geriatrics. This will increase the odds that the medical examiner will be able to spot warning signs of physical and mental health issues unique to elderly individuals.<sup>307</sup> In addition, to avoid delays that can occur in the sick call process, all elderly inmates should have their prison medical files “red-flagged” so that they can be seen by prison medical staff or be sent to receive outside medical services on a priority basis.<sup>308</sup> (This does not mean that an elderly inmate always will receive medical care ahead of a younger inmate. Naturally, a younger inmate suffering from a severe chronic illness should receive priority treatment over an elderly inmate with a much less serious medical concern). Several prison systems already implement a process of this type for their elderly inmates.<sup>309</sup>

Elderly inmates who are clearly unable to care for themselves (i.e., unable to provide for their own basic safety and hygiene needs) should immediately be placed on a “special watch” list

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<sup>301</sup> See note 300, *supra*.

<sup>302</sup> This is all part of the adequate medical care that prison officials are constitutionally required to deliver to inmates. See Part IC, *supra*.

<sup>303</sup> Interview with Carl Koenigsmann, *supra* note 76.

<sup>304</sup> Interview with James LeBlanc, *supra* note 196. In addition, the Louisiana correctional system takes additional preventative measures with elderly inmates, such as colon cancer screenings and flu vaccinations. *Id.* Other states have taken similar measures with their elderly prisoners. See, e.g., Interview with Justin Jones, *supra* note 23; Interview with Andy Pallito, *supra* note 196.

<sup>305</sup> Interview with Carl Koenigsmann, *supra* note 76.

<sup>306</sup> See note 300, *supra*.

<sup>307</sup> See note 289, *supra*.

<sup>308</sup> See CORRECTIONAL HEALTHCARE, *supra* note 49, at 24–25.

<sup>309</sup> See, e.g., *id.*, *supra* note 49, at 24 (describing a “red-flagging” process with both physical files and computerized files within the Michigan Department of Corrections).

for enhanced monitoring by prison medical staff.<sup>310</sup> They should also be added to a list preventing them from being transferred to another correctional facility except under emergency conditions, as sudden moves to a new prison can be both physically and mentally taxing for an elderly inmate.<sup>311</sup>

## **b. Training Needs**

“Prisons have always been built for the sturdy and the strong, not for the weak and the frail” said sociologist Ronald Aday. “And that’s where many of these problems are coming from. Prisons are a terrible place to become old and sick.”<sup>312</sup> Observers consistently recognize that the mindset of correctional institutions focuses on young offenders, not an aging incarcerated population.<sup>313</sup> As a result, most of the training for prison personnel has traditionally been aimed at maintaining order in an environment populated by young, healthy prisoners.<sup>314</sup>

This mindset is problematic today, with the fastest-growing group of inmates consisting of people who are not young and often not healthy.<sup>315</sup> Elderly prisoners require a manner of “handling” that is distinct from the way that prisons — institutions that are designed on principles of regimented scheduling and uniform treatment — are typically operated.<sup>316</sup> “You need a lot more patience,” said Keith Davis, Warden of Deerfield Correctional Facility in Virginia, a prison that primarily houses elderly inmates. “You need a lot of communication. And you need a lot of compassion. That doesn’t mean that you let them (the inmates) take over. What it means is that older people do things differently and think about things differently, and have different needs. You have to take all of that into account when you work with them.”<sup>317</sup>

Unfortunately, the attributes described by Davis are not always evident in interactions between officers and older inmates. The 2012 Human Rights Watch report on elderly inmates stated that “[e]ven in prisons with high proportions of older prisoners, staff do not consistently

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<sup>310</sup> Again, this is a measure that various states have already instituted (with varying degrees of intensity).

<sup>311</sup> In general, elderly individuals do not like to leave an environment that is familiar to them. *See, e.g.,* Carolyn L. Rosenblatt, *Helping Aging Parents Who Don’t Want Help*, FORBES, Sept. 15, 2010, <http://www.forbes.com/2010/09/15/helping-elderly-homecare-assisted-living-personal-finance-helping-aging-parents.html> (stating that most elderly people prefer to remain in a familiar living environment). For elderly prisoners, transfer to a new facility—a difficult procedure even for younger prisoners—can be exceptionally difficult, and therefore should be avoided except in certain circumstances (i.e., moving to a new facility where the inmate can receive more intensive medical attention and care).

<sup>312</sup> Interview with Ronald Aday, *supra* note 13.

<sup>313</sup> *See* note 48, *supra*; Curran, *supra* note 14; Abner, *supra* note 14, at 10.

<sup>314</sup> *See* Curran, *supra* note 14; Curtin, *supra* note 48, at 476; Interview with Jamie Fellner, *supra* note 240; CORRECTIONAL HEALTHCARE, *supra* note 49, at 43.

<sup>315</sup> *See* note 14, *supra*; CORRECTIONAL HEALTHCARE, *supra* note 49, at 30.

<sup>316</sup> *See* OLD BEHIND BARS, *supra* note 14, at 62 (“Correctional staff have the responsibility to enforce rules fairly and uniformly”).

<sup>317</sup> Interview with Keith Davis, *supra* note 52.

treat them (or any others) with respect.”<sup>318</sup> The report goes on to describe instances where corrections officers taunted elderly inmates for certain medical conditions.<sup>319</sup> It also discussed situations where custody staff grew extremely frustrated and impatient with older prisoners.<sup>320</sup> Such negative interactions could prove to be extremely detrimental to an elderly inmate, causing adverse effects to his or her mental, emotional, and even physical state.<sup>321</sup>

Often, these problems occur not from malice, but from lack of understanding about the unique needs and situations of the elderly.<sup>322</sup> Therefore, proper training of prison personnel about dealing with elderly individuals — a measure which a growing number of state correctional leaders are requiring — is essential.<sup>323</sup> These trainings should not be a one-time experience, either, but should occur on a regular basis to reinforce the principles of proper and effective conduct with regard to elderly individuals. Also, this training should not be delivered by a corrections official, as some states are currently doing, but rather by an outside geriatric specialist who also has knowledge about the corrections system and its goals.<sup>324</sup> Periodic evaluations performed by prison supervisors should include a section specifically appraising the ways in which officers interact with elderly inmates.<sup>325</sup>

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<sup>318</sup> OLD BEHIND BARS, *supra* note 14, at 64.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *See, e.g., id.* at 65 (describing the experiences of Bonnie Frampton, an elderly prisoner who says she has experienced poor treatment at the hands of various corrections officers in Colorado); *see also* CORRECTIONAL HEALTHCARE, *supra* note 49, at 4 (describing the importance of awareness and sensitivity training for correctional staff working with elderly inmates).

<sup>322</sup> *See* OLD BEHIND BARS, *supra* note 14, at 63 (describing the challenging experiences of a California corrections officer who works in a unit with inmates who have dementia. The officer “came to the unit with no understanding of dementia, or even any training in how to communicate with those who have it.” This left the officer in the difficult situation of “learning it as (he goes) along.”). *See also* FLA. CORR. MED. AUTH., INCARCERATING ELDERLY AND AGING INMATES: MEDICAL AND MENTAL HEALTH IMPLICATIONS 8 (2000) (“A lack of adequately trained prison staff is a barrier in responding fully to the special needs of the aging inmate.”); Belluck, *supra* note 4 (“Corrections officers are used to punishing aggressive inmates, not evaluating them for Alzheimer’s.”).

<sup>323</sup> *See id.* at 66 (“Having become used to thinking that ‘violence is just around the corner’ and that a big, firm hand is necessary to avert the ever-present potential for danger, it is a big change for (corrections officers) to develop a more ‘caring’ approach for the aged and infirm.”).

<sup>324</sup> It is true that this will cost money, and that corrections budgets are already stretched thin. *See* note 295, *supra*; *see also* Interview with Jamie Fellner, *supra* note 240 (noting that cost is probably the paramount barrier to offering elderly inmate-specific training). However, as America’s incarcerated population ages, corrections officials have an obligation to train their staff in appropriate ways to deal with these older prisoners. It would seem that there are better ways for the budget to be trimmed, such as the proper use of early release policies with low-risk, high-cost elderly inmates. *See* Part IIIB, *infra*.

<sup>325</sup> The particulars of these appraisals can be determined by the oversight committees discussed later in this report. *See* Part IIC, *infra*.

Similarly, prison medical staff should have the opportunity to receive training from gerontologists (or at least from medical professionals with a geriatrics focus in their work).<sup>326</sup> While this clearly is not the same as having a full-time geriatrics specialist on hand, it will hopefully enable prison doctors and nurses to become more attuned to the unique needs of elderly individuals. This should allow prison medical workers to catch warning signs earlier, helping them determine when visits to an outside specialist are necessary for proper care.

### c. Institutional Policies

As noted earlier, elderly inmates are frequently prescribed medications and medical aids that could potentially threaten institutional security.<sup>327</sup> Canes, crutches, even something as seemingly benign as a pair of eyeglasses can be used as a weapon.<sup>328</sup> Inmates have all-too-often been caught “cheeking” prescription medications — stuffing pills inside their cheeks and then requesting more medicine — in an attempt to illegally overdose on the drugs.<sup>329</sup> Such experiences understandably breed distrust and suspicion by correctional staff toward inmates when they are prescribed these medicines or assistance devices.<sup>330</sup>

However, elderly inmates frequently depend on these medications and medical aids for day-to-day survival.<sup>331</sup> A wrongful denial of access to a particular drug or device could be

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<sup>326</sup> See, e.g., BRIE WILLIAMS, MARC F. STERN & ROBERT GREIFINGER, AGING IN CUSTODY 10 (Presentation at the 2012 Correctional Health Care Conference). Again, this is something which certain states are beginning to implement. See Interview with Robert Greifinger, *supra* note 77 (discussing his work as a medical consultant to prisons, including those that have questions about geriatric care).

<sup>327</sup> See notes 270–73, *supra*.

<sup>328</sup> The eyeglasses example was given by Commissioner Fischer, who noted — half-jokingly, half-seriously — that an inmate with glasses could even use the stems to poke somebody in the eye and severely injure them. Interview with Brian Fischer, *supra* note 109.

<sup>329</sup> This practice was described by Director Jones from Oklahoma’s Department of Corrections, who said that it was incredible how many pills some inmates could tuck away in their mouths. In addition to overdosing, inmates will also do this to use the pills as barter items with other prisoners. See Interview with Justin Jones, *supra* note 23. See also Sheena McFarland, *Prescription Meds the Hottest Currency in Utah State Prison*, SALT LAKE TRIBUNE, Aug. 13, 2011, <http://www.sltrib.com/sltrib/news/52281869-78/inmates-prison-inmate-pain.html.csp>; Kenneth L. Appellbaum, *Assessment and Treatment of Correctional Inmates with ADHD*, 165 AM. J. PSYCHIATRY 1520, 1522 (2008) (“Some individuals become quite skilled at passing cursory mouth checks while cheeking their drugs.”).

<sup>330</sup> See McFarland, *supra* note 330 (quoting a prison physician stating that “We get gamed every day” by inmates faking illnesses); see also CORRECTIONAL HEALTHCARE, *supra* note 49, at 49 (describing the “skepticism” that prisoners who abuse the facility medical system generate among the medical staff).

<sup>331</sup> This is not surprising, given the large number of elderly inmates who suffer from chronic medical conditions. See generally Amy J. Harzke et al., *Prevalence of Chronic Medical Conditions Among*

devastating to them.<sup>332</sup> It therefore seems that the best practice in such situations is to give elderly inmates, along with all chronically ill and terminally ill inmates, the benefit of the doubt. While elderly inmates certainly can still try to “manipulate the system,” the suffering that these inmates could incur if mistakenly prevented from using a necessary medicine or medical aid tips the scales in their favor.<sup>333</sup>

Of course, this does not mean that prisons should surrender all control over these situations. On the contrary, abuses should be prevented when possible. Close observation of inmates when they receive prescription medications or medical assistance devices is necessary. Yet the prescribed item should not be taken away from the elderly inmate without a clear showing that the inmate’s continued use of the medicine or device is not medically necessary and poses an undue risk to the safety and security of the facility.<sup>334</sup>

Some prisons have also started to implement “accommodation regulations” for elderly inmates.<sup>335</sup> Inmates with mobility difficulties can be granted more time at chow and in the showers.<sup>336</sup> Elderly inmates who have trouble standing for long periods of time can be dismissed

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*Inmates in the Texas Prison System*, 87 J. URBAN HEALTH 486, 501 (2010) (“Chronically ill inmates who delay or fail to receive needed care . . . are at increased risk of serious illness and hospitalization.”); Editorial, *Health of Elderly Prisoners*, 30 AGE AND AGEING 369–70 (2001) (describing elderly prisoners as a “doubly disadvantaged group” whose health care needs outpace those of the general population); PRICE, *supra* note 253 (discussing the importance of closer tracking of health issues and faster delivery of care for older prisoners); OLD BEHIND BARS, *supra* note 14, at 75 (describing the heightened need for intensive medical monitoring and care for elderly inmates).

<sup>332</sup> See note 332; see also Interview with Ronald Aday, *supra* note 13.

<sup>333</sup> Take, for instance, the simple example used earlier of the inmate whose arthritis necessitates the use of a cane. See note 271, *supra*. If that inmate is denied the use of that cane by correctional staff, this means that he or she will not be able to perform the vital function of walking without severe pain. This further means that he or she will have a difficult time getting to the mess hall, the bathroom, and other essential places within the prison, causing further negative health consequences for that inmate.

<sup>334</sup> A degree of reasonableness must be used in these situations. For example, even if an elderly inmate has used a particular medical assistance device in an improper way, the facility still should not automatically deprive him or her of the device. Instead, correctional and medical staff should work out a feasible and fair plan by which the inmate can still access the device when needed, but in a way that reduces the likelihood of the inmate misusing the device again. Making such reasonable accommodations for inmates with disabilities is required by the ADA. See 28 C.F.R. § 35.130(b)(7).

<sup>335</sup> For instance, in Louisiana, inmates with certain chronic illnesses now are given a month’s supply of medications so that they do not need to make frequent trips to pill call. See Interview with James LeBlanc, *supra* note 196. This is just one of several recent examples of prison policy changes to better accommodate elderly inmates.

<sup>336</sup> See Interview with Brian Fischer, *supra* note 109; Belluck, *supra* note 4. Consequences of not instituting such policies can be very damaging to elderly inmates. See Robert W. Stock, *Inside Prison, Too, A Population is Aging*, N.Y. TIMES, Jan. 18, 1996, <http://www.nytimes.com/1996/01/18/garden/senior-class-inside-prison-too-a-population-is-aging.html?pagewanted=all&src=pm> (“When it’s time for mess, the old guys get out of the way, or they get run over by the young ones . . . So then they have to wolf down their food. Same thing in the recreation room — they don’t get a table.”).

from certain prison procedures (such as roll call) early or permitted to sit down after a short time span, and can be allowed to go to the front of long lines or sit down while they wait.<sup>337</sup> In prisons with bunk bed housing, older prisoners can be guaranteed a bottom bunk, taking out the strain of climbing up to a top bunk every night.<sup>338</sup> Inmates suffering from dementia can be (and always should be) exempted from certain regulations that they may no longer understand, such as rules regarding personal appearance and conduct.<sup>339</sup> A few prisons, such as Colorado Territorial Correctional Facility, have designated a specific period of “yard time” — the daily recreation period — for older inmates, as well as younger prisoners with disabilities.<sup>340</sup>

Certain facilities have even gone as far as creating special groups for elderly inmates, hoping to create a sense that the accommodations are a badge of honor rather than a sign of weakness. At Central California Women’s Prison, for example, women age 55 and over are invited into the Silver Fox Program, where they receive benefits like extra pillows and blankets, additional time doing laundry, and the use of shortcuts when walking within the prison complex.<sup>341</sup>

The lingering question, though, is what troubles these accommodations might cause for the rest of the facility. Prison life is built around schedules and rules.<sup>342</sup> Difficulties can possibly arise whenever these schedules are changed and these rules are bent for some inmates but not for others.<sup>343</sup> This leads to a larger question, one which will be addressed later in this article:

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<sup>337</sup> See James Ridgeway, *The Graying of America’s Prisons*, *The Crime Report*, Dec. 7, 2009, <http://www.thecrimereport.org/archive/the-graying-of-americas-prisons/> (describing the difficulty that many older prisoners have in standing on lines for long periods of time).

<sup>338</sup> See Interview with Keith Davis, *supra* note 52 (specifically mentioning top bunks as a significant barrier for elderly inmates in certain facilities).

<sup>339</sup> See OLD BEHIND BARS, *supra* note 14, at 52 (quoting a corrections officer describing the exceptions that need to be made for inmates suffering from dementia. “We could write her up for verbal abuse,” the officer said of a prisoner with dementia, “but what’s the point?”).

<sup>340</sup> *Id.* at 69.

<sup>341</sup> *Id.* at 48. It is important to note that although the majority of elderly prisoners currently are male, the unique needs of elderly female prisoners pose additional challenges and costs, and must be dealt with appropriately by corrections officials. See Rebecca Reviere & Vernetta D. Young, *Aging Behind Bars: Health Care for Older Female Inmates*, 16 *J. OF WOMEN & AGING* 55–69 (2003) (describing many unique care needs of elderly female prisoners and asserting that “[b]y failing to anticipate the increase in older women, prisons may be failing to provide for many of the health needs of this vulnerable population.”); Chuck Molnar, *Senior Corner: Elderly Prisoners in California Need Advocacy*, *SANTA CRUZ SENTINEL*, Aug. 8, 2010, [http://www.santacruzsentinel.com/localnews/ci\\_15708807](http://www.santacruzsentinel.com/localnews/ci_15708807) (noting that certain advocates “are particularly concerned about California’s elderly female prison population.”); Interview with Ronald Aday, *supra* note 13 (“It becomes even more important to ensure that their needs are not neglected just because they [female elderly prisoners] are a minority of the elderly prison population.”).

<sup>342</sup> CORRECTIONAL HEALTHCARE, *supra* note 49, at 53–54 (“Prison systems are ‘command’ or ‘machine’ bureaucracies dedicated to the safety of the public and the prison staff.”).

<sup>343</sup> See, e.g., Curtin, *supra* note 48, at 488 (“Routine is the keystone of a prisoner’s life . . . The elderly and physically infirm can disrupt this routine because of their varying degrees of mobility.”).

whether elderly inmates should be housed separately from a prison's general population or whether they should be mainstreamed with the facility's younger inmates.<sup>344</sup>

#### d. Use Of Technology

Access to medical care outside of the facility is both costly and challenging.<sup>345</sup> Often, prisons are located in rural regions without a hospital nearby.<sup>346</sup> Getting the inmate to a medical facility therefore requires a time-consuming and costly trip during which the inmate must be under constant supervision by security personnel.<sup>347</sup> For elderly inmates, these trips can be particularly fatiguing.<sup>348</sup> However, they often are necessary for the inmate to receive a proper diagnosis and treatment in a specialized area of medicine, such as gerontology.<sup>349</sup>

Today, however, technological advancements offer another possibility that is less costly for the prison and less arduous for the inmate. In certain circumstances, telemedicine — using information technology “to provide or support clinical care at a distance” — can provide a reasonable alternative to off-prison medical visits.<sup>350</sup> Elderly inmates often can be seen right away by a physician through telemedicine, saving the time spent jumping through hoops for approval of an off-site medical visit.<sup>351</sup> This can allow an elderly inmate's illness to be diagnosed and a course of treatment prescribed with great efficiency, a particularly important consideration for older individuals.<sup>352</sup> Also, telemedicine can allow an inmate access to specialists in a particular area of care that might not be offered at any nearby hospital.<sup>353</sup>

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<sup>344</sup> See Part IIB, *infra*.

<sup>345</sup> Notes 134 & 137, *supra*.

<sup>346</sup> See, e.g., Tracy Huling, *Building a Prison Economy in Rural America*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer and Meda Chesney-Lind, eds., 2002).

<sup>347</sup> See Part IIA(2), *supra*.

<sup>348</sup> See, e.g., GUBLER, *supra* note 134, at 2 (describing how the long trips to an outside medical specialist leave an 82-year-old inmate exhausted and give her “severe bruising on her hands and feet from the shackles and chains.”).

<sup>349</sup> See note 287, *supra*.

<sup>350</sup> See Hagop Mekhjian et al., *An Ohio Telemedicine System for Prison Inmates: A Case Report*, 2 *TELEMEDICINE JOURNAL* 17–24 (1996); Noriaki Aoki et al., *Cost-Effectiveness Analysis of Telemedicine Analysis to Evaluate Diabetic Retinopathy in a Prison Population*, 27 *DIABETES CARE* 1095–1101 (2004); John Gramlich, *Telemedicine: Lessons From State Prison*, TS-SI, May 12, 2009, <http://ts-si.org/horizons/4755-telemedicine-lessons-from-state-prison>; Curtin, *supra* note 48, at 490–92.

<sup>351</sup> Note 350, *supra*.

<sup>352</sup> Curtin, *supra* note 48, at 492 (“One study reported the average waiting time to see a specialist dropped from ninety-four days before the use of telemedicine to twenty-three days after.”).

<sup>353</sup> *Id.*; see also Michael Brignell, Richard Wootton & Len Gray, *The Application of Telemedicine to Geriatric Medicine*, 36 *AGE AND AGEING* 369–74 (2007) (discussing this and other benefits of telemedicine for geriatric care, a field which is often neglected in rural or remote areas).

The use of telemedicine is gaining more widespread acceptance in American prisons.<sup>354</sup> Since 1996, the Federal Bureau of Prisons' Federal Medical Center (FMC) in Lexington, Kentucky, has operated a telemedicine system.<sup>355</sup> Other federal prisons have followed suit.<sup>356</sup> As of 2009, at least 27 states maintained a telemedicine presence in at least one of their prisons.<sup>357</sup> In Texas, for instance, the J.W. Estelle geriatric unit in Huntsville uses a telemedicine system with four video cameras.<sup>358</sup> Medical records for the inmate are made available instantaneously to the consulting doctor.<sup>359</sup> And reports indicate that both inmates and staff at the Estelle unit find the system to be satisfactory.<sup>360</sup> Other states have given equally high marks for the use of telemedicine in their prisons.<sup>361</sup>

Naturally, telemedicine will not be appropriate in every instance. There will be some circumstances where this technology will not be able to replace a physical examination and face-to-face care.<sup>362</sup> In such situations, inmates must be afforded the in-person meeting with the specialist whom they need to see.<sup>363</sup> Yet for the benefits that it provides in cost, efficiency, and enhanced access to specialists, correctional systems certainly should consider adding telemedicine to their toolkit of ways to provide adequate care for elderly prisoners.

#### **e. Inmates Caring For Inmates**

Tim Gruber still remembers the first time he saw a convicted murderer caring for an elderly prisoner. "He treated this older man with so much compassion, even tenderness," recalled Gruber, a photographer whose recent series of pictures documenting the lives of aging inmates has received nationwide attention.<sup>364</sup> "Here was somebody who was in prison for killing

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<sup>354</sup> Gramlich, *supra* note 350.

<sup>355</sup> U.S. DEP'T OF JUSTICE, TELEMEDICINE CAN REDUCE CORRECTIONAL HEALTH CARE COSTS 8 (1999).

<sup>356</sup> *Id.* Other federal prisons using telemedicine include the federal corrections institutions in Lewisburg, Pennsylvania and Allenwood, Pennsylvania. *See id.*

<sup>357</sup> Gramlich, *supra* note 350.

<sup>358</sup> *See* Jaime Shimkus, *Estelle Unit Does It All — And Then Some*, CORRECTCARE, Spring 2003, available at <http://www.ncchc.org/pubs/CC/profiles/17-2.html>; Curtin, *supra* note 48, at 490–91.

<sup>359</sup> Curtin, *supra* note 48, at 490–91.

<sup>360</sup> *Id.*

<sup>361</sup> *See* Mekhjian et al., *supra* note 350, at 24; Gramlich, *supra* note 350; Aoki et al., *supra* note 350, at 1100.

<sup>362</sup> *See, e.g.,* Brignell et al., *supra* note 353, at 370 ("It is difficult to take full responsibility for hospital type care from a distance."); Kristin Elisabeth Solberg, *Telemedicine Set to Grow in India Over the Next Five Years*, 371 THE LANCET 17 (2008) (discussing limitations and benefits of telemedicine, including comment from a doctor who said that "for diagnosis and 'major problems', he needs to meet his patients face-to-face.").

<sup>363</sup> Again, this is part of the Eighth Amendment obligation of providing adequate care for inmates. Part IC, *supra*.

<sup>364</sup> Telephone Interview with Tim Gruber, photographer (Jan. 24, 2012). Gruber is the photographer of *Served Out*, a multi-media exhibition documenting the lives of elderly inmates at the Kentucky State Reformatory. For the complete set of Gruber's photographs in this collection, visit <http://ackermangruber.com/projects/served-out/>.

somebody, yet he had volunteered to work in an area of the prison that required him to care for another person. You could almost sense that this was becoming a transformative experience for this man.”<sup>365</sup>

Gruber’s observations of one inmate assigned to care for another were not unique to that particular prison. In the search for solutions regarding elderly prisoners, perhaps the most unexpected development has been the key role played by inmates themselves. A surprising number of correctional institutions now operate programs in which younger inmates perform vital care tasks for aging prisoners.<sup>366</sup> Such opportunities, most corrections leaders agree, provide a great advantage to the facility, to the elderly inmate, and to the younger caregiving inmate.<sup>367</sup> The facility saves money when these jobs are performed by inmates rather than by a salaried prison employee.<sup>368</sup> The elderly inmate gains the benefit of these care tasks, and also enjoys a strong relationship with a younger member of the prison population, decreasing the likelihood that the older inmate will engage in dangerous isolating behaviors.<sup>369</sup> And the younger inmate has the experience of caring for another human being, earning a sense of responsibility and a feeling of importance.<sup>370</sup> “Sometimes, for the first time in an inmate’s life, he’s looking out for somebody other than himself,” said Keith Davis, the warden at Virginia’s Deerfield Correctional Facility, who oversees an inmate-to-inmate care program there. “That’s a special experience for that inmate. I always say that once you change the heart, the rest of it is easy.”<sup>371</sup>

Inmate-to-inmate assistance programs recently have gained particular acclaim for helping prisoners with dementia.<sup>372</sup> A February 2012 New York Times article described the work of the “Gold Coat” program at the California Men’s Colony, in which a number of violent felony

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<sup>365</sup> *Id.*

<sup>366</sup> See, e.g., Interview with Justin Jones, *supra* note 23 (“It’s one of the things I’m proudest of in our workings with older inmates”); Interview with Keith Davis, *supra* note 52 (discussing the Inmate Caretaker Group in Deerfield Correctional Facility’s assisted-living area); Interview with James LeBlanc, *supra* note 196 (“Some of the roles of offender assistants include providing peer support and education, assisting with hospice or end-of-life care activities, assisting impaired offenders on a one-on-one basis with activities of daily living, (and) serving as a companion to offenders on suicide watch, if qualified and trained.”); Interview with Andy Pallito, *supra* note 196 (“We have certain inmates trained to assist the elderly or infirmed with their hospice needs”); Belluck, *supra* note 4 (describing inmate-to-inmate assistance program for inmates with dementia at the California Men’s Colony).

<sup>367</sup> See note 366, *supra*.

<sup>368</sup> Furthermore, these programs allow professional care staff to concentrate on more specialized care tasks for the elderly inmates, hopefully helping ensure that these tasks are performed at a high level of quality.

<sup>369</sup> See Interview with Justin Jones, *supra* note 23 (“There seems to be a different sort of trust, too, when it’s inmate-to-inmate.”); see also note 247, *supra* (discussing the mental health importance of keeping inmates in contact with other people and preventing them from becoming isolated).

<sup>370</sup> See Belluck, *supra* note 4. In Oklahoma, according to Jones, younger inmates are so interested in helping the elderly prisoners that there is a wait-list for the program, allowing corrections leaders to pick only the very best inmates for the job. Interview with Justin Jones, *supra* note 23.

<sup>371</sup> Interview with Keith Davis, *supra* note 52.

<sup>372</sup> See Belluck, *supra* note 4.

offenders received special training to help inmates with forms of dementia such as Alzheimer's disease.<sup>373</sup> Members of the "Gold Coats" described with pride the tasks that they perform, such as helping inmates with dementia shower, shave, dress, groom themselves, and even change their adult diapers.<sup>374</sup> They also protect the prisoners suffering from dementia from abuse and exploitation by other inmates.<sup>375</sup> Other states, such as Louisiana, are training inmates to perform similar tasks for prisoners with dementia in their correctional facilities.<sup>376</sup>

For such programs to function properly, prisons must provide three elements: (1) an intensive screening process so that only inmates who are mentally equipped to be trusted with these elderly individuals are accepted, (2) a thorough training program so that participants understand the needs of elderly individuals and gain a sense of how to react quickly if something unexpected happens, and (3) incentives for prisoners to take part in these programs.<sup>377</sup> With the "Gold Coat" program, for instance, a clean disciplinary record "for about 5 to 10 years" is required before an inmate can be admitted.<sup>378</sup> Mental health professionals from the regional Alzheimer's Association chapter train the inmates to help out in these caregiving functions.<sup>379</sup> And the benefits to being a "Gold Coat" apparently are well-known in the prison, paying better than other jobs in the facility and improving an inmate's prison record, which can help their parole chances.<sup>380</sup>

In addition, there are certain types of work which inmates should not be permitted to perform on other inmates. Professional medical tasks should never be delegated to inmates.<sup>381</sup> Preventing inmates from accessing the confidential medical records of other inmates is another concern which must be taken into account when planning inmate-to-inmate care programs.<sup>382</sup> Yet for the basic personal assistance, protection, and companionship functions described earlier

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<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* In addition to providing essential services to inmates with dementia, the "Gold Coats" program also seems to have a rehabilitative benefit for the inmates providing the care tasks. One "Gold Coat" inmate was quoted as saying "I didn't have any feelings about other people (before). In that way, I was a predator. Now, I'm a protector." Another stated that after working in a job where "you get spit on, feces thrown on you, urine on you, you get cursed out," he had gained compassion that would help him live a better life "on the street." *Id.*

<sup>376</sup> *See id.* Another extremely sensitive area in which younger inmates have helped elderly inmates is end-of-life care through prison hospice programs. *See* note 397, *infra*.

<sup>377</sup> All of the inmate-to-inmate care programs described by the various corrections leaders interviewed for this report contain these three elements.

<sup>378</sup> Belluck, *supra* note 4.

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *See, e.g.*, Interview with James LeBlanc, *supra* note 196 (Inmates working as "offender assistants" in Louisiana prisons cannot deliver any medical care and cannot play a role in healthcare-delivery decisions, such as who gets to see a doctor or a nurse).

<sup>382</sup> *See id.*

in this section, developing programs where inmates can help other inmates provides a unique way to help elderly inmates, one which seems to result in benefits to everyone involved.

## f. End-Of-Life Care

Dying in prison is one of the gravest fears of any inmate.<sup>383</sup> For an aging prisoner, one who knows that his or her life is drawing to a close, this fear can turn into a very uncomfortable realization.<sup>384</sup> Knowledge that death is imminent can often cause severe depression, anger, or fear in an inmate.<sup>385</sup> Yet with an increasing number of lengthy sentences, particularly life without parole sentences, deaths in prisons are a reality that prison officials must frequently face.<sup>386</sup> As of 2009, approximately 3,300 people died behind bars from natural causes annually.<sup>387</sup>

Decisions about what prisons should do for inmates in end-of-life situations frequently are daunting, forcing officials to make difficult choices about what degree of care is owed to a prisoner and what exceptions can be made in a near-death situation.<sup>388</sup> “Certainly, end-of-life care is the biggest challenge,” said Vermont Department of Corrections Commissioner Andy Pallito. “This comes in two ways. One, the overall cost of administering end-of-life care, and two, the challenge of having someone pass away from end of life challenges in a safe and humane environment.”<sup>389</sup>

Corrections leaders agree that the ever-challenging balance between security goals and care objectives becomes particularly difficult when a prisoner is near death.<sup>390</sup> The balance in such situations logically seems to lean toward the “care” side of the equation, making the inmate

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<sup>383</sup> ADAY, *supra* note 14, at 128 (“Dying in prison is the most dreaded nightmare of prisoners—perhaps because they spend all their lives scratching at the walls to get out.”); Ira R. Byock, *Dying Well In Corrections — Why Should We Care?*, 9 J. CORR. HEALTH CARE 107 (2002) (“Dying in prison is what inmates dread most. They fear spending their last hours in agony, alone, separated from family outside and from friends within prison walls.”).

<sup>384</sup> See, e.g., John F. Linder & Frederick J. Meyers, *Palliative Care for Prison Inmates*, 298 J. AM. MED. ASS’N 894, 900 (2007); ADAY, *supra* note 14, at 128 (“Like the elderly in the free world, older inmates in poor health are more likely to think frequently about death.”). See also Ray Weiss, *They Live with the Fear of Dying in Jail*, LAKELAND LEDGER, Oct. 7, 1979, at E1 (describing the emotional struggles of elderly inmates contemplating death inside Avon Park Correctional Institution).

<sup>385</sup> See Byock, *supra* note 383 (describing these emotions as common responses to the knowledge that the end is near, particularly in a prison setting where the fear of dying handcuffed and surrounded by guards is strong).

<sup>386</sup> OLD BEHIND BARS, *supra* note 14, at 83. Furthermore, some elderly inmates enter prison in extremely poor health, meaning that even a short sentence will probably end with them dying behind bars. *Id.*

<sup>387</sup> NAT’L HOSPICE & PALLIATIVE CARE ORG., END OF LIFE CARE IN CORRECTIONS 1 (2009), available at [http://www.nhpc.org/files/public/access/corrections/Corrections\\_The\\_Facts.pdf](http://www.nhpc.org/files/public/access/corrections/Corrections_The_Facts.pdf).

<sup>388</sup> See generally Linder & Meyers, *supra* note 384 (discussing conflicts that often arise between prison rules and the need to provide compassion and care at the end of an inmate’s life).

<sup>389</sup> Interview with Andy Pallito, *supra* note 196.

<sup>390</sup> See Linder & Meyers, *supra* note 384 (describing difficulties faced by prison physicians and hospice workers in providing palliative care to inmates).

reasonably comfortable and allowing him or her to pass away with dignity.<sup>391</sup> Yet resources allocation can once again become an issue here. Prison medical staffs are consistently stretched to the limit.<sup>392</sup> Sometimes, situations could arise where prison doctors are forced to choose between devoting their attention to comforting a prisoner who is dying and treating a prisoner who still has a chance to live. In such situations, it would be understandable if the doctor were to devote more attention to the inmate who has a chance of survival.<sup>393</sup>

The dying inmate, though, still must not be neglected during the final moments of his or her life. The National Hospice and Palliative Care Organization has developed a set of guidelines for end-of-life treatment in prisons, and all prison medical workers should be familiar with these guidelines and understand ways to implement them in practice.<sup>394</sup> Often, though, these standards can be met largely through the attention of hospice workers.<sup>395</sup> Prison hospice programs have established a strong foothold in many state and federal facilities, offering comfort-oriented care so that the patient can pass away “with as little pain as possible in an environment where they have mental and spiritual preparation for the natural process of dying.”<sup>396</sup> Hospice workers can provide an array of crucial services during an inmate’s final days, ranging from pain management to spiritual support to psychological counseling.<sup>397</sup> They also can serve an

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<sup>391</sup> In the final moments of a prisoner’s life, there seems to be nothing that can possibly be gained from taking any measure that does not allow the inmate to pass away in the most dignified manner possible. As noted before, the purpose of corrections institution is to punish, but not to seek another human being’s suffering. *See Part ID, supra.*

<sup>392</sup> *See* OLD BEHIND BARS, *supra* note 14, at 83; Interview with Justin Jones, *supra* note 23 (“When I look at the number of people serving life without parole, I know these are people who are going to be in our prisons until the end of their lives.”).

<sup>393</sup> Ideally, of course, both would receive the best possible quality of care. However, with prison medical staffs often overworked and stretched to their limits, this is often not realistic. This underscores the importance of trained hospice workers providing proper palliative care in these situations, allowing prison medical personnel to concentrate on other curable (or potentially curable) cases.

<sup>394</sup> NAT’L HOSPICE & PALLIATIVE CARE ORG., QUALITY GUIDELINES FOR HOSPICE AND END-OF-LIFE CARE IN CORRECTIONAL SETTINGS (2009). The report included input from a variety of key correctional organizations, including the Federal Bureau of Prisons, the National Institute of Corrections, and the American Correctional Health Services Association. *Id.* at ii.

<sup>395</sup> *See generally* NAT’L INST. OF CORR., HOSPICE AND PALLIATIVE CARE IN CORRECTIONS (1998); OLD BEHIND BARS, *supra* note 14, at 84. Prison hospice programs have existed since the 1980s, but have become increasingly common and necessary with the aging of America’s prison population. Linder & Meyers, *supra* note 384. There is even a National Prison Hospice Association. *See* <http://npha.org/about/>.  
<sup>396</sup> HOSPICE AND PALLIATIVE CARE IN CORRECTIONS, *supra* note 395, at 1.

<sup>397</sup> *See* HOSPICE AND PALLIATIVE CARE IN CORRECTIONS, *supra* note 395, at 1; Linder & Meyers, *supra* note 384; *see also* Kurt Streeter, *Amid Ill and Dying Inmates, A Search for Redemption*, L.A. TIMES, Nov. 20, 2011 (describing hospice care in the California Medical Facility, a high-security prison. When an inmate is thought to have less than 72 hours left to live, the prison’s hospice workers “sit vigil” with him until the end, ensuring that no prisoner has to die alone). Prison hospice programs have proven to be a key way in which properly trained younger inmates can provide basic services for older inmates. *See* Rick Jervis, *Inmates Assist Ill and Dying Fellow Prisoners in Hospices*, USA TODAY, Nov. 30, 2009, [http://www.usatoday.com/news/nation/2009-11-29-prison-hospices\\_N.htm](http://www.usatoday.com/news/nation/2009-11-29-prison-hospices_N.htm); John Leland, *Fellow Inmates*

important role in contacting the inmate's family members and letting them know that death is near, sometimes facilitating a last reunion between the inmate and his or her family before the end comes.<sup>398</sup>

Some of the most challenging decisions for corrections personnel can arise when a dying inmate asks to be with his or her family.<sup>399</sup> Visitation privileges in prisons are strictly regulated for obvious security reasons.<sup>400</sup> Commonly, though, prisons will permit far greater visitation privileges with family members during the inmate's final days.<sup>401</sup>

A great dilemma arises when an inmate wants to be with somebody who is not an immediate family member, but instead is part of the inmate's "family of choice."<sup>402</sup> Prisoners frequently are estranged from their biological families, who have moved on with their lives during the inmate's incarceration.<sup>403</sup> As a result, some inmates will develop meaningful family-like relationships with other prisoners.<sup>404</sup> At death, an inmate might want to be with a "family of choice" member instead of — or in addition to — the inmate's blood relations.<sup>405</sup> Such meetings between inmates could, under normal circumstances, violate certain prison policies. However, in the circumstance of an inmate's impending death, it seems logical that prison personnel should grant the inmate's last wishes whenever possible, provided that the desire is not unreasonable and does not blatantly jeopardize the prison's safety.<sup>406</sup>

Advance care planning is also an important component of end-of-life care.<sup>407</sup> If an inmate is known to be dying, he or she should be afforded the opportunity to develop important

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*Ease the Pain of Dying in Jail*, N.Y. TIMES, Oct. 17, 2009,  
<http://www.nytimes.com/2009/10/18/health/18hospice.html>.

<sup>398</sup> HOSPICE AND PALLIATIVE CARE IN CORRECTIONS, *supra* note 395, at 1 (discussing the "grief counseling for bereaved families" role that hospice programs play).

<sup>399</sup> See QUALITY GUIDELINES, *supra* note 394, at 1.

<sup>400</sup> See OLD BEHIND BARS, *supra* note 14, at 84.

<sup>401</sup> *Id.* ("Normal prison visitation rules are typically relaxed in prison hospices so that family members can sit at the relative's bedside seven days a week and are permitted to touch and hug their loved one, something not usually permitted in prison.").

<sup>402</sup> QUALITY GUIDELINES, *supra* note 394, at 1.

<sup>403</sup> See *id.* ("Family of biology are frequently no longer in the picture"); Interview with Ronald Aday, *supra* note 13.

<sup>404</sup> See, e.g., Leland, *supra* note 397 (describing an encounter between a dying elderly prisoner and a younger prisoner working in the hospice program in which the older prisoner referred to the younger inmate as "his family.>").

<sup>405</sup> QUALITY GUIDELINES, *supra* note 394, at 1; Linder & Meyers, *supra* note 384; Byock, *supra* note 383 ("Family" in this circumstance is not defined by marriage or bloodline alone, but by the phrase "for whom it matters.") (emphasis supplied).

<sup>406</sup> This means that visitors to the dying inmate will still need to submit to standard security procedures of the institution, such as a frisk before going inside to visit the inmate in hospice care.

<sup>407</sup> Unfortunately, advance planning measures can also be all-too-easily overlooked. As of 2005, fewer than 1% of inmates conducted advance directive discussions. Susan Franzel Levine, *Improving End-of-Life Care of Prisoners*, 11 J. CORR. HEALTH CARE 317 (2005).

directives in advance of death, including a Last Will and Testament and a Health Care Proxy.<sup>408</sup> Some prisons already provide for these services for inmates and their families.<sup>409</sup> Notably, though, some facilities have policies forbidding inmates from creating “Do Not Resuscitate” orders that would stop medical staff from providing treatment if their mind and body had deteriorated to a certain level.<sup>410</sup> Some corrections leaders have stated that these orders could provoke unrest within the inmate population if one inmate is known to not be resuscitated by prison medical staff.<sup>411</sup> However, there appears to be little concrete evidence showing that carrying out a “Do Not Resuscitate” order can cause problems between inmates and staff. Furthermore, it seems logical the priority in a near-death situation should be that individual’s final wishes, not the hunch that carrying out those wishes might somehow lead to discontentment among other inmates.

At the base of end-of-life concerns, of course, is the issue of whether inmates should be behind bars at the time of their death in the first place. This complex debate will be addressed in Part III.<sup>412</sup>

#### **g. Active Treatment**

Adequate health care for an aging population includes more than just treating the sick.<sup>413</sup> Working to ensure that healthy elderly inmates remain healthy is also an essential component.<sup>414</sup> Unfortunately, this component of regular “active treatment” is often forgotten in the discussions about medical care in prisons, where special programs aimed at a particular segment of the prison population are often the first area slashed in budget cuts.<sup>415</sup>

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<sup>408</sup> In general, these documents are recognized as fundamental components of end-of-life planning, giving the person final control over where his or her assets will go and what his or her final health wishes are. The need for making and executing these documents in an informed manner is not eliminated simply because a person is behind bars.

<sup>409</sup> This is particularly common in facilities that are designated as primarily “geriatric prisons.” See, e.g., Interview with Keith Davis, *supra* note 52.

<sup>410</sup> See Linder & Meyers, *supra* note 384 (noting that several jurisdictions do not give inmates this option).

<sup>411</sup> *Id.* (“Advance care directives and DNR orders can carry added meaning in the criminal justice setting, fueled by inmate distrust that the correctional system acts with their best interests in mind.”).

<sup>412</sup> Part III, *infra*.

<sup>413</sup> See CORRECTIONAL HEALTHCARE, *supra* note 49, at 33 (“Despite their physical limitations, older inmates need to stay physically active and mentally alert as long as possible.”).

<sup>414</sup> See *id.*; see also PRICE, *supra* note 253, at 21; FLA. REPORT ON ELDERLY AND AGING INMATES, *supra* note 287 (discussing the need for elderly inmates to remain active through age-appropriate programs).

<sup>415</sup> See OLD BEHIND BARS, *supra* note 14, at 68. (“Always seen as a privilege or luxury rather than an essential component of corrections, programs have been slashed in US prisons because of budget crises.”).

Elderly prisoners suffer perhaps more than any other single group from a lack of programming aimed at their particular needs and abilities.<sup>416</sup> Rarely are prison programs designed specifically for the physical and psychological needs of an aging population.<sup>417</sup> The recent Human Rights Watch report observed that many older inmates “have little to do besides read, watch television, or talk to each other.”<sup>418</sup> While this hardly seems cruel and unusual at first glance, this form of physical and mental stagnation can lead to serious medical consequences for an elderly individual.<sup>419</sup> For instance, it is well-documented that older people who do not experience much movement and stimulation — both for the brain and for the body — are at a much higher risk of contracting cognitive impairments such as Alzheimer’s disease.<sup>420</sup>

With this in mind, it appears evident that part of a prison’s constitutional health care obligation includes not only primary care, but also age-appropriate active treatment.<sup>421</sup> This is an area where many correctional facilities are still struggling for solutions, largely because of budget cuts.<sup>422</sup> In Ohio, for example, financial constraints led Hocking Correctional Facility — historically a leader in developing active treatment strategies for elderly inmates — to eliminate programs aimed at helping inmates deal with aging-related physical and mental changes.<sup>423</sup> “Many prisons will have special-needs facilities, but no special-needs programs,” pointed out Ronald Aday. “That is a shortcoming for elderly inmates. We need more therapeutic activities

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<sup>416</sup> See Telephone Interview with Mary Harrison, Founder and Director of the “True Grit” program at Northern Nevada Correctional Center (June 21, 2012).

<sup>417</sup> OLD BEHIND BARS, *supra* note 14, at 68.

<sup>418</sup> *Id.*

<sup>419</sup> See Shimkus, *supra* note 75 (“Old age need not mean a continual downward spiral . . . [P]rogramming should strive to help elderly inmates stay physically active and mentally alert, for example, through self-help programs.”); Interview with Keith Davis, *supra* note 52 (“For elderly people, the plague is loneliness, helplessness, and boredom. Eliminate these things, and the quality of life gets better — not just for elderly prisoners, but for all elders.”).

<sup>420</sup> See, e.g., Ryan Jaslow, *Daily Physical Activity Protects Against Alzheimer’s, Even in Adults Over 80*, CBS, Apr. 18, 2012, [http://www.cbsnews.com/8301-504763\\_162-57415964-10391704/daily-physical-activity-protects-against-alzheimers-even-in-adults-over-80/](http://www.cbsnews.com/8301-504763_162-57415964-10391704/daily-physical-activity-protects-against-alzheimers-even-in-adults-over-80/) (describing Rush University Medical Center study’s findings that daily physical activity substantially reduces risk of cognitive decline and Alzheimer’s disease); R.S. Wilson et al., *Loneliness and Risk of Alzheimer’s Disease*, 64 ARCH. GEN. PSYCHIATRY 234–40 (2007); Deborah E. Barnes & Kristine Yaffe, *The Projected Effect of Risk Factor Reduction on Alzheimer’s Disease Prevalence*, 10 THE LANCET 819–28 (2011) (listing cognitive inactivity and depression as some of the key risk factors for Alzheimer’s disease).

<sup>421</sup> Given the acceptance of these principles in the medical literature, prisons have an obligation to provide some age-appropriate forms of active treatment for elderly inmates to reduce these proven health risks. See Part IC, *supra*.

<sup>422</sup> See OLD BEHIND BARS, *supra* note 14, at 68; Interview with Jamie Fellner, *supra* note 240.

<sup>423</sup> *Id.* at 68. Hocking Correctional is widely recognized as one of the most innovative prisons regarding appropriate programming for elderly prisoners. One of their programs, “Aunt Jane’s Storybook,” allowed participants to choose an age-appropriate book to share with a member of their family. The inmate reads the book into an audio recorder. The recording is then sent to the family along with a copy of the book and a personal message from the inmate. See PRICE, *supra* note 253, at 21.

directed at the well-being of that population. Right now, we're developing a medical model for elderly prisoners. But we do not really have a social model."<sup>424</sup>

Perhaps the greatest strides toward creating a viable social model are currently occurring at Northern Nevada Correctional Center in Carson City under the leadership of Mary Harrison, a psychologist originally tasked with treating sex offenders in the facility.<sup>425</sup> Titled "True Grit", the unique older inmate program now welcomes more than 200 older prisoners, with a waiting list of approximately 25 more.<sup>426</sup>

Offerings within the True Grit program range from arts and crafts work — in which the finished products often are donated to area schools and charities — to movement therapy sessions to poetry readings and creative writing circles.<sup>427</sup> There are drama groups and even five musical ensembles, all of them bursting at the seams with members.<sup>428</sup> Some inmates work in the program's wheelchair "chop shop", fixing wheelchairs for use by other inmates in the prison.<sup>429</sup> Others are involved with animal therapy programs.<sup>430</sup> Many go to "life skills" classes aimed at preparing the inmates for success in free society.<sup>431</sup>

Yet despite the multiple programs, True Grit is not a vacation resort. "We're not soft on anybody," Harrison said. "We have a screening process to decide who we let in. And when you get in, we have rules and we have standards, and you have to follow all of them."<sup>432</sup> Those who do not comply are not permitted to continue with the program.<sup>433</sup> Proper hygiene and grooming — no "scruffy beards" allowed — is a must.<sup>434</sup> Appropriate behavior is expected at all times.<sup>435</sup> The inmates are fully required to keep their unit clean.<sup>436</sup> Lethargy simply doesn't seem to happen. "These people are very active in here," Harrison said, "and that's what they want. They

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<sup>424</sup> Interview with Ronald Aday, *supra* note 13.

<sup>425</sup> See Steve Milne, *National Award for Nevada's True Grit Inmate Program*, CAPITOL PUBLIC RADIO, Oct. 7, 2011, available at <http://www.caprдио.org/articles/2011/10/07/national-award-for-nevada%27s-true-grit-inmate-program>. Harrison said that she decided to start a program aimed at the needs of the elderly when she noticed too many of the facility's elderly inmates "just sitting around" and not interacting with anyone. Interview with Mary Harrison, *supra* note 416.

<sup>426</sup> Interview with Mary Harrison, *supra* note 416.

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> *Id.* Harrison also pointed out that this program saves money for the rest of the prison, as they can have their wheelchairs repaired in-house.

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> Interview with Mary Harrison, *supra* note 416.

<sup>433</sup> *Id.* Harrison said that there have been some inmates who have been dismissed from the program, or who have decided to leave it on their own terms. Yet the vast majority of inmates, she said, want to stay and comply fully with the program's guidelines without any trouble.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Id.* "It's a nice, clean unit," Harrison said, "because our people take ownership of keeping it that way. They take a lot of pride in it."

don't just want to sit around and watch themselves grow old. They're still alive, and they want to live."<sup>437</sup>

The key component, according to Harrison, is individualized active treatment.<sup>438</sup> Every inmate in the program receives a written treatment plan tailored to their offense and their personal rehabilitation goals, taking into account their specific physical, mental, emotional, and spiritual needs.<sup>439</sup> The plan travels with the inmate during their entire time in True Grit, and is re-evaluated and updated on a regular basis.<sup>440</sup> So far, the process seems to be working. Inmates taking psychotropic medication when they enter the program often are able to stop taking the strong drugs after a period of time.<sup>441</sup> And for inmates who use the program as a stepping stone for re-entry into society, the results are consistently good.<sup>442</sup> "We've had a lot of people paroled from our program, and we don't see recidivism," Harrison said. "They're not ending up back in prison. That's why it is so important that everyone one here takes accountability for committing his offense and is willing to (engage in the) program in a way targeted to his own rehabilitation."<sup>443</sup>

In a time of tight budgets, though, the most impressive aspect of True Grit is the expense in public funds: nothing.<sup>444</sup> "True Grit does not cost the state anything," Harrison said. "We have no budget line at all."<sup>445</sup> All of the staff members are volunteers from the community.<sup>446</sup> All of the supplies are donated.<sup>447</sup> All of the programs exist without taking one cent from taxpayer dollars.<sup>448</sup>

In some respects, the volunteers seem to gain as much from True Grit as the prisoners. "Too often, we lock (people) up for time, not for working on things that they've had trouble with before on the outside," said Rod McMullen, a military veteran and retired art teacher who leads veterans counseling sessions and life skills classes for True Grit. "I feel good about my part in

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<sup>437</sup> *Id.*

<sup>438</sup> Interview with Mary Harrison, *supra* note 416. As already noted, elderly inmates are not a homogenous group, affirming the importance of this type of individually tailored active treatment and continued care. *See* note 69, *supra*.

<sup>439</sup> Interview with Mary Harrison, *supra* note 416. The assessment includes evaluations of the inmate's physical and mental health, work history and skills, criminal history, family ties, life skills, and community ties. *Id.*

<sup>440</sup> *Id.*; *see also* Mary T. Harrison, *True Grit: An Innovative Program for Elderly Inmates*, CORRECTIONS TODAY, December 2006, at 47.

<sup>441</sup> Interview with Mary Harrison, *supra* note 416.

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> *See* Harrison, *supra* note 440, at 47 ("No state funds (other than the psychologist's salary) were expended to set up the program.").

<sup>445</sup> Interview with Mary Harrison, *supra* note 416.

<sup>446</sup> *Id.*; *see also* Telephone Interview with Rod McMullen, True Grit volunteer (June 21, 2012); Telephone Interview with Chelsey Spring, True Grit volunteer (June 21, 2012).

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

changing that.”<sup>449</sup> Another True Grit volunteer, Chelsey Spring, had similar comments about providing services inside the prison. “I learn a lot from the people in the program itself,” Spring said about the creative writing classes and discussion sessions that she leads. “It has reinforced my belief that when somebody learns to be productive and looks out for others, that person is going to become a better citizen, willing to go out and contribute to society in a more positive way.”<sup>450</sup>

Yet True Grit still experiences its share of challenges. First on Harrison’s wish-list is a larger staff, which would allow her to welcome in the inmates currently on the waiting list.<sup>451</sup> And her professional colleagues at Northern Nevada Correctional are unlikely to augment the True Grit workers.<sup>452</sup> Harrison said she tried to get “fellow staff-people” to work with her on several occasions, but they consistently turned her down, saying that they preferred working with younger inmates.<sup>453</sup> Until such attitudes about “old inmates” change among prison staff, it will be difficult to envision programs such as True Grit existing on a larger-scale level.

Still, it remains surprising that more facilities haven’t adopted a True Grit-type of model for their elderly prisoners. With so many elderly inmates in the nation’s prisons, creating some sort of viable active treatment plan has become a vital component of prison health care. Facilities would be well-advised to focus on this area of care sooner rather than later, and some are already starting to do so.<sup>454</sup> Taking sick elderly inmates and helping them get well naturally is an essential part of medical care, but methods for taking healthy elderly inmates and keeping them that way also deserves greater attention.

## **B. Housing and Accessibility Questions**

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<sup>449</sup> Interview with Rod McMullen, *supra* note 446.

<sup>450</sup> Interview with Chelsey Spring, *supra* note 446.

<sup>451</sup> Interview with Mary Harrison, *supra* note 416.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> The Hocking facility in Ohio, despite their current budgetary constraints, remains a leader in this area. In Montana, a partnership between the University of Montana, Montana Tech, and the Montana State Prison resulted in a wellness program for older prisons called “Exercise Over 40,” with flexibility work and cardiac aerobic training for these inmates. See Michelle Gaseau, *Caring for the Elderly Behind Bars*, CORRECTIONS.COM, Nov. 19, 2001, <http://www.corrections.com/news/article/11566>. The Texas Department of Criminal Justice demands that its prisons make certain types of activities available for elderly prisoners, including outdoor walking, horseshoes, arts and crafts, and table games. WILLIAMS, *supra* note 49, at 24. Virginia’s Deerfield Correctional Facility offers a wide range of programs for the elderly, ranging from vocational training to religious programs to fitness work in the prison’s fully accessible gymnasium. All inmates in the prison are required to take part in at least one program as long as they are physically and mentally able to do so. See Interview with Keith Davis, *supra* note 52. What really sets True Grit apart from the others, however, is its ability to provide individualized programming plans using a broad range of offerings without using any state funds. With corrections budgets tight, this cost-free component is extremely important.

One of the most exasperating issues in the discussion about elderly inmates is a matter that outwardly seems simple: where to put them. What makes this question so vexing is the surprisingly large number of possible answers — all of which appear to be manageable but none of which seem to be a comfortable fit.

For instance, an elderly inmate can be housed in the general population of a prison, the solution which seems to place the least amount of strain on corrections officials and the best way to integrate elderly inmates into a “normal” prison life.<sup>455</sup> However, this arrangement can also put elderly inmates at a greater risk of exploitation by younger, more physically fit inmates.<sup>456</sup> Furthermore, many existing prisons, particularly older correctional facilities, pose substantial accessibility barriers for inmates with disabilities.<sup>457</sup> An alternative to this arrangement would be creating a separate unit — or even a separate facility — for elderly inmates. This type of congregate housing arrangement would concentrate the older prisoners in one particular area, where they could receive increased attention and specialized care for their unique needs.<sup>458</sup> Yet this comes with a high price tag, and research has shown that older inmates can psychologically suffer if they spend all of their time solely with other elderly people.<sup>459</sup> In addition, such a setup could violate integration provisions of the Americans With Disabilities Act.<sup>460</sup>

Still another option would be to house elderly inmates in a private facility, a facility that is managed and paid for by a corporation rather than by the state. This is believed to be a cost-saving measure for states, as well as a chance for elderly prisoners to be housed in an environment without delays of services that can be caused by state agency “red tape.”<sup>461</sup> On the other hand, private prisons also have many detractors for providing a level care that many commentators have called unconstitutional.<sup>462</sup>

In this section, we examine these options, as well as barriers to each and how these barriers may be overcome. We also look at some of the accessibility shortcomings in many prison facilities and what the law requires in this regard.

## 1. Accessibility Issues

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<sup>455</sup> See, e.g., OLD BEHIND BARS, *supra* note 14, at 48 (“When it comes to housing the elderly, prison systems support ‘mainstreaming,’ that is, keeping older inmates in the ‘general population’ as long as possible, consistent with their particular physical and mental needs and vulnerabilities.”).

<sup>456</sup> See notes 59, 114, 187, and 194, *supra* (discussing the heightened risk of victimization when elderly inmates and younger inmates are in a “mixed population” setting).

<sup>457</sup> See Part IIB(1), *infra*.

<sup>458</sup> See Part IIB(3), *infra*.

<sup>459</sup> *Id.*

<sup>460</sup> The ADA requires public entities, including prisons, to provide services in “the most integrated setting appropriate to the needs of qualified individuals with disabilities.” See 42 U.S.C. § 12101 *et seq.* This could be violated by a setup where elderly prisoners with disabilities are housed solely with other elderly prisoners with disabilities. See Part IIB(3), *infra*.

<sup>461</sup> See Part IIB(4), *infra*.

<sup>462</sup> *Id.*

Regardless of where an elderly prisoner is housed, accessibility will always be a key concern. Given that many prisons were constructed before accessibility notions were codified in the ADA and subsequent statutes, it is not surprising that many facilities present barriers to inmates with disabilities.<sup>463</sup> In Oklahoma, for instance, the newest prison was built in 1979.<sup>464</sup> Many of New York's largest prisons were likewise designed before the ADA was enacted.<sup>465</sup>

Notably, the ADA's standards for existing structures are not as strict as they are for new buildings. The ADA does not require that all existing buildings be retrofitted for accessibility immediately.<sup>466</sup> Title II, the ADA provision covering prisons, does not mandate that every facility be fully accessible to people with disabilities.<sup>467</sup> As long as the public entity is able to offer its programs in some way that is reasonably accessible to people with disabilities, the ADA's standards are satisfied — as long as the public entity can justify that it is providing the programs to people with disabilities in the most integrated setting appropriate to that context.<sup>468</sup> The law also says that when a business alters an existing facility in a way that affects usability, the areas or elements being altered must comply with the ADA standards, which can make these renovations expensive and time-consuming to undertake.<sup>469</sup> As a result, while newer prisons must be built in accordance with ADA standards,<sup>470</sup> America's many older prisons frequently still possess certain features that pose difficulties for disabled prisoners, a group which includes many elderly inmates.<sup>471</sup>

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<sup>463</sup> By 1990, the year that the ADA was signed into law, there were already 1,287 prisons in the United States. See Randall G. Shelden, *The Prison Industrial Complex*, THE PROGRESSIVE POPULIST, Nov. 1, 1999, <http://www.populist.com/99.11.prison.html>.

<sup>464</sup> Interview with Justin Jones, *supra* note 23.

<sup>465</sup> See Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC, December 1998, <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/4669/> (discussing the large number of prisons built in New York State during the 1980s).

<sup>466</sup> See 28 C.F.R. § 35.151(a) (1) (2011) (“Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, *if the construction was commenced after January 26, 1992.*”) (emphasis added).

<sup>467</sup> See U.S. DEP'T OF JUSTICE, COMMON QUESTIONS ABOUT TITLE II OF THE AMERICANS WITH DISABILITIES ACT (ADA), *available at* <http://www.ada.gov/pubs/t2qa.txt> (“Title II of the ADA requires that a public entity make its programs accessible to people with disabilities, not necessarily each facility or part of a facility.”).

<sup>468</sup> See *id.*; 28 C.F.R. § 35.130(d) (“A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”).

<sup>469</sup> 28 C.F.R. § 35.151(b) (1) (2011) (“Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, *if the alteration was commenced after January 26, 1992.*”).

<sup>470</sup> The building standards under the ADA now have a specific section regarding prisons and detention facilities. See 28 C.F.R. § 35.151(k) (1) (2011) (“New construction of jails, prisons, and other detention and correctional facilities shall comply with the 2010 Standards”).

<sup>471</sup> See Part IIA, *supra*.

Architectural barriers are the most common accessibility problems that emerge in older prison facilities.<sup>472</sup> The barriers can be found in yard areas, dining halls, visiting areas, recreational facilities, medical clinics, law libraries, and other key parts of the correctional complex.<sup>473</sup> Probably the most common issue arises from areas which can be accessed only by stairs, with no alternatives (i.e., elevators, ramps, etc) of any sort for prisoners who are physically unable to use stairs.<sup>474</sup> For elderly inmates with mobility limitations, this can present some significant problems.<sup>475</sup> Importantly, if these barriers prevent an inmate from accessing something to which he or she is constitutionally entitled — such as food in the mess hall — the prison needs to make reasonable accommodations to find a way for inmates to access these things.<sup>476</sup>

Other problems can arise from less-noticeable obstacles. Inaccessible toilets and showers for inmates with physical disabilities is a common concern.<sup>477</sup> A lack of cells that can accommodate a wheelchair is also frequently cited as a problem,<sup>478</sup> although the implementing regulations to the ADA now require that a particular number of cells must have accessibility accommodations for inmates with mobility limitations.<sup>479</sup> Communication becomes a significant concern for older inmates who begin to lose their sight or their hearing, particularly in the heavily rules-based environment of a prison. Prison administrators should make copies of facility

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<sup>472</sup> See, e.g., CORRECTIONAL HEALTHCARE, *supra* note 49, at 30 (“The physical plants commonly found in correctional facilities were designed for young and physically active inmates.”).

<sup>473</sup> See, e.g., OLD BEHIND BARS, *supra* note 14, at 47; CORRECTIONAL HEALTHCARE, *supra* note 49, at 30.

<sup>474</sup> CORRECTIONAL HEALTHCARE, *supra* note 49, at 30 (“Living units and support service buildings frequently are scattered over wide areas, and inmates must walk long distances for meals, medical services, and other activities.”); OLD BEHIND BARS, *supra* note 14, at 47 (“They (elderly inmates) confront the long distances that exist between housing units and prison services and programs.”).

<sup>475</sup> See note 474, *supra*.

<sup>476</sup> See, e.g., *Love v. Westville Correctional Center*, 103 F.3d 558 (7th Cir. 1996) (affirming a jury award of \$30,000 to a quadriplegic prisoner who was denied access to multiple programs and services in the Indiana State Prison); *Pierce v. Cnty. Of Orange*, 526 F.3d 1190, 1196 (9th Cir. 2008) (county violated the ADA by denying inmates with mobility limitations access to the bathroom by architectural barriers); *Beckford v. Irvin*, 49 F.Supp.2d 170, 173–74 (W.D.N.Y. 1998) (inmate with mobility impairment received \$150,000 in compensatory and punitive damages after being effectively denied showers, yard time, and other recognized essentials because prison staff denied him use of his wheelchair, preventing him from accessing these vital things); *Rainey v. Cnty. Of Delaware*, 2000 U.S. Dist. LEXIS 10700, at \*5 (E.D. Pa. 2000) (allowing claim that inmate with disabilities had been denied sufficient time to travel to the dining hall, inherently depriving him of food).

<sup>477</sup> OLD BEHIND BARS, *supra* note 14, at 47; see also *Schmidt v. Odell*, 64 F.Supp.2d 1014, 1031–33 (D. Kan 1999) (ADA suit by double-amputee prisoner against a facility which severely delayed in providing him a shower chair); *Kaufman v. Carter*, 952 F.Supp. 520, 532 (W.D. Mich. 1996) (inmate allowed to pursue claim of ADA violation on the grounds that the facility failed to provide an accessible shower and commode).

<sup>478</sup> See *Beckford*, 49 F.Supp.2d at 173, OLD BEHIND BARS, *supra* note 14, at 47.

<sup>479</sup> 28 C.F.R. § 35.151(k) (1) (2011) (requiring that “a minimum of 3%, but no fewer than one, of the total number of cells in a facility” provide “accessible mobility features”, and that “[c]ells with mobility features shall be provided in each (security) classification level.”).

rules in Braille or develop some other reasonable arrangement to accommodate visually impaired inmates.<sup>480</sup> Likewise, they should provide a sign language interpreter or make some other reasonable arrangement for deaf or hard-of-hearing inmates at disciplinary hearings and other important prison matters that are communicated orally.<sup>481</sup>

As with the other issues discussed in this article, corrections leaders have already started to address some of these concerns.<sup>482</sup> The question, though, is whether they have done enough. Often, their responses seem to involve retrofitting a certain number of cells for greater “handicap accessibility.”<sup>483</sup> As the prison population ages, however, one can naturally expect the number of inmates with disabilities to increase.<sup>484</sup> Whether prisons will simply continue to retrofit more and more cells for accessibility purposes, or whether they will a different solution as accessibility needs grow, remains to be seen.

What should never occur, though, is an institutional justification that an inmate’s disability cannot be accommodated because the change would jeopardize security goals. It is true that certain requested improvements or accommodations might indeed pose a threat to facility safety, and those alterations should not be made. However, the inquiry should not end there. Instead, facilities should make a thorough examination of whether reasonable alternatives can be taken to improve the situation in a manner which does not endanger institutional safety. A different method of accomplishing the same objective without placing the facility at risk can likely be found.<sup>485</sup> Not only the ADA, but also good common sense, requires this.

## 2. Mainstreaming Benefits And Concerns

The proposition of housing elderly inmates together with younger inmates sparks both worries and praises. Often, older inmates express a personal preference for living in a mixed-age population.<sup>486</sup> “They want that integration,” said Human Rights Watch Special Advisor Jamie

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<sup>480</sup> Clearly, an inmate who cannot see the prison rules and policies cannot be expected to abide by them unless some other reasonable accommodation is made.

<sup>481</sup> See, e.g., *Duffy v. Riveland*, 98 F.3d 447, 453 (9th Cir. 1996) (holding that inmate who was deaf could go forward to claim of ADA violation on the grounds that the facility had failed to provide him with a qualified interpreter).

<sup>482</sup> Once again, of course, the extent to which these issues have been addressed varies widely from jurisdiction to jurisdiction, and from facility to facility.

<sup>483</sup> See Interview with Justin Jones, *supra* note 23; Editorial, *Graying Population Forces Prison Retrofit*, SCRIPPS HOWARD, Feb. 13, 2012, available at <http://www.journalgazette.net/article/20120213/EDIT05/302139994/1021/EDIT>; Crary, *supra* note 295.

<sup>484</sup> See Part II, *supra* (noting the large number of elderly inmates who suffer from chronic illnesses, thus putting this demographic group at a much higher risk of disability).

<sup>485</sup> This is in keeping with the ADA’s requirement of making “reasonable modifications” for persons with disabilities. See Part IC(2), *supra*.

<sup>486</sup> See Interview with Jamie Fellner, *supra* note 240; Interview with James LeBlanc, *supra* note 196; CORRECTIONAL HEALTHCARE, *supra* note 49, at 30; OLD BEHIND BARS, *supra* note 14, at 48; Curtin, *supra* note 48, at 494.

Fellner. “They don’t want (an arrangement) where it’s just old codgers living with other old codgers.”<sup>487</sup>

When the mainstreaming system works well, the benefits can be great for both older and younger prisoners. Mississippi Department of Corrections Commissioner Christopher Epps and Chief Medical Officer Gloria Perry both said that mixed-age housing “tends to work well” in their state’s prisons.<sup>488</sup> Younger inmates, they said, tend to become “unofficial caretakers” of the elderly inmates.<sup>489</sup> In a reciprocal way, older inmates often assume mentoring roles toward the younger prisoners, sometimes becoming the father or mother that a younger inmate never had.<sup>490</sup>

Louisiana Department of Corrections Secretary James LeBlanc described the potential benefits to a mixed-age population at two of his state’s facilities: Elayn Hunt Correctional Center and Louisiana State Penitentiary.<sup>491</sup> “Elderly offenders tend to balance the younger ones when it comes to optimum functioning of a unit,” he said.<sup>492</sup> At Louisiana State Penitentiary, where most of the inmates are serving life sentences, LeBlanc said that the bond between younger and older prisoners seems exceptionally strong.<sup>493</sup> “The younger offenders realize that they might be in the same situation one day,” LeBlanc said, “so it is not unusual to see younger offenders assisting the elderly.”<sup>494</sup> He said that he has often seen young inmates pushing elderly inmates in a wheelchair to and from meals and pill call, and helping the older inmates with a variety of daily living activities.<sup>495</sup>

When the system goes bad, though, the results can be horrid. Elderly prisoners can become easy prey for younger inmates.<sup>496</sup> “It’s terrible to come here as a 70-year-old,” one aged inmate told Human Rights Watch. “You lose all your family, your home. You’re here with all these kids, noisy, disrespectful, they steal from you, take whatever you got from canteen.”<sup>497</sup> In addition, the number of exceptions to prison regulations that need to be made for elderly inmates can take its toll on the general population. Younger prisoners can become resentful of the older inmates for being granted necessary “breaks” from certain rules on account of their age and health status.<sup>498</sup> Some corrections leaders even wonder whether the mentor/caretaker relationship

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<sup>487</sup> Interview with Jamie Fellner, *supra* note 240.

<sup>488</sup> Interview with Christopher Epps, *supra* note 196; Interview with Gloria Perry, *supra* note 196.

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> Interview with James LeBlanc, *supra* note 196.

<sup>492</sup> *Id.*

<sup>493</sup> *Id.*

<sup>494</sup> *Id.*

<sup>495</sup> *Id.* (also noting that “[t]here are a large number of elderly offenders that have been in prison for so long that their dorm mates have become their family.”).

<sup>496</sup> See notes 59, 114, 182, and 194, *supra*.

<sup>497</sup> OLD BEHIND BARS, *supra* note 14, at 57.

<sup>498</sup> See, e.g., Interview with Brian Fischer, *supra* note 109 (discussing potential challenges when prison rules are “bent” for one person or group of people but not for others).

between old and young prisoners is a thing of the past.<sup>499</sup> “I don’t think I really see that very much,” said Carl Koenigsmann, the Chief Medical Officer for New York State’s Department of Corrections and Community Supervision. “You have so many gangs in prison now, and their gang rivalries don’t end with age. They don’t care if you’re old, young, whatever. All they care about is that you’re from a rival gang.”<sup>500</sup>

In the end, mainstreaming older prisoners into the general population seems to be a good fit for some — but definitely not all — elderly inmates. “There’s obviously a common sense component with this,” Fellner said. “You have a whole range of ages here. It may not make sense to have 80-year-olds living with 40-year-olds. It may not make sense to have older inmates in poor physical or mental condition living around a lot of younger prisoners who could take advantage of them. But for some prisoners, that type of integrated population is just what they need.”<sup>501</sup>

The greatest challenge for prisons going forward will be developing a system to determine which elderly inmates would benefit from age-integration and which could be placed at risk by it. Difficult decisions will also need to be made if an elderly inmate says that he or she wishes to live in a mixed-age population, but prison staff believes that he or she would be in substantial peril of victimization in such a setting. As human beings, the autonomy of prisoners to make certain choices about their lives must be respected. However, prisons play an important role as custodians, and prison officials have legal and moral obligations to keep inmates away from dangerous situations. With this in mind, it seems that an informed good-faith determination that a particular inmate would be at risk of harm by living in a prison’s general population should be the ultimate deciding factor, even over an elderly inmate’s personal desire to live in an age-integrated setting.<sup>502</sup>

### **3. Congregate Housing Benefits And Concerns**

Most states today have at least one separate unit for elderly prisoners.<sup>503</sup> Some have developed new facilities within existing prisons specifically for older inmates or for inmates with certain needs, such as the Unit for the Cognitively Impaired in New York State’s Fishkill Correctional Facility, the Enhanced Care Unit at Missouri’s Jefferson City Correctional Center,

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<sup>499</sup> See Interview with Carl Koenigsmann, *supra* note 76.

<sup>500</sup> *Id.*

<sup>501</sup> Interview with Jamie Fellner, *supra* note 240.

<sup>502</sup> Again, this is part of the prison system’s constitutional duty to protect its inmates. See Part IC, *supra*. If a prisoner will clearly be at risk if housed in general population, the facility has an obligation to prevent such an arrangement — even if the inmate wishes it. While inmates clearly do not surrender all rights of making decisions, a decision that could put themselves at a grave risk of harm is certainly one in which their wishes can be overruled by prison officials. *But see contra* CORRECTIONAL HEALTHCARE, *supra* note 49, at 31 (stating that in Minnesota, elderly inmates may decide to stay in general population, and indicating that at least in this state, the inmate has the final say in the matter.).

<sup>503</sup> See, e.g., notes 504 and 505, *infra*.

and the State of Washington’s assisted living center at Coyote Ridge Corrections Center.<sup>504</sup> Others have designated entire prisons primarily for inmates above a certain age and/or with certain medical conditions, such as the Deerfield facility in Virginia, the Laurel Highlands prison in Pennsylvania, and a stand-alone facility at the Joseph Harp Correctional Center complex in Oklahoma.<sup>505</sup>

Generally, this manner of age-specific or condition-specific living — known as “congregate housing”<sup>506</sup> — receives high marks from corrections officials. “You have all of these people who, because of their age and medical condition, have needs that are different from a lot of other prisoners,” said New York State Department of Corrections and Community Supervision Commissioner Brian Fischer, who believes that geriatric facilities will become commonplace in state correctional systems within 10 years. “They live a lifestyle that is different from a lot of other inmates. Keeping this population together lets us focus on their needs better, because they are in one place. It’s better for staff and better for the inmates.”<sup>507</sup>

Keith Davis, the warden at Deerfield, had similar praise for the congregate housing system. “It’s safer for the older guys to be grouped together,” he said.<sup>508</sup> Keeping the geriatric inmates in one place, he pointed out, allowed him to make certain accommodations that might be a profound security risk in a general population setting.<sup>509</sup> He also said that consolidating elderly prisoners in one location made his job easier, permitting him to focus on keeping “predators”

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<sup>504</sup> Interview with Brian Fischer, *supra* note 109; Tina Maschi et al., *Forget Me Not — Dementia In Prison*, 52 THE GERONTOLOGIST 441 (2012); Jamie Fellner, *Assisted Living — Behind Bars*, N.Y. DAILY NEWS, Mar. 26, 2012, [http://articles.nydailynews.com/2012-03-26/news/31241757\\_1\\_younger-prisoners-state-and-federal-prisons-long-sentences](http://articles.nydailynews.com/2012-03-26/news/31241757_1_younger-prisoners-state-and-federal-prisons-long-sentences); *Aging In Prison*, COLUMBIA DAILY TRIBUNE, Aug. 22, 2010, <http://www.columbiatribune.com/news/2010/aug/22/aging-in-prison/>; *Aging Inmates Prompt Creation of Assisted Living Center At Coyote Ridge Prison*, AP WIRE, Aug. 16, 2010, <http://www.foxnews.com/us/2010/08/16/aging-inmates-prompt-creation-assisted-living-center-washington-prison/>; Pupovac, *supra* note 137.

<sup>505</sup> Interview with Keith Davis, *supra* note 52; Interview with Justin Jones, *supra* note 23; Kevin Sieff, *Virginia’s Prison System Struggles to Handle the Surge in Elderly Inmates*, WASH. POST, Sept. 8, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/07/AR2010090706514.html>; Barbara Hoberock, *State Prisons Grapple with Rising Population of Aging Inmates*, TULSA WORLD, Jan. 7, 2011, [http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20110107\\_16\\_A1\\_CUTLIN990053](http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20110107_16_A1_CUTLIN990053); Amy Worden & Inquirer Harrisburg Bureau, *Perzel’s New Home is Laurel Highlands Prison*, PHILADELPHIA INQUIRER, June 17, 2012, [http://articles.philly.com/2012-06-17/news/32270009\\_1\\_speaker-john-m-perzel-betsy-nightingale-minimum-security-prison](http://articles.philly.com/2012-06-17/news/32270009_1_speaker-john-m-perzel-betsy-nightingale-minimum-security-prison); Moraff, *supra* note 128 (referring to Laurel Highlands as “Pennsylvania’s only prison tasked with handling sick and elderly prison inmates.”).

<sup>506</sup> See Curtin, *supra* note 48, at 489.

<sup>507</sup> Interview with Brian Fischer, *supra* note 109.

<sup>508</sup> Interview with Keith Davis, *supra* note 51.

<sup>509</sup> *Id.*

away from the older prisoners and delivering medical care in a manner tailored to older individuals, including prisoners with dementia.<sup>510</sup>

Yet creating, staffing, and operating geriatric prison facilities comes at a significant cost.<sup>511</sup> And taxpayers often grow weary of the high price tags that new prison facilities — particularly facilities focusing on the needs of a geriatric population — typically carry.<sup>512</sup> For instance, Missouri corrections administrators stated in 2011 that they plan to eventually open geriatric housing units in five state prisons, along with building a separate prison hospital for elderly inmates.<sup>513</sup> For Missouri Supreme Court Judge Michael Wolff, the costs of such measures seemed outrageous.<sup>514</sup> "I don't think the public is really all that keen on spending hundreds of millions of dollars on running nursing homes in prison for old — dare I say — harmless guys," he said in an interview around the time when the state's plan was announced.<sup>515</sup>

Even with the high costs, the geriatric units and facilities still never seem to have enough beds to accommodate what Davis called "the grey tsunami."<sup>516</sup> Mississippi Department of Corrections leaders said that their state's 90-bed geriatric treatment center, located at the Mississippi State Penitentiary at Parchman, is currently filled to capacity and maintaining a waiting list.<sup>517</sup> Oklahoma Department of Corrections Director Justin Jones said that "there is often a waiting list" of elderly inmates seeking transfer to the Joseph Harp facility.<sup>518</sup> "If we opened another (geriatric) facility," he said, "we could fill it up right away."<sup>519</sup>

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<sup>510</sup> *Id.*

<sup>511</sup> See, e.g., Sieff, *supra* note 505 ("It costs \$28,800 annually to house an inmate at Deerfield, compared with the \$19,000 it costs at most of the state's medium-security prisons."); Torsten Ove, *Pa. Prison Population Growing Older, Sicker, Costlier*, PITTSBURGH POST-GAZETTE, Mar. 6, 2005, <http://www.post-gazette.com/stories/local/uncategorized/pa-prison-population-growing-older-sicker-costlier-572772/?print=1> (describing the new \$6 million medical wing planned for the Laurel Highlands prison, which primarily houses elderly offenders); *Montana Seeks Bids for New Prison Facility*, AP WIRE, Jan. 24, 2012, available at [http://billingsgazette.com/news/state-and-regional/montana/montana-seeks-bids-for-new-prison-facility/article\\_f69f0861-fb4c-5490-bd7d-72fff504abdf.html](http://billingsgazette.com/news/state-and-regional/montana/montana-seeks-bids-for-new-prison-facility/article_f69f0861-fb4c-5490-bd7d-72fff504abdf.html) (noting that the Montana Legislature had already authorized \$3 million for the project, which was designed to be a prison for elderly inmates needing greater medical attention); Barbara Hoberock, *Prison to Hold Elderly, Infirm*, TULSA WORLD, Oct. 16, 2003, <http://www.tulsaworld.com/news/article/prison-to-hold-elderly.html> (discussing the costs of the Joseph Harp complex in Oklahoma); Williams, *supra* note 14 (discussing costs of building new facilities aimed at elderly and sick prisoners in California).

<sup>512</sup> See, e.g., Jones & Chung, *supra* note 14; see generally, AT AMERICA'S EXPENSE, *supra* note 38 (describing the general dislike that many taxpayers have for putting more money into prison construction or renovation).

<sup>513</sup> See Pupovac, *supra* note 137.

<sup>514</sup> *Id.*

<sup>515</sup> *Id.*

<sup>516</sup> Interview with Keith Davis, *supra* note 52.

<sup>517</sup> Interview with Christopher Epps, *supra* note 196.

<sup>518</sup> Interview with Justin Jones, *supra* note 23.

<sup>519</sup> *Id.*

The other concern about prisons that are exclusively or almost exclusively for elderly inmates is the “old codgers living with old codgers” syndrome warned against by Fellner.<sup>520</sup> Even in free society, situations where elderly individuals have exposure only to other elderly individuals have been proven to create problems, including increased risk of clinical depression and cognitive decline.<sup>521</sup> In Oklahoma, Jones said, their geriatric facility has gained a certain fear-driven stigma from the inmates, who call it “the death house.”<sup>522</sup> Furthermore, Title II of the ADA demands that public entities “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities”<sup>523</sup> — a mandate which prisons could conceivably violate by housing only elderly and disabled inmates in one location.<sup>524</sup>

Some states have dealt with this issue by setting up methods for inmates in geriatric facilities to have some interaction with younger inmates. Inmate-to-inmate care programs are a common way of accomplishing this.<sup>525</sup> Also, with regard to the ADA’s requirements, some elderly inmates with disabilities simply cannot be adequately and safely programmed in a mainstream population setting.<sup>526</sup> This is particularly true for inmates who have significant

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<sup>520</sup> See note 487, *supra*.

<sup>521</sup> See PRICE, *supra* note 253, at 10 (discussing potential mental and emotional challenges for elderly inmates lacking any exposure to younger prisoners); OLD BEHIND BARS, *supra* note 14, at 57 (quoting Fishkill Correctional Facility Superintendent William Connelly as saying that “keeping the older inmates active in a mixed age group population promotes their own physical and mental well-being.”); Fazel et al., *supra* note 61; Curtin, *supra* note 48, at 495 (“A lack of contact with younger inmates may reinforce a sense of isolation and make adjustment upon release more difficult.”).

<sup>522</sup> Interview with Justin Jones, *supra* note 23.

<sup>523</sup> 28 C.F.R. § 35.130(d) (2011) (“A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”); see generally *Olmstead v. L.C.*, 527 U.S. 581 (1999) (affirming the validity of the “integration mandate” under Title II of the ADA, the provision which applies to prisons).

<sup>524</sup> The Attorney General’s Title II regulations define “the most integrated setting” as “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.” 28 C.F.R. Pt. 35, App. A (2010) (addressing § 35.130). Thus, a “geriatric prison” housing only or mostly older prisoners with disabilities could violate this standard by preventing any interaction between these prisoners with disabilities and other people (presumably other prisoners) without disabilities.

<sup>525</sup> Such programs can be extremely effective in prisons which primarily house geriatric inmates but also have a limited number of younger prisoners in the population. See, e.g., KOZLOV, *supra* note 14, at 28, 29 (discussing examples of how “the older inmates ‘set an example for these younger guys’ and ‘have the respect of their younger peers.’”). Notably, Kozlov still supports the congregate housing model in most cases, but emphasizes the need for many older inmates to have exposure to people besides just other older inmates. *Id.* at 29.

<sup>526</sup> See OLD BEHIND BARS, *supra* note 14, at 57 (“[T]here is little doubt that ensuring elderly offenders are incarcerated in a manner that respects their human dignity may require transfer from general population units at some point during their incarceration.”).

cognitive impairments, such as dementia.<sup>527</sup> Thus, it would not be appropriate to house and program such inmates in a more integrated prison environment.<sup>528</sup>

Importantly, though, geriatric prison facilities must be prevented from becoming “death houses.”<sup>529</sup> Administrators must ensure that these facilities used primarily for elderly inmates include not only medical care and housing conditions aimed at older prisoners, but also include age-appropriate active treatment in their planning.<sup>530</sup> Without a good active treatment component, these facilities will indeed disintegrate into living morgues, places where old inmates go to wither and die.<sup>531</sup>

It is true that all of this added care comes at a price. Yet as Fischer pointed out, elderly inmates automatically present a higher cost to the prison system.<sup>532</sup> “We know that as inmates age, their cost to corrections goes up,” he said. “It goes up a lot. So you’re going to be paying more money for older prisoners anyway.”<sup>533</sup> The money, Fischer said, is better spent if used for a concentrated housing area where elderly prisoners can receive necessary care and accommodations without disrupting the general population.<sup>534</sup>

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<sup>527</sup> See *id.* at 53 (“At some point, cognitive problems can grow so severe that remaining in the general population is no longer an option.”)

<sup>528</sup> See *Olmstead*, 527 U.S. at 607. According to the Supreme Court, Title II entities are required to provide more integrated services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity. If it no longer is feasible for an elderly inmate to be housed in general population among younger, healthier inmates, then the situation would fail the first prong of this three-pronged test. Similarly, if the inmate with disabilities specifically does not want to remain integrated in general population, it would seem logical that the prison should respect that inmate’s wishes under the second prong of this test.

<sup>529</sup> This was the phrase which Oklahoma Department of Corrections Director Justin Jones said that many inmates used regarding the geriatric facility at the Joseph Harp complex. See note 522, *supra*.

<sup>530</sup> See Part IIA(3)(g), *supra*.

<sup>531</sup> See Interview with Mary Harrison, *supra* note 416; OLD BEHIND BARS, *supra* note 14, at 51 (describing the concern voiced by some correctional leaders that elderly inmates were “simply wasting away” in their facility).

<sup>532</sup> Interview with Brian Fischer, *supra* note 109.

<sup>533</sup> *Id.*

<sup>534</sup> *Id.* See also *Spotlight: Prison Gray*, CORRECTIONAL NEWS, Dec. 4, 2009, <http://www.correctionalnews.com/articles/2008/07/25/spotlight-julyaugust-2008-prison-gray> (quoting Fishkill Correctional Facility Superintendent William Connolly as saying, with regard to the high cost of geriatric prison facilities, “My response is always, ‘Pay me now or pay me later,’ because if you don’t take care of these inmates in a dedicated unit like this, you’ll pay a premium for their care in an outside healthcare facility.”). Some commentators also state that the costs of congregate care of elderly prisoners actually provide some cost-saving benefits. See Interview with Keith Davis, *supra* note 52 (“Prisons, by nature, can do things cheaper. With medical care, for example, we try to get the doctors to come to our facility, rather than the other way around.”); Curtin, *supra* note 48, at 493 (“Outpatient subspecialty care, hospital inpatient care, and rehabilitative and supportive services are easier to make at congregate facilities and are more cost effective owing to economies of scale.”).

Congregate housing is not the best fit for every elderly prisoner. Yet for older inmates requiring an enhanced level of medical care and special accommodations in their day-to-day routine, geriatric facilities have obvious advantages that cannot be ignored. As the number of elderly inmates in America continues to increase, developing new facilities with older prisoners in mind is an issue that all correctional systems will need to face.<sup>535</sup>

#### 4. Privately Owned Facilities

In January 2012, the Maine Legislature's Criminal Justice Committee unanimously rejected a bill to allow a private prison in their state.<sup>536</sup> Despite a proposal which asserted that installation of a private prison could create jobs in a rural part of Maine and could house prisoners less expensively than state-run prisons ever could, the Criminal Justice Committee was not persuaded.<sup>537</sup> Their rationale for voting down the bill, though, was as notable as the rejection itself: a discovery that no company wanted to operate a private prison focused on "serving elderly prisoners who need health monitoring and care."<sup>538</sup>

With this realization, a hope that a cost-effective plan had been found for dealing with the rise of elderly inmates vanished.<sup>539</sup> With prison leaders in many states, including Maine, stating that they are not equipped to meet the needs of an aging incarcerated population, several observers have taken several long looks at "private prisons" — facilities owned and operated by a corporation rather than by the state — as a possible solution.<sup>540</sup> For well over a decade now, corporate-operated prisons have advertised their services as a means of correctional services at a lower cost to the state.<sup>541</sup> Conceptually, the argument is a familiar one: a free-market enterprise is inherently able to provide services at a much lower price tag than any government-controlled

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<sup>535</sup> See Williams, *supra* note 14 ("Prison officials look at the projected increase in aging prisoners in their systems and realize in the very near future they will need to operate specialized geriatric facilities."); Abner, *supra* note 14, at 10 ("Specialized housing for elderly inmates appears to be another trend in the states."); WILLIAMS, *supra* note 49, at 7.

<sup>536</sup> George L. Tibbetts, Jr., *Advocacy Group Hails Defeat of Private Prison Legislation*, THE VALLEY VOICE, Jan. 10, 2012, <http://thevalleyvoice.org/2012/01/10/advocacy-group-hails-defeat-of-private-prison-legislation/46779/>.

<sup>537</sup> See *id.*

<sup>538</sup> *Id.*

<sup>539</sup> *Id.*

<sup>540</sup> See, e.g., Vince Beiser, *Pensioners or Prisoners? As the Number of Elderly Inmates Rises, Private Firms See A Hot Niche Market*, THE NATION, May 17, 1999, at 28–29; Ralph E. Stone, *Are Private, For-Profit Prisons the Answer to California's Overcrowded Prisons?*, BERKLEY DAILY PLANET, May 31, 2011, [http://www.berkeleydailyplanet.com/issue/2011-06-01/article/37908?headline=Eclectic-Rant-Are-Private-For-Profit-Prisons-the-Answer-to-California-s-Overcrowded-Prisons-](http://www.berkeleydailyplanet.com/issue/2011-06-01/article/37908?headline=Eclectic-Rant-Are-Private-For-Profit-Prisons-the-Answer-to-California-s-Overcrowded-Prisons-;); David M. Reutter, *Florida Provides Lesson in How Not to Privatize State Prisons*, PRISON LEGAL NEWS, June 2012, [https://www.prisonlegalnews.org/24135\\_displayArticle.aspx](https://www.prisonlegalnews.org/24135_displayArticle.aspx).

<sup>541</sup> Corrections Corporation of America, for instance, has made this argument—with great commercial success—since 1983. See <http://www.cca.com/>.

system.<sup>542</sup> In addition, correctional corporations claim that they provide greater economic benefits to local communities than state prisons ever could, given that they pay property and sales taxes, and hire primarily from populations in the region near where their facilities are built.<sup>543</sup>

Many states have taken notice of these arguments. In Vermont, for instance, around 20% of the state's total inmate population is housed with the private prison giant Corrections Corporation of America.<sup>544</sup> And the Green Mountain State is hardly unique in this decision. In fact, Corrections Corporation of America — a publically traded company that has been praised as one of “America’s Big Companies” in *Forbes* magazine<sup>545</sup> — claims that it operates the fifth-largest corrections system in America, behind only the federal government and three states.<sup>546</sup> Other private prison organizations, while not as large as Corrections Corporation of America, have also found widespread success in recent years.<sup>547</sup> Some states, including Pennsylvania and South Carolina, have contracted with private prison companies specifically for housing elderly and infirm prisoners.<sup>548</sup> Overall, the use of private prisons between 1999 and 2010 increased by 40% at the state level and by an astounding 784% in the federal prison system.<sup>549</sup>

Yet private prisons have also experienced criticism on the state and federal levels. As a corporation beholden to its shareholders, all of whom want the enterprise to be profitable, many observers worry that the money-making mission of private prisons can lead to human rights

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<sup>542</sup> See ADRIAN T. MOORE, PRIVATE PRISONS: QUALITY CORRECTIONS AT LOWER COST 15–20 (Reason Pub. Policy Inst. 1998); CHARLES W. THOMAS, CORRECTIONAL PRIVATIZATION: THE ISSUES AND THE EVIDENCE (Fraser Inst. 1996); Guy Shefer & Alison Liebling, *Prison Privatization—In Search of A Business-like Atmosphere?*, 8 CRIMINOLOGY & CRIM. JUSTICE 261, 275 (2008); Travis C. Pratt & Jeff Maahs, *Are Private Prisons More Cost-Effective Than Public Prisons? A Meta-Analysis of Evaluation Research Studies*, 45 CRIME & DELINQUENCY 358, 359–60 (1999); *Who Benefits When a Private Prison Comes to Town?* (NPR radio broadcast Nov. 5, 2011), available at <http://www.npr.org/2011/11/05/142058047/who-benefits-when-a-private-prison-comes-to-town>.

<sup>543</sup> See THOMAS, *supra* note 542; *Who Benefits?*, *supra* note 542; Stone, *supra* note 540.

<sup>544</sup> Interview with Andy Pallito, *supra* note 196 (“Today, about 20%+ of our total inmate count is housed with Corrections Corp. of America.”).

<sup>545</sup> Corrections Corp. of America, *About Us*, <http://www.cca.com/about/>; see also Walter Pavlo, *Corrections Corp. of America On Buying Spree — State Prisons For Sale?*, FORBES, Feb. 14, 2012, <http://www.forbes.com/sites/walterpavlo/2012/02/14/corrections-corp-of-america-on-buying-spree-state-prisons-for-sale/>.

<sup>546</sup> See <http://www.cca.com/about/>.

<sup>547</sup> Among the other leading players in the for-profit prison industry are The GEO Group, which has operated since 1984 and claims to save up to 30% in correctional costs, and Community Education Centers, which operates in 17 states with services from operating correctional facilities to providing in-prison treatment services. See GEO Group, Inc., *Welcome to the GEO Group*, <http://www.geogroup.com/index>; Community Education Centers, *Overview*, [http://www.cecintl.com/about\\_overview.html](http://www.cecintl.com/about_overview.html).

<sup>548</sup> Beiser, *supra* note 540.

<sup>549</sup> CODY MASON, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 1 (The Sentencing Project 2012).

abuses.<sup>550</sup> The corporate incentive to cut costs, many people fear, can create conditions of imprisonment that are poor, if not downright inhumane.<sup>551</sup> Cost-trimming can potentially lead to less training for corrections officers and fewer safety measures for both staff and inmates.<sup>552</sup> It can lead to a reduction in proper programming for inmates, meaning that the prison's work can turn from rehabilitation to mere custody, as private prisons do not make money on empty cells.<sup>553</sup> Most troubling of all, it can lead to inadequate health care, as inmates are not permitted to receive the often-costly level of medical services that they need.<sup>554</sup>

Corrections corporations leaders have issued strong statements denying that such abuses are taking place.<sup>555</sup> Yet at least some of the concerns seem to be well-founded, particularly in the

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<sup>550</sup> See, e.g., Scott Cohn, *Private Prison Industry Grows Despite Critics*, CNBC, Oct. 18, 2011, [http://www.msnbc.msn.com/id/44936562/ns/business-cnbc\\_tv/t/private-prison-industry-grows-despite-critics/#.UCGFmKDoJqN](http://www.msnbc.msn.com/id/44936562/ns/business-cnbc_tv/t/private-prison-industry-grows-despite-critics/#.UCGFmKDoJqN) (describing the danger of putting “a dollar figure on every inmate that is held at a private prison.”); Paul Krugman, *Prisons, Privatization, Patronage*, N.Y. TIMES, June 21, 2012, <http://www.nytimes.com/2012/06/22/opinion/krugman-prisons-privatization-patronage.html> (discussing horrific human rights abuses at private prisons in New Jersey); Douglas Clement, *Private vs. Public: The Prison Debate*, FEDGAZETTE (Minnesota), Jan. 1, 2002, [http://www.minneapolisfed.org/publications\\_papers/pub\\_display.cfm?id=2049](http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=2049) (questioning whether private prisons are cutting too many costs and sacrificing too much in quality correctional supervision and care); Editorial, *Private Prison: When the Popular Wisdom is Untested*, IDAHO STATESMAN, Mar. 9, 2012, <http://www.idahostatesman.com/2012/03/09/2027518/when-the-popular-wisdom-is-untested.html>; MASON, *supra* note 549, at 10–12; Beiser, *supra* note 540; Tibbetts, *supra* note 536.

<sup>551</sup> See note 550, *supra*. In particular, see MASON, *supra* note 549, at 11 (listing numerous documented instances of abuse and neglect that endangered inmates in private prisons); Krugman, *supra* note 550 (“Privatized prisons save money by employing fewer guards and other workers, and by paying them badly. And then we get horror stories about how these prisons are run. What a surprise!”)

<sup>552</sup> MASON, *supra* note 549, at 11; Krugman, *supra* note 550; Cohn, *supra* note 550; see also J.J. Hensley, *State Rips Private Prison, Begins Making Changes*, ARIZONA REPUBLIC, Aug. 20, 2010, <http://www.azcentral.com/news/articles/2010/08/19/20100819arizona-prison-escape-report-brk19-ON.html> (discussing an Arizona report describing a poorly run private facility that led to the escape of three inmates); Judith A. Greene, *Lack of Correctional Services: The Adverse Effect on Human Rights*, IN CAPITALIST PUNISHMENT: PRISON PRIVATIZATION AND HUMAN RIGHTS (Andrew Coyle, Rodney Neufield & Allison Campbell, eds., 2003) (discussing several operational flaws and deficiencies in the private prison system, among them inadequate staffing and subpar training for staff).

<sup>553</sup> See generally DAVID SHAPIRO, *BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION* (ACLU Nat'l Prison Project 2011) (stating that private prisons create a profit motive for keeping prisoners in confinement rather than preparing them for release into society, thus turning a basic criminal justice goal upside-down).

<sup>554</sup> See note 550, *supra*; Greene, *supra* note 552; SHAPIRO, *supra* note 553.

<sup>555</sup> See, e.g., CORRECTIONAL CORP. OF AMERICA, *CCA AT A GLANCE*, at 2, available at [http://www.cca.com/static/assets/10-0115\\_CCA\\_at-a-glance-2010-Flyer\\_.pdf](http://www.cca.com/static/assets/10-0115_CCA_at-a-glance-2010-Flyer_.pdf) (“CCA has a proven record of going above and beyond the standards of government-run prisons.”); RICHARD P. SEITER, *PRIVATE CORRECTIONS: A REVIEW OF THE ISSUES* 4–6 (disputing claims that private prisons are unsafe, inefficient, and unaccountable for their actions); Richard A. Oppel, Jr., *Private Prisons Found to Offer Little in Savings*, N.Y. Times, May 18, 2011, <http://www.nytimes.com/2011/05/19/us/19prisons.html?pagewanted=all> (quoting advocate for private prisons as refuting recent research data as being too limited); DAVID W. MILLER, *THE DRAIN OF PUBLIC PRISON SYSTEMS AND THE ROLE OF PRIVATIZATION: A CASE STUDY OF STATE CORRECTIONAL SYSTEMS*

area of health care. Recent reports by The New York Times and The Washington Post, as well as other media outlets, have pointed out significant health and safety problems caused by cost-cutting in private prisons.<sup>556</sup> Lawsuits against corrections corporations during the past two decades have highlighted terrible incidents of poor medical care and neglect.<sup>557</sup> Even the belief that private prisons are providing services more efficiently and less expensively than government-run prisons has been challenged in recent years, with studies demonstrating that the financial savings is actually far less than expected.<sup>558</sup>

Based on these significant risks alone, it seems that private prisons should not be a viable option for elderly prisoners. Of the entire prison population, the elderly inmates would be the group most profoundly harmed by subpar health care and inadequate staffing.<sup>559</sup> For some corrections officials, these hazards are enough for them to keep their elderly inmates away from corporate-run facilities entirely. “We try not to send the inmates who are old and infirm into the

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(2010), available at <http://www.csa.com/discoveryguides/prisons/review.php> (asserting that private prisons truly do reduce overcrowding and provide substantial savings for corrections budgets without sacrificing human rights values).

<sup>556</sup> Krugman, *supra* note 550; Kimberly Leonard, *Privatized Prison Health Care Scrutinized*, WASH. POST, July 21, 2012, [http://www.washingtonpost.com/national/health-science/privatized-prison-health-care-scrutinized/2012/07/21/gJQAgs70W\\_story.html](http://www.washingtonpost.com/national/health-science/privatized-prison-health-care-scrutinized/2012/07/21/gJQAgs70W_story.html).

<sup>557</sup> For instance, during the last 10 years, Corrections Corporation of America alone has been a defendant in 1,591 lawsuits. See Bob Sanders, *Proposal Under Review Would Put All New Hampshire Prisoners in Private, For-Profit Facilities—The First State To Do So*, NEW HAMPSHIRE BUS. REV., Apr. 6, 2012, <http://www.nhbr.com/news/956132-395/proposal-under-review-would-put-all-new.html>. Other for-profit prison corporations have also been susceptible to suits. In June 2011, for instance, a court awarded an \$8.4 million verdict against GEO Group for a wrongful death action in Oklahoma, citing GEO Group’s gross negligence. *Id.* A Texas jury awarded \$47.5 million in compensatory and punitive damages for malicious and wrongful death against GEO Group (then called Wackenhut) arising out of the brutal murder of an inmate that facility staff watched, laughing and smirking, until the inmate was dead. See Peter Gorman, *Private Prisons, Public Pain*, FORT WORTH WEEKLY, Mar. 10, 2010, <http://www.fwweekly.com/2010/03/10/private-prisons-public-pain/>. Often, these cases are settled out of court. For instance, in 2008, GEO Group negotiated a \$42.4 million civil settlement regarding an inmate death at a GEO facility in Texas. See Sanders, *supra*. In September 2011, Corrections Corporation of America settled a potential class-action lawsuit regarding alleged mistreatment of inmates at a facility in Idaho, a facility so violent that it became known as “Gladiator School.” See *Idaho Inmates Settle Prison Lawsuit*, AP WIRE, Sept. 20, 2011, available at <http://www.spokesman.com/stories/2011/sep/20/idaho-inmates-settle-prison-lawsuit/>. In 2012, a federal lawsuit over abuses at the privately run Walnut Grove Correctional Facility in Mississippi settled with a consent decree that highlighted barbaric conditions toward juvenile inmates in the prison. See Booth Gunter, *Investigation, Lawsuit Expose Barbaric Conditions at For-Profit Youth Prison in Mississippi*, SOUTHERN POVERTY LAW CTR., May 3, 2012, <http://www.splcenter.org/get-informed/news/splc-investigation-lawsuit-expose-barbaric-conditions-at-for-profit-youth-prison-i>.

<sup>558</sup> See Krugman, *supra* note 550 (“[D]espite many promises that prison privatization will lead to big cost savings, such savings . . . have simply not materialized.”); Oppel, *supra* note 555 (“Data there suggest that privately operated prisons can cost more to operate than state-run prisons — even though they often steer clear of the sickest, costliest inmates.”).

<sup>559</sup> See Part IIA, *supra*.

private prisons,” said Oklahoma Department of Corrections Director Justin Jones. “I don’t think that they’ll get the medical attention that they need.”<sup>560</sup>

Beyond these issues, though, is the problem encountered by the Criminal Justice Committee in Maine: Many private prison companies simply will not accept elderly inmates.<sup>561</sup> Older prisoners, with their substantially higher cost of custodial care, are not conducive to maintaining a healthy corporate profit margin.<sup>562</sup> As a consequence, prison corporations typically stipulate that they get to “cherry-pick” the healthiest inmates from a state’s population, allowing them to care for only the least-expensive prisoners — a category which does not include the elderly.

Overall, private prisons are risky places for elderly inmates to be housed, as well as facilities that are unlikely to accept many older prisoners in the first place. Even if private prisons truly are cost-effective for governments and economic stimulus engines for rural communities, these benefits do not outweigh the dangers of housing elderly individuals in such sites.<sup>563</sup>

In the end, it seems that there is no one-size-fits-all solution for housing elderly inmates. Private prisons seem to be unattractive for an aging population. Mainstreaming would work well for some older inmates, but not for those who are suffering from significant physical or mental disabilities and needing greater attention. Separate facilities offer significant benefits, but come at a high monetary cost, and require additional precautions to ensure that geriatric prisons do not turn into feared “death houses.” Instead, prison systems will be better off developing alternatives that best fit older inmates of varying physical and mental states, keeping in mind that elderly prisoners are an extremely diverse group.<sup>564</sup> As some corrections leaders already have noted, building new geriatric prison facilities is a step that is already necessary, and will become more so as the number of elderly people behind bars increases. Just as important, though, will be creating and maintaining a proper sustainable system by which elderly inmates can be screened and identified for an appropriate housing placement.

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<sup>560</sup> Interview with Justin Jones, *supra* note 23.

<sup>561</sup> See *Popular Wisdom*, *supra* note 550 (“Under its contract with the state (of Idaho) . . . [t]he state is solely responsible for housing elderly inmates.”); Opper, *supra* note 555 (“They leave the most expensive prisoners with taxpayers and take the easy prisoners.”); Greene, *supra* note 552; Beiser, *supra* note 540; Tibbetts, *supra* note 536.

<sup>562</sup> See Part IB, *supra*.

<sup>563</sup> See also Beiser, *supra* note 540, at 28 (“[A]ren’t there more sensible ways to deal with America’s tens of thousands of frail, sick, old convicts than keeping them behind bars?”).

<sup>564</sup> See Part IA, *supra*. See also CORRECTIONAL HEALTHCARE, *supra* note 49, at 57 (discussing the importance of properly classifying elderly inmates in accordance with their varying needs and conditions); OLD BEHIND BARS, *supra* note 14, at 52, 57 (noting that corrections officials recognize the need for better ways to classify elderly inmates according to their housing needs).

### C. Oversight Questions

In the midst of any series of questions about how something can be changed comes another equally essential point: How will we know that the changes taking place are truly in the best interest of all involved? Thus, it is important that prison systems consider not only the methods of meeting the needs of elderly inmates, but also the ways in which these methods will be overseen.

Given that the basic needs of elderly inmates are in many ways unique from the general prison population, the oversight of issues surrounding elderly prisoners should be tailored to their unique situation. It therefore seems logical that all state and federal corrections systems should have an “elderly inmates committee” designated for this purpose. To represent the most balanced and informed viewpoint possible, this committee should include representatives from the major stakeholders in this issue, including experienced corrections officers, representatives from facility medical staffs, and outside geriatrics specialists.<sup>565</sup> This committee should also have an inmate representative, chosen through a careful screening process. The chosen inmate should be somebody who is elderly under the prison system’s definition, but who is also in good enough mental and physical condition to meaningfully participate in the committee’s work.<sup>566</sup> The inmate should also be someone who has maintained a good behavior record while in prison.

This committee should be charged with establishing specific policy directives regarding matters pertaining to elderly inmates.<sup>567</sup> These directives should be written and published for use at all prisons within the state (or, in the case of the federal government, within all of the federal prisons).<sup>568</sup> Issues for which elderly inmate directives should be established include:

- Types of medical conditions which should always automatically lead to a timely visit (or visits) with an outside specialist in geriatric care.
- Procedures for elderly inmates to be given prescribed medications and medical devices (such as wheelchairs, canes, walkers, eyeglasses, dentures, special shoes, therapeutic back braces, etc.) in a timely manner, and specific protections against elderly inmates being denied these medications and medical devices without just cause.
- Basic requirements of programming/active treatment for elderly inmates.

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<sup>565</sup> See Part IIA (describing the importance of input from geriatrics professionals in forming best practices regarding elderly inmates).

<sup>566</sup> The inmate should have one vote, equal to all of the other members of the committee.

<sup>567</sup> Often, prison systems lack written directives that deal specifically with the treatment of elderly prisoners. See, e.g., Interview with Brian Fischer, *supra* note 109; Curtin, *supra* note 48, at 494–95.

<sup>568</sup> Putting the directives in writing is especially important for everyone involved — staff and inmates alike — in a prison system. Since everything in a prison is based on rules and routines, a set of written standards regarding elderly prisoners will help clarify what the expectations are for both the staff and the older inmates, avoiding disputes about what exactly is expected from both sides.

- Procedure for elderly inmates to request a special diet, and best practices for the facility to accommodate dietary needs of inmates.
- Specific training requirements for all staff members regarding unique needs of older individuals and best practices for accommodating those basic needs.
- Appropriate work assignments for elderly inmates, and medical criteria for when an inmate should not be given any work assignment at all.
- Specific procedures for elderly inmates to be evaluated and assigned to either a mainstream housing situation or a congregate housing situation.

In addition, this committee should also require the formation of elderly inmate committees at all correctional facilities. These facility committees — which should also be composed of corrections officers, facility medical personnel, and outside geriatric specialists — should act as special review boards for grievances made by elderly inmates for denials of proper medical care and treatment. It is true that prison systems already have a grievance process in place for the entire prison population.<sup>569</sup> Yet the unusual position of the elderly inmate, coupled with the growing numbers of elderly inmates in every prison system, necessitates a review board specifically for older prisoners.<sup>570</sup> Since health issues typically worsen faster for elderly inmates than they do for younger inmates, and since elderly inmates are recognized as generally being more vulnerable to victimization than younger inmates, it is important that elderly inmates have their grievances heard in an expedited manner.<sup>571</sup> A specific timeframe for review of elderly inmate grievances should be established by the state elderly inmates committee, allowing decisions to be rendered quickly and, if necessary, improvements made in a timely manner.

The creation of these oversight committees would not be meant to suggest that prisons will intentionally harm elderly inmates, nor that they will be negligent toward older prisoners. Instead, it is merely one more way in which prisons can ensure that elderly inmates are being treated in accordance with legal standards.<sup>572</sup> It safeguards the prison system as well as the prisoner. There will, of course, be times when elderly prisoners will bring complaints that are frivolous, and those complaints should certainly be dismissed. Yet for the times when the

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<sup>569</sup> Indeed, use of these internal grievance systems is now essential for inmates under the Prison Litigation Reform Act, which requires exhaustion of administrative remedies before the inmate can bring a suit in federal court. *See* Part IC, *supra*.

<sup>570</sup> *See* Part IIA, *supra*.

<sup>571</sup> *Id.*

<sup>572</sup> By the creation of written directives aimed at elderly prisoners, and by the creation of committees specifically aimed at oversight of conditions for older inmates, it would seem natural that proper conditions for older prisoners could be more easily enforced and ensured.

concerns are legitimate and genuine, this process will provide both a set of written standards for elderly inmates and an expedited process of reforming problems if those standards are not met.

### III Questions On The Outside: Concerns Facing Elderly Inmates From Policies Formed Beyond The Prison Walls

*“We have the ability to incarcerate a lot of people. But we also need to have an understanding of when we shouldn’t do this, or when it is just not feasible to do this anymore. It’s a situation where everyone involved feels very conflicted.”*

*-- Brie Williams, lead author of “Balancing Punishment and Compassion for Seriously Ill Prisoners”<sup>573</sup>*

The most immediate needs for elderly inmates exist on the inside of prisons, where an aging population presents unique and unprecedented demands on the American correctional system.<sup>574</sup> Yet the dramatic recent rise of elderly prisoners, together with the fact that this trend will continue for at least a few more decades, also presents important longer-term questions that go beyond the prison gates. Legitimate questions exist about the role that age and health condition should play in an individual’s term of incarceration.<sup>575</sup> As the prison population has aged, some observers have asked whether age and medical status should serve as a mitigating factor when sentencing a convicted criminal.<sup>576</sup> Even more widespread is the call for a reform of the parole system, implementing new ways in which an aging and sick inmate can get out of prison early.<sup>577</sup> These issues, on top of the immediate care issues discussed in the previous section, will also need to be dealt with as the number of elderly prisoners continues to rise.

These measures have important cost considerations. The longer an elderly inmate remains in prison, the greater his or her cost burden becomes to the government.<sup>578</sup> In addition, shorter prison terms for “qualified” elderly individuals will likely allow them better access to the type of specialized medical care that they need, and could ideally allow them a quicker rehabilitation back into free society — a key goal of correctional policy.<sup>579</sup> In certain circumstances, this could

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<sup>573</sup> Telephone Interview with Dr. Brie Williams, Associate Professor of Medicine, Division of Geriatrics, University of California, San Francisco (Mar. 15, 2012). Dr. Williams is the lead author of the report “*Balancing Punishment and Compassion for Seriously Ill Prisoners*.”

<sup>574</sup> See Part II, *supra*.

<sup>575</sup> See, e.g., AT AMERICA’S EXPENSE, *supra* note 38; OLD BEHIND BARS, *supra* note 14, at 80–82; WILLIAMS, *supra* note 49, at 8; Curtin, *supra* note 48, at 497–99; Interview with Ronald Aday, *supra* note 13; Interview with Brie Williams, *supra* note 573.

<sup>576</sup> See Part IIIA, *infra*.

<sup>577</sup> See Part IIIB, *infra*.

<sup>578</sup> See Part IB (discussing the significant costs of proper custodial care for elderly inmates).

<sup>579</sup> See Part ID (describing the importance of rehabilitation as a correctional goal); see also Part II, *supra* (discussing the tremendous strain that elderly inmates place on prison medical systems).

also promote reunification of families that had been split apart by the prison sentence, an important consideration for both the elderly individual and his or her family members.<sup>580</sup>

However, there are also strong arguments against age and sickness as a sentencing factor and against early release from prison for these same reasons. Crime victims and their families do not want to see the person who wronged them sentenced to a shorter term or permitted to leave prison early simply because he or she is feeble and sick.<sup>581</sup> Concerns abound that such allowances can lead to a “watering down” of the American criminal justice system, delivering a sense that crimes are not taken seriously by the government.<sup>582</sup> Furthermore, adjustments from prison society to free society are daunting for elderly individuals.<sup>583</sup> For someone who has spent most of his or her life in prison, it can be practically impossible.<sup>584</sup> Financially poor and commonly lacking any sort of family support on the outside, many released elderly prisoners find themselves unable to contribute to society at all.<sup>585</sup> What’s more, society typically doesn’t want them, either. Care facilities such as nursing homes commonly reject any person with a criminal record, particularly somebody who has committed a violent crime.<sup>586</sup> As a result, an elderly individual released from prison can easily find himself or herself on the street and

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<sup>580</sup> It is true that many elderly inmates are estranged from their family members. Yet for older prisoners who do have family “on the outside,” separation from their family can be extraordinarily difficult, particularly if the elderly inmate is in prison for the first time. *See* IT’S ABOUT TIME, *supra* note 70, at 5 (listing “separation from family and friends” as one of the key stressors that adversely affects an elderly inmate’s health).

<sup>581</sup> *See, e.g.*, Interview with Keith Davis, *supra* note 52; Interview with Carl Koenigsmann, *supra* note 76; Interview with Brie Williams, *supra* note 573.

<sup>582</sup> This is certainly an understandable concern, particularly for the crime victims themselves. *See, e.g.*, Ove, *supra* note 511 (quoting a murder victim’s family member who was upset about the idea of the perpetrator getting out of prison early because of age and terminal illness. “I know that it is expensive to keep an inmate in prison for the rest of his or her natural life,” the family member wrote. “However, has the advisory committee considered what the homicide has cost my family? Do you really think that we would feel compassion for the inmate who killed our son if he became terminally ill? He came very close to destroying our entire family!”).

<sup>583</sup> *See* WILLIAMS, *supra* note 49, at 8; CORRECTIONAL HEALTHCARE, *supra* note 49, at 42.

<sup>584</sup> *See, e.g.*, CRAIG HANEY, THE PSYCHOLOGICAL IMPACT OF INCARCERATION: IMPLICATIONS FOR POST-PRISON ADJUSTMENT (2002); Kirk Mitchell, *Elderly Parolees Get Help in Reintegrating*, DENVER POST, Aug. 3, 2010, [http://www.denverpost.com/news/ci\\_15663717](http://www.denverpost.com/news/ci_15663717) (describing the challenges of several long-term inmates who were released late in life, including one man who was behind bars for 50 years before he was released); *see also* JACK STEWART, THE REINTEGRATION EFFORT FOR LONG-TERM INFIRM AND ELDERLY FEDERAL OFFENDERS (RELIEF) PROGRAM 1, 2 (Correctional Serv. of Canada 1999).

<sup>585</sup> *See* note 584, *supra*; *see also* Interview with Brian Fischer, *supra* note 109 (“You have to look at where they’re going to end up and what they’re going to do, and that can be very tough . . . I mean, we can say that somebody is “employable,” but who’s really going to hire them? Unemployment’s already high and the economy’s already tough. Now, you have somebody with a criminal record and a high age trying to get a job? That’s not easy.”).

<sup>586</sup> *See* Part IIIB(3), *infra*.

destitute with truly no place left to turn — worse off, in fact, than if he or she were still behind bars.<sup>587</sup>

This section considers these broader issues presented by the rise of elderly inmates. In doing so, it looks at the two areas that are and will continue to be under the greatest scrutiny: sentencing and early release.

## A. Sentencing Questions

### 1. Type And Length Of Sentences As A Contributing Factor

One out of every 100 American adults is incarcerated.<sup>588</sup> Altogether, the number of American behind bars surpasses the total population of many states.<sup>589</sup> Yet these numbers, by themselves, do not truly reflect a problem. If an individual has committed a crime worthy of a prison sentence, that person deserves to go to prison, regardless of how the imprisonment will affect the national prison statistics. As Paul G. Cassell, a former federal district court judge from Utah, told *The New York Times* in 2008: “One out of every 100 adults is behind bars because one out of every 100 adults has committed a serious criminal offense.”<sup>590</sup>

However, a worthy groundswell of support has existed for more than two decades to re-examine what the United States considers to be “a serious criminal offense.”<sup>591</sup> Particular attention is currently focused on prisoners serving sentences for committing a non-violent crime.<sup>592</sup> This demographic encompassed more than half of the United States prison and jail population as of 2010.<sup>593</sup> Between 1978 and 1996, non-violent offenders comprised 77% of the growth in intake to state and federal prisons.<sup>594</sup> The nationwide rise of non-violent criminals entering American prisons has continued from that time, with more than one million non-violent

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<sup>587</sup> Avoiding this situation, according to Commissioner Fischer, “comes down to the support system that (the inmate) has out in the free world.” Interview with Brian Fischer, *supra* note 109.

<sup>588</sup> ONE IN 100, *supra* note 94; Adam Liptak, *U.S. Imprisons One in 100 Adults, Report Finds*, N.Y. TIMES, Feb. 29, 2008, <http://www.nytimes.com/2008/02/29/us/29prison.html>.

<sup>589</sup> *See* note 96, *supra*. Interestingly, though, the total prison population of the United States actually decreased slightly in 2010, the first decline in America’s incarcerated population since 1972. PAUL GUERINO, PAGE M. HARRISON, & WILLIAM J. SABOL, PRISONERS IN 2010 1–2 (U.S. Dep’t of Justice 2011).

<sup>590</sup> Liptak, *supra* note 588.

<sup>591</sup> *See* notes 105 & 106, *supra*.

<sup>592</sup> *See, e.g.*, PEW CTR. ON THE STATES, PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA 1 (“Some of the money that we are spending on locking up low-risk, non-violent inmates should be shifted to strengthening community corrections programs like probation and parole.”); IRWIN, SCHIRALDI & ZIEDENBERG, *supra* note 106; Schlosser, *supra* note 465; White, *supra* note 103.

<sup>593</sup> SCHMITT ET AL., *supra* note 94, at 1.

<sup>594</sup> IRWIN, SCHIRALDI & ZIEDENBERG, *supra* note 106, at 3; *see also id.* at Table 1.

criminals in U.S. correctional facilities today.<sup>595</sup> Non-violent drug offenders alone made up one-fourth of the American prison population in 2011.<sup>596</sup>

Today, all U.S. states use prison time to punish certain crimes which other countries would penalize with community service, fines, house arrest, treatment programs, or other incarceration alternatives.<sup>597</sup> Some states use incarceration to punish offenses which other democracies do not consider a crime at all.<sup>598</sup> “There are more ways than ever to end up in prison in America,” sociologist Ronald Aday said. “Crimes which might be punished by other means are instead punished by going directly to prison. We have to ask ourselves what this is accomplishing.”<sup>599</sup>

The inquiry does not end with the sheer number of incarceration-based punishments, either. The length of prison sentences for certain crimes has also received widespread criticism in recent years.<sup>600</sup> Since the 1980s, legislatures have imposed mandatory minimum sentences for a broad range of crimes, restricting judges’ discretion in sentencing.<sup>601</sup> An increase in “determinate sentences” — laws which set a fixed prison term rather than allowing prisoners to apply for conditional release after a minimum term — resulted in more prisoners becoming long-time guests of the government.<sup>602</sup> Many states have passed “truth-in-sentencing laws” requiring that certain categories of offenders serve a high percentage of their sentence (usually 85%) before even having the chance to go before a parole board, increasing the length of time that sentenced individuals have to stay in prison.<sup>603</sup> Statutes aimed at punishing repeat offenders, such as “three strikes laws,” also keep people in prison for longer periods of time.<sup>604</sup>

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<sup>595</sup> *Id.* at 4 (noting that 1998 was the first year when the American non-violent prisoner population exceeded one million individuals).

<sup>596</sup> SCHMITT ET AL., *supra* note 94, at 1.

<sup>597</sup> See Adam Gopnik, *The Caging of America*, THE NEW YORKER, Jan. 30, 2012, [http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat\\_atlarge\\_gopnik?currentPage=1](http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik?currentPage=1); Liptak, *supra* note 94 (“Americans are locked up for crimes — from writing bad checks to using drugs — that would rarely produce prison sentences in other countries.”); see generally MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1996) (asserting that while other countries have a preventative criminal justice system, the United States has a reactive criminal justice system).

<sup>598</sup> Note 59, *supra*.

<sup>599</sup> Interview with Ronald Aday, *supra* note 13.

<sup>600</sup> See note 94, *supra*.

<sup>601</sup> See James P. Lynch & William J. Sabol, *Did Getting Tough On Crime Pay?*, URBAN INST., Aug. 1, 1997, <http://www.urban.org/publications/307337.html>; DITTON & WILSON, *supra* note 100, at 1; MACKENZIE, *supra* note 103, at 1; Gopnik, *supra* note 597.

<sup>602</sup> See note 601, *supra*.

<sup>603</sup> See Interview with Christopher Epps, *supra* note 196 (“Mississippi enacted the Truth in Sentencing Laws in 1995, and incorporated more crimes than the federal government required for TIS. As a result, more people are incarcerated for longer periods of time, with lengthier sentences than many states.”); see also Peter B. Wood & R. Gregory Dunaway, *Consequences of Truth-in-Sentencing: The Mississippi Case*, 5 PUNISHMENT & SOCIETY 139–54 (2003); Emily G. Owens, *Truthiness in Punishment: The Far*

A look at some of the crimes for which the longest sentences have been handed down reveals an array of offenses that includes plenty of horrific crimes — murder, rape, aggravated assault, sex offenses involving minors.<sup>605</sup> Yet it also includes too many situations where the punishment does not seem to fit the crime. For instance, the United States Supreme Court affirmed two 25 years-to-life sentences for a man who stole \$153 of videotapes, because the man had committed two prior felonies.<sup>606</sup> Individuals serving life sentences in the U.S. today also include “getaway drivers in convenience store robberies gone awry, aging political radicals from the 1960s and 1970s, women who killed their abusive partners, three-strikers serving 25 years-to-life for trivial infractions like stealing two piece of pizza, and men who killed their teenage girlfriends decades ago in a fit of jealous rage.”<sup>607</sup> In one case that has received particularly significant attention recently, the Scott sisters of Mississippi — both of them first-time offenders — were sentenced to consecutive life terms for stealing \$11 in a theft where nobody was injured.<sup>608</sup> They spent 16 years behind bars before receiving a pardon from the governor (under substantial pressure from civil rights organizations) when one of the sisters developed severe kidney problems and needed a transplant from the other.<sup>609</sup>

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*Reach of Truth-in-Sentencing Laws in State Courts*, 8 J. EMPIRICAL LEGAL STUD. 239–61 (2011); Lynch & Sabol, *supra* note 601.

<sup>604</sup> See Thomas B. Marvell & Carlisle Moody, *The Lethal Effects of Three Strikes Laws*, 30 J. LEGAL STUD. 89, 90–95 (2001); Emily Bazelon, *Arguing Three Strikes*, N.Y. TIMES, May 21, 2010, <http://www.nytimes.com/2010/05/23/magazine/23strikes-t.html?pagewanted=all>; Jack Leonard, *After 17 Years, Three-Strikes Law is Still Hotly Debated*, L.A. TIMES, Sept. 5, 2011, <http://articles.latimes.com/2011/sep/05/local/la-me-home-depot-theft-20110905>; ONE IN 100, *supra* note 94, at 3; MACKENZIE, *supra* note 103, at 22; White, *supra* note 103.

<sup>605</sup> See, e.g., OLD BEHIND BARS, *supra* note 14, at 30 (“Persons convicted of violent crimes, including violent sex offenses, typically receive the longest prison sentences and for that reason they “stack up” in the prison population . . . They are thus more likely to be growing older behind bars, fueling the aging prison population.”); see also Interview with Keith Davis, *supra* note 52 (noting that a significant percentage of elderly inmates are people who committed heinous crimes and deserve to receive lengthy prison terms). “Traditionally, violent offenders stay in prisons the longest,” Davis said, noting that this held true for the demographics at Deerfield Correctional Facility. “So who gets old in prison? Often, It’s the rapist and the murderer.”)

<sup>606</sup> *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003); see also *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (upholding 25-to-life sentence of a man who stole three golf clubs, because it was his third felony conviction under California law).

<sup>607</sup> Marie Gottschalk, *Days Without End: Life Sentences and Penal Reform*, PRISON LEGAL NEWS (January 2012), [https://www.prisonlegalnews.org/%28S%28utm\\_vzn45swlaxf55nhjhc355%29%29/24102\\_displayArticle.aspx](https://www.prisonlegalnews.org/%28S%28utm_vzn45swlaxf55nhjhc355%29%29/24102_displayArticle.aspx).

<sup>608</sup> See Transcript of Record at 177, *Scott v. Mississippi*, No. 94-KA-01063 (Dec. 17, 1996), available at <http://www.scribd.com/doc/21748684/Scott-Sisters-Opinion>; Bob Herbert, *So Utterly Inhumane*, N.Y. TIMES, Oct. 12, 2010, [http://www.nytimes.com/2010/10/12/opinion/12herbert.html?\\_r=1](http://www.nytimes.com/2010/10/12/opinion/12herbert.html?_r=1).

<sup>609</sup> See Krissah Thompson, *Miss. Gov. Haley Barbour to Free Sisters Sentenced to Life in Prison for Robbery*, WASH. POST, Dec. 30, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/29/AR2010122905093.html>; Susan Donaldson James, *Supporters Applaud*

Importantly, as Vermont Department of Corrections Commissioner Andy Pallito pointed out, relying too heavily on specific anecdotes about long sentences could be dangerous.<sup>610</sup> “I believe that on balance, judges do a pretty remarkable job given the information that they have to work with,” Pallito said. “There will always be room for improvement, and the better that we get at giving judges information regarding the cases in front of them, the better the outcome. Judges walk a thin line between a fair trial and trying to gain enough information to make a good decision.”<sup>611</sup> Yet when the discretion of judges is greatly limited, as many laws during the last three decades have done, even the most fair-minded arbiter of justice can do only so much.<sup>612</sup> And hard data demonstrates that the increased use of lengthy prison sentences in the U.S. goes well beyond anecdotes. As of 2010, 15 states had prison populations with more than 10% of their inmates serving life sentences: California (20%), New York (18.0%), Alabama (17.3%), Massachusetts (17.1%), Nevada (16.4%), Delaware (13.8%), Georgia (13.1%), Washington (12.5%), Nebraska (11.8%), Hawaii (11.6%), Florida (11.3%), Louisiana (10.9%), Tennessee (10.5%), Ohio (10.4%), and West Virginia (10.4%).<sup>613</sup>

The sentencing trend that has received the most attention, though, is the increased use of life sentences without any possibility of parole.<sup>614</sup> The total number of inmates serving life without the possibility of parole sentences has more than tripled since 1992.<sup>615</sup> Described by some criminal justice experts as the “penultimate penalty,” behind only the death penalty, it is the weightiest sentence available in many U.S. states.<sup>616</sup> As former Alabama Assistant Attorney

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*Plan to Release Scott Sisters in Kidney Deal*, ABC, Dec. 30, 2010, <http://abcnews.go.com/US/scott-sisters-released-16-years-prison-kidney-deal/story?id=12508754#.UCPYyqDoJqM>.

<sup>610</sup> Interview with Andy Pallito, *supra* note 196.

<sup>611</sup> *Id.*

<sup>612</sup> See note 601, *supra*.

<sup>613</sup> Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FEDERAL SENTENCING REPORTER 27, 31 (2010).

<sup>614</sup> See, e.g., GORDON HAAS & LLOYD FILLION, LIFE WITHOUT PAROLE: A RECONSIDERATION 2, 7–11 (2003); ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 2, 7–8 (The Sentencing Project 2009); Catherine Appleton & Bret Grover, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597–615; Editorial, *The Misuse of Life Without Parole*, N.Y. TIMES, Sept. 12, 2011, <http://www.nytimes.com/2011/09/13/opinion/the-misuse-of-life-without-parole.html>; Kevin Johnson, *Report Wants Life Without Parole Abolished*, USA TODAY, July 22, 2009, [http://www.usatoday.com/news/washington/2009-07-22-lifers\\_N.htm](http://www.usatoday.com/news/washington/2009-07-22-lifers_N.htm); DITTON & WILSON, *supra* note 100, at 6; Nellis, *supra* note 613, at 31.

<sup>615</sup> See Johnson, *supra* note 614.

<sup>616</sup> Many states have outlawed the death penalty, but every state in America uses some form of life without parole. See NELLIS & KING, *supra* note 614, at 10; *Misuse of Life Without Parole*, *supra* note 614 (also noting that while Alaska does not officially use life without parole sentences, the state does employ 99-year sentences as a *de facto* version of life without parole).

General Edward Carnes once described it: “[L]ife without parole means just that — no parole, no communication, no way out until the day you die, period.”<sup>617</sup>

For certain heinous crimes, such a severe penalty seems to be a worthwhile option. Notably, it provides an alternative to the death penalty, where mistaken convictions are irreversible.<sup>618</sup> Yet the prevalence with which life without parole is presently used deserves a second look. Of the approximately 141,000 prisoners sentenced to life in the United States today, nearly one-third are serving sentences without the possibility of parole.<sup>619</sup> In six states — Illinois, Iowa, Maine, Louisiana, Pennsylvania, and South Dakota — all life sentences are automatically without the possibility of parole.<sup>620</sup> In 1984, the federal system abolished parole for crimes committed on or after November 1, 1987, leaving federal life-term prisoners without the possibility of ever getting out again.<sup>621</sup> Even for states that do not mandate life without parole for all of their life sentences, life without parole can be a frequently wielded sword. As of 2010, 27 states had made life without parole a mandatory sentence for at least one specific offense.<sup>622</sup>

Altogether, more than 40,000 inmates in America today are serving life sentences without any chance of release — an experience that Lewis E. Lawes, former warden of New York State’s storied Sing Sing prison, once described in vivid terms. “Death fades into insignificance when compared with life imprisonment,” Lawes stated. “To spend each night in jail, day after day, year after year, gazing at the bars and longing for freedom, is indeed expiation.”<sup>623</sup> To know that this routine will last forever, that you have no hope of ever redeeming yourself in the eyes of society, has been described as the most desperate feeling on earth.<sup>624</sup> Even the U.S. Supreme Court has taken note of the most damaging impact in a life without parole setting: a complete “denial of hope.”<sup>625</sup>

Of course, all of this could be worthwhile if the societal gain were clear. Certainly, the lengthy sentences do have their supporters. In *Harmelin v. Michigan*, the U.S. Supreme Court

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<sup>617</sup> Andrew H. Malcolm, *Capital Punishment is Popular, But So Are Its Alternatives*, N.Y. TIMES, Sept. 10, 1989, <http://www.nytimes.com/1989/09/10/weekinreview/the-nation-capital-punishment-is-popular-but-so-are-its-alternatives.html?pagewanted=all&src=pm>.

<sup>618</sup> See Appleton & Glover, *supra* note 614, at 603.

<sup>619</sup> Gottschalk, *supra* note 607.

<sup>620</sup> See NELLIS & KING, *supra* note 614, at 5; Gottschalk, *supra* note 607.

<sup>621</sup> See ROBERT Z. WELSH, TOUGH ON CRIME AND THE BUDGET: THE DIFFICULT BALANCING ACT OF PUBLIC SAFETY AND SKYROCKETING PRISON COSTS 9 (Ga. Budget & Policy Inst 2008) (“The U.S. Sentencing Commission’s guidelines went into effect on November 1, 1987, and mandated that defendants sentenced for offenses committed on or after that date are to serve determinate sentences. Parole for federal offenses was abolished.”).

<sup>622</sup> Nellis, *supra* note 613, at 28.

<sup>623</sup> Gottschalk, *supra* note 607.

<sup>624</sup> See Interview with Ronald Aday, *supra* note 13.

<sup>625</sup> *Graham v. Florida*, 560 U.S. \_\_\_ (2010) (slip op., at 19). In *Graham*, the Supreme Court held that juveniles convicted of non-homicide offenses cannot be sentenced to life without parole. *Id.* (slip op., at 31).

held that life without parole sentences do not require the “super due process” necessary in a death penalty case.<sup>626</sup> The Court paid special attention to the role of these sentences in removing the most dangerous criminals from society forever and reinforcing the importance of the rule of law.<sup>627</sup> Yet more recent research has indicated that longer prison sentences do not necessarily correlate to a greater reduction in crime.<sup>628</sup> Instead, these studies show that the certainty of being punished is a much better deterrent than the actual severity of the penalty.<sup>629</sup> If this research is accurate, then a sentence of 15 years will actually have an impact that is as great — or even greater — than imposing a life term.

Corrections officials themselves have become concerned about coping with the results of these trends. “We have an awful lot of people serving life without parole sentences in our prisons,” said Oklahoma Department of Corrections Director Justin Jones. “They’re guaranteed to be with us (until) they die. We can’t do anything about that. The state ends up holding the bag on these cases.”<sup>630</sup> Mississippi Department of Corrections Commissioner Christopher Epps expressed similar doubts about aspects of his state’s sentencing policies. “My standard reaction is (that) we need to figure out who we’re afraid of and who we’re mad at,” Epps said. “If an alternative to incarceration is available for a particular offender, use that first, especially for first-time offenders.”<sup>631</sup> Asked if he felt that Mississippi’s sentencing laws were currently appropriate, Epps said no. “Not for all crimes,” he stated. “There are many alternatives to incarceration.”<sup>632</sup>

Precisely when those alternatives should be used, and what those alternatives should be, cannot be answered here. These are value judgments that will need to be made individually by each jurisdiction. Yet at a time when more people being sentenced to prison for longer terms is

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<sup>626</sup> See 501 U.S. 957, 994–95 (1991); see also J. Mark Lane, *Is There Life Without Parole? A Capital Defendant’s Right to a Meaningful Alternative Sentence*, 26 LOY. L.A. L. REV. 327, 351–53 (1993).

<sup>627</sup> See *Harmelin*, 501 U.S. at 989–90.

<sup>628</sup> See PEW CTR. FOR THE STATES, *TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS* (2012); JUSTICE POLICY INST., *FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS 3* (2011) (“U.S. research shows little to no correlation between time spent in prison and recidivism rates.”); BARBARA S. VINCENT & PAUL J. HOFER, *THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS 14* (Fed. Judicial Ctr. 1994) (“Mandatory minimums have had no observable effect on crime.”); see also Note 106, *supra*.

<sup>629</sup> See, e.g., Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 769 (2010) (quoting the 18<sup>th</sup>-century Italian philosopher Cesare Beccaria in stating that “The certainty of a punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity; even the least evils, when they are certain, always terrify men’s minds . . . .”); SCHMITT ET AL., *supra* note 94, at 9 (“[A]nalysts are nearly unanimous in their conclusion that continued growth in incarceration will prevent considerably fewer, if any, crimes than past increases did and will cost taxpayers substantially more to achieve.”); WRIGHT, *supra* note 233, at 1 (“Research to date indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce deterrent benefits.”) (emphasis supplied).

<sup>630</sup> Interview with Justin Jones, *supra* note 23.

<sup>631</sup> Interview with Christopher Epps, *supra* note 196.

<sup>632</sup> *Id.*

clearly contributing to the increase in elderly prisoners — a major contributor to corrections becoming the second-fastest growth area of state budgets, far outpacing areas such as education<sup>633</sup> — every state would benefit from scrutinizing its own judgments in this area. Indeed, a number of states — including Arizona, California, Kansas, Mississippi, Nevada, New York, North Carolina, South Carolina, Texas, and West Virginia — have already undertaken detailed studies and/or introduced new measures with an eye toward sentencing reform.<sup>634</sup>

Each state in the nation would do well to follow suit. Examining how to reduce prison time for low-risk offenders (i.e., first-time criminals who commit non-violent crimes) without jeopardizing public safety goals is vital, as is determining whether programs that are alternatives to incarceration can be added or broadened.<sup>635</sup> Looking for ways to improve sentencing laws to allow for more individualized “evidence-based sentencing” as opposed to one-size-fits-all sentencing recommendations will also be valuable.<sup>636</sup>

In 2012 alone, states from Hawaii to New Jersey passed laws aimed at altering their sentencing practices and employing incarceration alternatives.<sup>637</sup> With the total cost of state

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<sup>633</sup> Recently, this has become a highly publicized point of contention in many states. *See, e.g.*, Elizabeth Prann, *States Spend Almost Four Times More Per Capita on Incarcerating Prisoners Than Educating Students*, *Studies Say*, FOX, Mar. 14, 2011, <http://www.foxnews.com/politics/2011/03/14/states-spend-times-incarcerating-educating-studies-say-464156987/> (discussing reports from the U.S. Department of Justice and the National Education Association which reveal that most states spend three-to-four times more money per capita on prisons than on state education systems).

<sup>634</sup> *See* Gregory Pratt, *Arizona Attorneys for Criminal Justice Release New Report on Sentencing Reform*, PHOENIX NEW TIMES, Feb. 1, 2011, [https://www.google.com/#hl=en&sclient=psy-ab&q=arizona+attorneys+for+criminal+justice+release+report+highlighting+sentencing+reform&oq=arizona+attorneys+for+criminal+justice+release+report+highlighting+sentencing+reform&gs\\_l=hp.3...3986.20362.0.20675.94.53.5.17.17.1.1251.12945.0j39j8j5-3j0j3.53.0...0.0...1c.GzQeRQFonO8&pbx=1&bav=on.2,or.r\\_gc.r\\_pw.r\\_qf.&fp=452d7de8d5ce46bd&biw=1280&bih=615](https://www.google.com/#hl=en&sclient=psy-ab&q=arizona+attorneys+for+criminal+justice+release+report+highlighting+sentencing+reform&oq=arizona+attorneys+for+criminal+justice+release+report+highlighting+sentencing+reform&gs_l=hp.3...3986.20362.0.20675.94.53.5.17.17.1.1251.12945.0j39j8j5-3j0j3.53.0...0.0...1c.GzQeRQFonO8&pbx=1&bav=on.2,or.r_gc.r_pw.r_qf.&fp=452d7de8d5ce46bd&biw=1280&bih=615) (discussing recent reviews of sentencing practices in Arizona, New York, Mississippi, and the Carolinas); STATE EFFORTS AT SENTENCING REFORM, *supra* note 98, at 1–2 (discussing substantial efforts in Nevada, Kansas, Kentucky, and South Carolina); ONE IN 100, *supra* note 94, at 17 (describing measures toward sentencing reform in Texas); *Report Urges W.Va. Sentencing, Parole Reforms*, AP WIRE, Feb. 22, 2012, *available at* <http://www.wvgazette.com/News/politics/201202220184>.

<sup>635</sup> Again, evidence shows that other democracies around the world have successfully employed a greater number of incarceration alternatives in their criminal justice systems. This saves a substantial amount of money in their criminal justice budgets while evidently not resulting in a substantial increase in crime rates. *See* note 597, *supra*.

<sup>636</sup> *See* STATE EFFORTS AT SENTENCING REFORM, *supra* note 98, at 1–2 (“Research shows that implementation of evidence-based practices leads to an average decrease in crime of between 10 percent and 20 percent. Programs that are not evidence-based, on the other hand, tend to see no decrease or even a slight increase in crime.”).

<sup>637</sup> *See* Phillip Smith, *Some States Move on Sentencing Reform*, DRUG WAR CHRON., July 17, 2012, [http://stopthedrugwar.org/chronicle/2012/jul/17/some\\_states\\_move\\_sentencing\\_refo](http://stopthedrugwar.org/chronicle/2012/jul/17/some_states_move_sentencing_refo). Other states that passed legislation in 2012 aimed at sentencing reform include Illinois, Missouri, Ohio, Pennsylvania, and Tennessee. *Id.* In Alabama, a substantial sentencing reform bill passed the state legislature, aimed at changing the composition of the Alabama Sentencing Commission and demanding the passage and implementation of new truth-in-sentencing guidelines. *See Ward’s Sentencing Reform Bill Passes*

spending on corrections now above \$50 billion per year,<sup>638</sup> it would seem sensible for all states to seek and employ new solutions in this area. Doing so would reduce the number of people growing old behind bars and requiring expensive care as a result, thereby saving a significant amount of taxpayer dollars.<sup>639</sup> At the same time, it would also work toward meeting a key goal of correctional organizations: finding and employing ways to rehabilitate criminal offenders back into American society.<sup>640</sup>

## 2. Age As A Mitigating Factor At Sentencing

Marilyn Devine looks like someone who could be anybody's grandmother. With gray hair and blue eyes, the 76-year-old retired nurse hardly fits the standard profile of a bank robber.<sup>641</sup> Yet on March 6, 2006, Devine took an unloaded pistol, masked her face with a black-and-gold scarf, and held up a bank near Pittsburgh, walking away with nearly \$6,000.<sup>642</sup> Police apprehended her after a five-mile car chase.<sup>643</sup> At the police station, she told the arresting officers that she had committed the robbery for her 40-year-old son, who was unemployed and threatening to kill himself unless he could somehow get more money.<sup>644</sup> Later, Devine was tested by a psychologist and diagnosed with clinical depression, likely stemming from the ordeal with her son.<sup>645</sup>

There was no doubt that Devine was guilty of the heist.<sup>646</sup> The question, though, was what to do with her. Under the law, she was eligible for a prison sentence of 34 years.<sup>647</sup> Yet opinions were mixed about what kind of a sentence she should actually receive.<sup>648</sup> Raymond

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*Legislature*, SHELBY CNTY. REPORTER (Alabama), May 11, 2012, <http://www.shelbycountyreporter.com/2012/05/11/ward%E2%80%99s-sentencing-reform-bill-passes-legislature/>. California, home of the nation's most infamous "three strikes" law, is looking at proposed revisions to the law that would give "third strike" offenders a chance to reduce the length of their sentences by meeting certain initiatives. See Dan Levine & Mary Slossen, *Softer California Three-Strikes Law Would Save on Older Inmates*, Reuters, July 11, 2012, available at <http://news.yahoo.com/softer-california-three-strikes-law-save-older-inmates-050421459.html>.

<sup>638</sup> STATE EFFORTS AT SENTENCING REFORM, *supra* note 98, at 2. By some accounts, corrections is the second largest area of spending for states, trailing only Medicaid in state budgets. See *id.*

<sup>639</sup> Notes 614, 621 & 628, *supra*.

<sup>640</sup> See Part ID, *supra*.

<sup>641</sup> Gabrielle Banks, 76-year-old Grandmother Sentenced in Bank Robbery, PITTSBURGH POST-GAZETTE, Mar. 17, 2012, <http://www.post-gazette.com/stories/local/neighborhoods-south/76-year-old-grandmother-sentenced-in-bank-robbery-492252/>; Mark Houser, *No Black-and-White Answers to Graying of State Prisons*, PITTSBURGH TRIBUNE-REVIEW, Apr. 23, 2007, <http://tribune-review-pittsburgh.vlex.com/vid/black-white-answers-graying-prisons-192494951>.

<sup>642</sup> Banks, *supra* note 641.

<sup>643</sup> *Id.*

<sup>644</sup> *Id.*

<sup>645</sup> *Id.*

<sup>646</sup> Houser, *supra* note 641; Banks, *supra* note 641.

<sup>647</sup> Houser, *supra* note 641.

<sup>648</sup> Houser, *supra* note 641; Banks, *supra* note 641.

Devine, her 79-year-old husband, said that a lengthy prison sentence “would be a disaster for both of us.”<sup>649</sup> A Carnegie Mellon professor who had worked on a state committee researching issues facing elderly inmates weighed in with comments that Devine should be sentenced only to community service.<sup>650</sup> However, another member of that state committee, Mansfield University Professor Scott Thornsley, remarked that Devine should not receive “a ‘get out of jail free card’” because of her age.<sup>651</sup> “I know full well she could die in prison, and that’s unfortunate,” Thornsley told the *Pittsburgh Tribune-Review*. “But we must have consequences.”<sup>652</sup>

In the end, though, Devine’s consequences did not include a prison term.<sup>653</sup> Instead, she was sentenced to a 20-year probation period that included 23 months of house arrest.<sup>654</sup> She also was fined \$10,000 for the duress her victims suffered.<sup>655</sup> At sentencing, the trial judge appeared to be satisfied that justice had been served on the elderly offender.<sup>656</sup> A significant penalty had been imposed to send a message to her and to society, but the lack of prison time kept Devine away from a situation that she — and, perhaps, her husband — might not survive.

Another grandmother, however, was not as fortunate. Houston resident Elisa Castillo had a clean criminal record before being convicted in 2009 of conspiracy to smuggle drugs into the U.S. from Mexico.<sup>657</sup> Yet neither Castillo’s age nor her lack of previous convictions was enough to keep the trial judge from sentencing her to life without parole.<sup>658</sup> Refusing to plead guilty, she ultimately left the courtroom with a sentence longer than repeat drug offenders receive.<sup>659</sup> Today, her home is a prison where she is a generation older than her cell mates, who refer to her as “grandma.”<sup>660</sup>

The debate surrounding these two cases, and the startling differences between their outcomes, epitomizes the dilemma facing judges every time an elderly criminal defendant comes before their bench. Throw the book at them, and the person becomes yet another elderly prisoner, straining the resources of prisons and requiring large amounts of taxpayer money from corrections budgets.<sup>661</sup> Let them off with a lighter-than-normal sentence in an effort to temper justice with mercy, and you could fail to send the proper message that such conduct is not

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<sup>649</sup> Houser, *supra* note 641.

<sup>650</sup> *Id.*

<sup>651</sup> *Id.*

<sup>652</sup> *Id.*

<sup>653</sup> *See* Banks, *supra* note 641.

<sup>654</sup> *Id.*

<sup>655</sup> *Id.*

<sup>656</sup> *See id.*

<sup>657</sup> Dane Schiller, *Drug Crime Sends First-Time Offender Grandmom to Prison for Life*, HOUSTON CHRONICLE, May 22, 2012, <http://www.chron.com/news/houston-texas/article/Drug-crime-sends-first-time-offender-grandmom-to-3547226.php>.

<sup>658</sup> *Id.*

<sup>659</sup> *Id.*

<sup>660</sup> *Id.*

<sup>661</sup> *See* Part IA(c), IB; Part IIIA(1), *supra*.

acceptable in society, along with angering victims' advocates and other groups that can label you as "soft on crime."<sup>662</sup> It is an unpleasant decision, but it is one that judges are now making more frequently than ever.<sup>663</sup> New court commitments to state prisons of persons age 55 and older grew by 109% between 1995 and 2009.<sup>664</sup> In Florida, for instance, 3,452 inmates age 50 and older were sentenced to prison terms during fiscal year 2010-11.<sup>665</sup> In Ohio, new court commitments age 50 and over rose from 3.7% to 7.8% between 2000 and 2010.<sup>666</sup> On the federal level, the number of individuals age 61 and older sentenced to federal prisons increased 50% between 2000 and 2009.<sup>667</sup>

Among this rise in elderly criminal offenders, however, there appears to be little consistency as to when courts will allow age to factor into sentencing decisions. Some states, as well as the federal government, have statutes allowing judges to consider age as a mitigating factor when handing down a sentence in some or all circumstances.<sup>668</sup> In these situations, however, judges maintain discretion of when to consider age in their sentencing decisions, and the application of these statutes can be erratic. In Wisconsin, for instance, the state's Court of Appeals upheld a 14-year sentence for a 78-year-old man convicted of homicide by intoxicated use of a vehicle, determining that age did not stop the man from committing the crime and therefore should not lessen his sentence.<sup>669</sup> On the other hand, a federal district court sentenced a 60-year-old man convicted of distributing morphine to a term four years below the minimum term listed in the Federal Sentencing Guidelines.<sup>670</sup> In justifying why he gave the defendant a lower-than-expected sentence, the trial judge pointed to the man's advanced age, as well as his "health problems."<sup>671</sup>

Some commentators, using a utilitarian point of view, argue that age should factor into sentencing because less punishment is typically enough to deter an elderly offender from future

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<sup>662</sup> See Interview with Ronald Aday, *supra* note 13; Interview with Justin Jones, *supra* note 23; Interview with Keith Davis, *supra* note 52; Interview with Jamie Fellner, *supra* note 240; see also note 229, *supra*.

<sup>663</sup> See OLD BEHIND BARS, *supra* note 14, at 36–38 (discussing the increase in men and women entering prison at age 55 and above); Interview with Keith Davis, *supra* note 52 (describing personal observations of more elderly first-time offenders arriving at Deerfield Correctional Facility in recent years).

<sup>664</sup> OLD BEHIND BARS, *supra* note 14, at 37.

<sup>665</sup> FLA. DEP'T OF CORRECTIONS, INMATE ADMISSIONS: ELDERLY (50 OR OLDER) ADMISSIONS (2010–11), available at [http://www.dc.state.fl.us/pub/annual/1011/stats/ia\\_elderly.html](http://www.dc.state.fl.us/pub/annual/1011/stats/ia_elderly.html). Of these elderly "new arrivals," 89.9% were male, and 41.5% were entering prison in Florida for the first time. See *id.*

<sup>666</sup> OLD BEHIND BARS, *supra* note 14, at 39.

<sup>667</sup> *Id.*

<sup>668</sup> See, e.g., 18 U.S.C. § 3582 (2012); ALA. CODE §13a-5-51 (7) (2012); ALASKA STAT. §12.55.155 (d) (5) (2012) (as amended by 2012 Alaska Laws Ch. 54 (S.B. 151)); FLA. STAT. ANN. § 921.141 (6) (g) (2012); OR. REV. STAT. §163. 150 (1) (c)(A); TENN CODE ANN. § 40-35-113(6) (2012).

<sup>669</sup> Wisconsin v. Stenzel, 276 Wis.2d 224, 240–42 (2004).

<sup>670</sup> United States v. Fisher, 1990 U.S.App.LEXIS 16972, at \*2 (4th. Cir. Sept. 25, 1990).

<sup>671</sup> *Id.* at \*3.

offenses.<sup>672</sup> There is also a cost aspect to this line of thinking, as allowing sentences to be lessened because of age inherently means that the more care-intensive elderly individuals will spend less time behind bars.<sup>673</sup> Others, however, argue that crimes should be punished uniformly, regardless of the perpetrator’s age.<sup>674</sup> In fact, some criminal justice experts have stated that elderly offenders are even more culpable than younger criminals, as age traditionally brings experience and greater wisdom to understand right from wrong.<sup>675</sup> According to this point of view, failing to properly punish older criminals sufficiently could lead to a rise in crimes committed by the elderly.<sup>676</sup>

It seems that permitting age, by itself, to be a mitigating factor in sentencing is not a viable option. As discussed many times already in this report, “the elderly” is not a homogeneous group.<sup>677</sup> There are elderly criminals who are still quite dangerous, and who should receive a significant prison sentence despite their old age. Permitting them to receive a more lenient prison term simply because they are “old” does not appear to be a fair solution.

What does appear to be sensible, though, is allowing age combined with age-related conditions to serve as mitigating factors in sentencing. Several states already do this to some extent, as does the federal government.<sup>678</sup> For instance, courts should be more lenient in sentencing an elderly defendant with no prior criminal history, particularly if the offense committed is a lower-level crime.<sup>679</sup> Knowledge that elderly individuals are typically more

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<sup>672</sup> Evidence for this argument can be found in the exceptionally low recidivism rate among elderly offenders. *See Part IIIB, infra.*

<sup>673</sup> *See Part IB, supra.*

<sup>674</sup> This is the approach that has traditionally been followed by the federal Sentencing Guidelines, which do not put much weight on the idea that somebody’s age can be a mitigating factor. *See generally* Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 780 (2006) (stating that age was deemed by the drafters of the Federal Sentencing Guidelines to be “not ordinarily relevant in determining whether a sentence should be outside of the applicable guideline range.”).

<sup>675</sup> *See* Fred Cohen, *Old Age as a Criminal Defense*, 21 CRIM. BUL. 5, 16–17 (1985) (pointing out the existence of this argument, although not necessarily advocating for its use).

<sup>676</sup> *See id.*

<sup>677</sup> *See Part IA (1), supra.*

<sup>678</sup> For instance, the newly amended version of the relevant Alaska statute allows mitigation based on age only if “the conduct of an aged defendant was substantially a product of *physical or mental infirmities resulting from the defendant’s age.*” (emphasis added). *See* ALASKA STAT. §12.55.155 (d) (5) (2012) (as amended by 2012 Alaska Laws Ch. 54 (S.B. 151)). The Tennessee law allows for mitigation based on youth or old age only if the defendant’s age led him or her to “lack substantial judgment” in committing the offense. TENN. CODE ANN. § 40-35-113(6).

<sup>679</sup> This would seem to be consistent with sentencing practices already used by many judges nationwide. The combination of these three factors — older age, lower-level offense, and no past criminal record — should under virtually all circumstances equate to leniency at sentencing.

vulnerable to coercion and duress than younger people should also play a key mitigating role if the elderly defendant was somehow pressured or tricked into committing the crime.<sup>680</sup>

In addition, the physical and mental health of an elderly defendant should factor into sentencing. An older individual with a severe chronic illness or terminal illness will immediately become a substantial cost burden and a significant care challenge for prison systems, and will likely suffer more behind bars than a younger inmate would.<sup>681</sup> Courts should refrain from sentencing elderly defendants in such a situation to long prison terms except in the most drastic of circumstances. When possible and sensible, trial judges should employ incarceration alternatives in sentencing defendants who are old and sick.<sup>682</sup>

For younger inmates who are growing old in prison, however, the option of sentencing leniency based on age, health, and other age-related factors is not available to them at trial. As they grow older and as their health condition worsens, only one institution can alleviate their time in prison and the pressures that they are placing on the correctional system. We now will turn to the role of that institution: the parole board.

## **B. Early Release Questions**

In the late 1980s, at the height of the AIDS epidemic in American prisons, some states enacted laws allowing inmates who were severely ill and dying from AIDS to receive an early conditional release from prison.<sup>683</sup> Reasons offered by state legislatures favoring these “compassionate release” policies included easing the high cost impact that AIDS-suffering inmates left on state corrections budgets, lessening the overcrowded conditions of prisons, permitting terminally ill prisoners to die among family members rather than behind bars, enabling these people to seek more specialized medical care than could be easily offered in a prison environment, and allowing these individuals who now posed little threat to return to free society.<sup>684</sup> In general, advocates of these programs stated, early release for advanced AIDS sufferers was “the decent, moral, and most cost-effective approach.”<sup>685</sup>

Today, people offer these same rationales in advocating for the early release of certain elderly inmates.<sup>686</sup> As a result, the most contentious debate regarding elderly prisoners currently

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<sup>680</sup> Presumably, this could come into play particularly often for older individuals with cognitive impairments, as the elderly person may actually possess no comprehension whatsoever about the nature of what he or she is doing.

<sup>681</sup> See Part II, *supra*.

<sup>682</sup> Naturally, this does not mean that an elderly person with a lengthy criminal history who has just committed a violent felony should not receive prison time. Such a person would typically merit a prison sentence, regardless of age.

<sup>683</sup> See Aldenberg, *supra* note 229, at 548–51.

<sup>684</sup> See *id.* at 549–52.

<sup>685</sup> *Id.* at 551.

<sup>686</sup> See generally Bren Gorman, *With Soaring Prison Costs, States Turn to Early Release of Aged, Infirm Inmates*, STATE HEALTH NOTES, Sept. 2, 2008, <http://www.ncsl.org/default.aspx?tabid=14647>; Marjorie P.

is whether they should remain prisoners at all.<sup>687</sup> Proponents of “compassionate release” for some members of the elderly prisoner population point out that the risk of repeat offenses drops dramatically as people age.<sup>688</sup> They note that early release would shift the elderly inmate’s high costs away from the state government, often cutting public costs of caring for that person by more than half.<sup>689</sup> They show that overcrowding remains a nationwide crisis in prisons, and argue that it makes sense to release elderly inmates early as a way to reduce this problem.<sup>690</sup>

Yet there are also many vocal opponents of early release for any elderly prisoners. They argue that such a practice would seem “soft on crime.”<sup>691</sup> To opponents of early release, an inmate’s age and poor health should not excuse him or her from paying the assigned debt to society for committing a crime.<sup>692</sup> Some opponents have also noted that even a very sick man or woman can still retain the capacity to commit other crimes, including violent crimes, and that society should not take this risk.<sup>693</sup> Furthermore, crime victims understandably dislike the idea of

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Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners — Is the Cure Worse Than The Disease?*, 3 WIDENER J. PUB. L. 799, 836; Marty Roney, *36 States Offer Release to Ill or Dying Inmates*, USA TODAY, Aug. 14, 2008, [http://www.usatoday.com/news/nation/2008-08-13-furloughs\\_N.htm](http://www.usatoday.com/news/nation/2008-08-13-furloughs_N.htm); AT AMERICA’S EXPENSE, *supra* note 38; IT’S ABOUT TIME, *supra* note 70, at 10–12; OLD BEHIND BARS, *supra* note 14, at 80–82; GUBLER, *supra* note 134, at 11–12; Wheeler, *supra* note 70; Curtin, *supra* note 48, at 496–99; NPR Broadcast, *supra* note 229 (revealing various examples of these arguments in favor of early release programs for elderly inmates).

<sup>687</sup> See note 686, *supra*; see also Interview with Brian Fischer, *supra* note 109 (“This (medical parole and other early release programs) is an issue that you’re going to keep hearing more and more about.”).

<sup>688</sup> See, e.g., AT AMERICA’S EXPENSE, *supra* note 38, at vi, vii (“Research has conclusively shown that by age 50 most people have outlived the years in which they are most likely to commit crimes. For example, arrest rates drop to just over 2% at age 50 and are almost 0% at age 65 . . . There is also overwhelming evidence that prisoners age 50 and older are far less likely to return to prison for new crimes than their younger cohorts.”); OLD BEHIND BARS, *supra* note 14, at 81–82 (“[O]lder inmates who are released to the community are far less likely to recidivate . . . than younger inmates.”).

<sup>689</sup> See, e.g., Roney, *supra* note 686 (quoting early release advocate stating that “Early release of terminal or infirm inmates without a doubt saves tremendous amounts of tax dollars. The taxpayer simply can’t afford to pay exploding end-of-life health care costs.”); Gorman, *supra* note 686; At America’s Expense, *supra* note 38, at 26–41.

<sup>690</sup> See, e.g., NPR Broadcast, *supra* note 229 (statement by Project for Older Prisoners Founder Jonathan Turley about the overcrowded conditions in many prisons, and saying, in part, “[T]he question for society is not whether someone will be released. Someone’s going to be released. The Constitution requires that they be released unless we do a massive expansion of our prison system. The question is who.”).

<sup>691</sup> See, e.g., Aldenberg, *supra* note 229, at 552 (“Opponents of the early release of terminally ill . . . inmates argue that society must be tough on crime and that illness should not warrant the release of criminals.”); NPR Broadcast, *supra* note 229 (statements of several callers opposing early conditional release of elderly and sick inmates on the grounds that, in the words of one caller, “it is prison, after all. These people committed crimes.”).

<sup>692</sup> See *id.*

<sup>693</sup> This is not a particularly common occurrence. See note 688, *supra*. However, it is not an impossibility, either. Just one incident of recidivism by an elderly, sick, apparently low-risk inmate can prove very damaging for early release programs. See Interview with Brie Williams, *supra* note 573. For instance, one of the most bizarre examples of recidivism by an elderly and disabled inmate came in Michigan. An elderly double-amputee, who was confined to a wheelchair, was deemed a low risk to the public and was

the person who wronged them getting out of prison early, regardless of how old and infirm they may be.<sup>694</sup> “When somebody has committed a crime against you,” said Keith Davis, the Warden of Virginia’s Deerfield Correctional Facility, “it’s difficult to see them get out of prison early — especially when the judge promised you at sentencing that this person will never see the free world again.”<sup>695</sup>

In addition to all of this, there is the sheer unpopularity of this practice.<sup>696</sup> Advocating for compassionate release is a dicey position for a politician to take. “Nobody wins an election by saying ‘we need to let more people out of prison,’” said Oklahoma Department of Corrections Director Justin Jones, who favors an increased use of early release for elderly inmates in his state. “Nobody wins by saying ‘we need more people on parole.’ So we just keep enhancing punishment by long-term incarceration, regardless of the human cost and the financial cost.”<sup>697</sup> Remarks made by Wisconsin State Representative Scott Suder to the *Milwaukee Journal Sentinel* in 2006 reinforce the recurrent political dislike of compassionate release measures. “I don’t think age should be a factor . . . for letting people loose early or giving them things like house arrest,” Suder said. “Putting these criminals in residential nursing homes with an already vulnerable population . . . I think is just utterly dangerous.”<sup>698</sup>

Ironically, though, the inmates whom prisons more frequently tend to parole are younger, healthier individuals — people who pose a much higher threat of repeat offenses than elderly, less-healthy inmates.<sup>699</sup> While recidivism trends certainly do not apply to everyone, the “danger”

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granted early conditional release. *See* Curtin, *supra* note 48, at 499. Three weeks later, the man wheeled himself into a bank, pulled out a sawed-off shotgun, and robbed the bank at gunpoint. *Id.* He was caught quickly and sent back to prison for the rest of his life. *Id.* Not surprisingly, critics of early release in Michigan became much more vocal in the aftermath of that incident. *Id.* at 499–500.

<sup>694</sup> *See, e.g.,* IT’S ABOUT TIME, *supra* note 70, at 9 (quoting the Executive Director of the National Organization for Victim Assistance as saying that “If a person is sentenced to life, we know that they are naturally going to get old. A life sentence should mean life.”).

<sup>695</sup> Interview with Keith Davis, *supra* note 52 (also noting that perhaps judges bear a responsibility in providing crime victims with more realistic expectations at sentencing rather than making such broad promises).

<sup>696</sup> *See* IT’S ABOUT TIME, *supra* note 70, at 8 (“The decision to grant early release to any prisoner can be politically risky, regardless of potential cost savings.”); Curtin, *supra* note 48, at 498 (describing the “well-organized and vocal segment of the general population” that opposes early release, even for elderly and infirm inmates); Aldenberg, *supra* note 229, at 552–53 (discussing the potential political pitfalls for individuals advocating for early release programs for a particular classification of inmates).

<sup>697</sup> Interview with Justin Jones, *supra* note 23.

<sup>698</sup> Bob Purvis, *Cheaper Prison Options Sought: As Number of Older Prisoners Rises, So Do Costs for Care*, MILWAUKEE JOURNAL SENTINEL, Aug. 7, 2006, at A1, available at <http://news.google.com/newspapers?nid=1683&dat=20060807&id=dLoaAAAIAIAJ&sjid=NkUEAAAIAIAJ&pg=2998,4447975>.

<sup>699</sup> *See* AT AMERICA’S EXPENSE, *supra* note 38, at viii (noting that American correctional facilities often do not release very low-risk geriatric inmates, even though they generally are an extremely low threat to public safety); NPR Broadcast, *supra* note 229 (Jonathan Turley stating “What’s fascinating about our system is that we actually work to release prisoners when they are most dangerous, when the recidivism

feared by Representative Suder seems far greater from current parole practices than from an increase of compassionate release for geriatric inmates.<sup>700</sup> And just as failing to increase the level of care for elderly inmates is not a viable option, declining to expand early release programs in some manner is also implausible. American correctional systems, while much larger than they were just a few decades ago, typically still cannot keep pace with the rapid influx of new arrivals and the increased length of time that people are remaining in prison, leading to overcrowded facilities that drain too many state dollars.<sup>701</sup> Releasing somebody, some segment of the prison population, appears to be necessary to reduce this multi-faceted pressure on correctional systems.<sup>702</sup> Early release for certain elderly inmates — individuals identified to create high costs for corrections budgets and pose a low risk of harm to society — simply appears to be the most logical way to meet this need.<sup>703</sup>

Additionally, early release programs do not necessarily equate to total freedom from the penal system. Instead, the release can be — and should be — conditional.<sup>704</sup> The elderly criminal will still bear responsibility to meet certain conditions imposed upon him or her.<sup>705</sup> Failure to do so will result in re-incarceration.<sup>706</sup> Throughout his or her entire period of conditional release, the elderly individual will still be monitored closely by the correctional system, and their movements will often be greatly restricted.<sup>707</sup> This is a far cry from the “get out of jail free card” that many

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rates are the highest—young prisoners who are graduating up in crime. And then, around 30, we tend to hit them with long-term sentences, just about the time when they start to fall in their risk.”)

<sup>700</sup> Minimizing the risk in early conditional release programs for elderly inmates, however, cannot be possible without a thorough and effective screening process so that the right elderly prisoners are chosen for conditional release. *See* Part IIIB (1), *infra*; Part IIIB(2), *infra*.

<sup>701</sup> In the most vivid recent example of this, the United States Supreme Court upheld an order demanding that California reduce its grossly overcrowded prisons by more than 30,000 inmates. *See* *Brown v. Plata*, 131 S. Ct. 1910 (2011). The Court held that there was simply no other realistic means for California to end this crisis of unconstitutional prison conditions, given the state’s financial challenges. *See* Adam Liptak, *Justices, 5-4, Tell California to Cut Prisoner Population*, N.Y. TIMES, May 23, 2011, <http://www.nytimes.com/2011/05/24/us/24scotus.html?pagewanted=all>. While California presented an extreme case, many other states also have extremely overcrowded “warehouse” prisons. *See, e.g.,* Luke Whyte, *The 3 Most Crowded State Prison Systems in America*, CORRECTIONSONE, Oct. 27, 2009, <http://www.correctionsone.com/jail-management/articles/1959168-The-3-most-crowded-state-prison-systems-in-America/>. In the wake of *Brown*, there is now no doubt that something will need to be done to alleviate this pressure — and in a time of tight budgets, spending more money to build new prisons will probably not be the answer.

<sup>702</sup> *See* NPR Broadcast, *supra* note 229.

<sup>703</sup> *See* AT AMERICA’S EXPENSE, *supra* note 38, at 47–50.

<sup>704</sup> *Id.* at 47.

<sup>705</sup> *Id.*

<sup>706</sup> *See, e.g.,* N.Y. CORRECT. LAW § 273 (McKinney 2011); N.Y. EXEC. LAW §§ 243, 257-b (McKinney 2011) (discussing the parameters and restrictions of conditional release, including the penalties for violating the terms of conditional release, in New York State). Other states have laws with similar terms, including re-incarceration for violating the terms of a conditional release. *See, e.g.,* FLA. STAT. ANN. § 947.1405 (2012); OHIO REV. CODE ANN. (West 2012); OR. REV. STAT. § 161.336 (2012).

<sup>707</sup> *See* note 706, *supra*.

people believe early release to be.<sup>708</sup> While it still may not be enough for certain crime victims and victims advocate groups, it is again important to remember that retribution is only one of several goals on which the American criminal justice system focuses.<sup>709</sup> The understandable desire of taking revenge on the wrongdoer must still be outweighed if other actions are more likely to create a greater societal benefit.<sup>710</sup>

Several correctional systems have started to recognize the logic to early release for elderly inmates. A number of states have recently passed or enhanced laws aimed at some type of early release program aimed at older low-risk prisoners with substantial medical needs, although many are still very narrowly tailored, and those which designate a specific age of eligibility often use an age that is well above the typical prison definition of “elderly”.<sup>711</sup> The

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<sup>708</sup> For instance, many victims’ advocates argue that early release programs deny the victim and/or the victim’s family the satisfaction of knowing that the perpetrator was fully punished. *See, e.g.*, Dianna Hunt, *Texas Is Seeking Early Release for More and More Sick Inmates*, FORT WORTH STAR-TELEGRAM, Mar. 1, 2012, <http://www.star-telegram.com/2012/02/29/3774188/texas-is-seeking-early-release.html>; Karen Florin, *New Law Means Earlier Release for State’s Inmates*, THE DAY (Conn.), June 25, 2012, <http://www.theday.com/article/20120625/NWS02/306259977>; Sarah Etter, *Options for the Elderly*, CORRECTIONS, June 26, 2009, <http://www.corrections.com/articles/13362>; *see also* note 691, *supra*. However, this argument is not entirely correct. The wrongdoer is still being punished by the severe restrictions of movement, activity, and association placed upon him by the terms of conditional release. He or she may no longer be living behind prison walls, but in no way is he or she truly “free.”

<sup>709</sup> *See* Part ID, *supra*.

<sup>710</sup> *Id.*

<sup>711</sup> Typically, states that use age as a criterion for early release, such as Maryland and Virginia, tend to use age 65, even though “elderly” in the prison context is often defined at age 50. The criteria vary widely from state to state, with some states releasing only those inmates who are terminally ill, others releasing inmates who are incapacitated but are not necessarily at death’s door, and some states taking a broader approach to these early release programs entirely. Notably, though, no prisoner sentenced to life without parole can be eligible for any of these early release programs. *See, e.g.*, ALA. CODE 1975 §§ 14-14-1 to 14-14-7 (2012) (“Alabama Medical Furlough Act”); ALASKA STAT. § 33.16.085 (2012) (“Special Medical Parole”); ARK. CODE ANN. § 12-29-404 (West 2012) (“Medical Parole for a Terminal Illness or Permanent Incapacitation”); CAL. PENAL CODE § 3550 (West 2012) (“Rules Governing Medical Parole”); COLO. REV. STAT. ANN. § 17-22.5-403.5 (West 2012) (“Special Needs Parole”); CONN. GEN. STAT. ANN. § 54-131k (West 2012) (“Compassionate Parole Release”); IDAHO CODE ANN. § 20-223 (f) (2012) (“Parole and Rules Governing”); LA. REV. STAT. ANN. § 15:574.20 (2012) (“Medical Parole Program”); MD. CODE ANN. CRIM. LAW §14–101 (g) (West 2012) (“Eligibility for Parole after Age 65”); MICH. COMP. LAWS 791.235 (10) and (11) (2012) (“Release of Prisoner on Parole; Procedure”); MO. ANN. STAT. § 217.250 (West 2012) (“Offender with Terminal Disease, Report to Governor, Procedure”); MONT. CODE ANN. § 46-23-210 (2012) (“Medical Parole”); NEB. REV. STAT. § 83-1,110.02 (2012) (“Medical Parole; Conditions; Eligibility; Term”); N.H. REV. STAT. ANN. § 651-A:10-a (2012) (“Medical Parole”); N.J. STAT. ANN. 30:4-123.51c (West 2012) (“Medical Parole; Terminal Condition, Disease, or Syndrome”); N.M. STAT. ANN. § 31-21-25.1 (2012) (“Medical and Geriatric Parole Program”); N.Y. EXEC. LAW § 259-s (McKinney 2012) (“Release on medical parole for inmates suffering significant debilitating illnesses”); N.C. GEN. STAT. § 15A-1369.1 to 1369.5 (2012) (“Medical Release of Inmates”); OKLA. STAT. ANN. § 332.18 (2012) (“Placement on Board docket for Medical Reason”); OR. REV. STAT. § 144.122(1)(c) (2012) (“Adjusting Initial Release Date”); TEX. GOV’T CODE ANN. § 508.146 (West 2012) (“Medically Recommended Intense Supervision”); VT. STAT. ANN. § 502a (d) (“Release on

federal government also offers a limited early release statute focused on elderly, low-threat inmates.<sup>712</sup>

Yet while this is a vital step forward, it is still only half the battle. Implementing compassionate release programs is not simply a matter of throwing open the gates and letting inmates walk out of their cells.<sup>713</sup> A process must be established which scrutinizes whether an elderly inmate is a proper candidate for early release. It must be thorough enough to ensure that the lowest-risk, highest-cost inmates are qualifying for release, yet efficient enough to allow qualified elderly inmates to actually receive the release. The inmate must have both legitimate reasons to be let out and a place to go once he or she gets out.

Bearing in mind the proven need for compassionate release of qualifying elderly inmates, the remainder of this section focuses on the primary challenges of implementing these important programs.

## 1. Criteria

Naturally, the first step in developing compassionate release for elderly inmates is deciding whom this program will actually release from prison. Age alone is not enough to determine that a prisoner should receive conditional release.<sup>714</sup> Notably, the Project for Older Prisoners at George Washington University, one of the most successful programs in helping elderly inmates obtain early release, employs a nuanced background analysis before agreeing to take an inmate's case to the parole board.<sup>715</sup> The result is exceptional: inmates who have obtained release through the Project for Older Prisoners (POPS for short) have a 0% recidivism rate.<sup>716</sup> The message, therefore, is clear: well-established criteria and a thorough vetting process now will typically lead to much more productive results later.

### a. Health Status

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Parole"); VA. CODE ANN. § 53.1-40.01 (2012) ("Conditional Release of Geriatric Prisoners"); WYO. STAT. ANN. § 7-13-424 (2012) ("Medical Parole; Conditions").

<sup>712</sup> 18 U.S.C. § 3582 (c)(1)((A)(2). Notably, the federal government's threshold for their age-based early release programs is age 70. *Id.*

<sup>713</sup> An examination of all of the statutes listed above demonstrates a high degree of detailed planning before an inmate is allowed to receive early release. *See* note 711, *supra*.

<sup>714</sup> *See* Part IA (noting the great diversity among the elderly inmate population, thus demonstrating that advanced age alone is not enough to show that the inmate is an appropriate early release candidate).

<sup>715</sup> Jonathan Turley, *The Project for Older Prisoners*,

<http://www.law.gwu.edu/Academics/EL/clinics/Pages/POPS.aspx>.

<sup>716</sup> *See* Matthew Davies, *The Reintegration of Elderly Prisoners: An Exploration of Services Provided in England and Wales*, INTERNET J. OF CRIMINOLOGY (2011),

[http://www.internetjournalofcriminology.com/Davies\\_The\\_Reintegration\\_of\\_Elderly\\_Prisoners.pdf](http://www.internetjournalofcriminology.com/Davies_The_Reintegration_of_Elderly_Prisoners.pdf) ("It is widely cited that there are no reported cases of recidivism since the project (POPS) began.").

The most common starting point for determining whether to release an older inmate is looking at their physical and mental condition.<sup>717</sup> Historically, the most common form of early release for elderly inmates is “medical parole” for individuals with terminal illnesses.<sup>718</sup> Today, most states have some sort of provision allowing early release for inmates with an incurable medical condition.<sup>719</sup> Given that an individual who is dying rarely poses a high risk to public safety, but typically requires high-cost care in the prison system, such inmates are sensible to release. In addition, conditional release of inmates with terminal illnesses generally allows them access to more constant medical monitoring, and allows them to pass on in an environment that is more hospitable than a prison.<sup>720</sup>

Beyond this, several states also include early release provisions for inmates who are not terminally ill, but are physically or mentally incapacitated.<sup>721</sup> Again, this is a sensible segment of the prison population to be offered early release. Inmates who are medically incapacitated cost corrections systems a much larger-than-usual amount in providing adequate services and care.<sup>722</sup> They could typically receive specialized care more efficiently outside the prison walls.<sup>723</sup> And they generally pose an extremely low risk of committing additional crimes once released.<sup>724</sup>

Murkier waters emerge when it comes to elderly inmates with medical conditions which are not going to end in death and are not presently incapacitated, but which require substantial specialized care and severely limit the physical or mental functions of the inmate. States appear to be widely divided on this issue.<sup>725</sup> In general, however, it appears that states would still benefit

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<sup>717</sup> All of the state statutes cited in note 711 look closely at the physical and mental health status of the inmates. *See* note 711, *supra*.

<sup>718</sup> *See* Russell, *supra* note 686, at 804–805.

<sup>719</sup> *See* note 711, *supra*; *see also* Nat’l Conf. of State Legislatures, *Three Years of Conditional Release Laws*, THE BULLETIN, June 2010, at 5.

<sup>720</sup> Even though prison hospice programs have vastly improved palliative care in prisons, there is no denying the fact that an individual can pass on with greater dignity, comfort, and human contact in a home rather than behind bars. *See* Part IIA (3) (f), *supra*.

<sup>721</sup> *See* Note 711, *supra*; IT’S ABOUT TIME, *supra* note 70, at 7; *Three Years*, *supra* note 719, at 5. In general, states seem to be broadening their early release laws in this area. For instance, Maine, New York, and Wisconsin now allow inmates with non-terminal illnesses to be considered for release, something which these states did not do before 2008. *See Three Years*, *supra* note 719, at 5. Mississippi expanded its early release law during the 2012 legislative session to also include bedridden inmates. Interview with Christopher Epps, *supra* note 196; Interview with Gloria Perry, *supra* note 196. California expanded its early release laws in 2010 to include inmates who were permanently incapacitated, even if their illness was not terminal. *See* NICOLE D. PORTER, THE STATE OF SENTENCING 2010 3 (The Sentencing Project 2010). Kansas expanded its medically based early release law in 2010 as well. *See id.*

<sup>722</sup> *See* Part IB, *supra*.

<sup>723</sup> *See* Part IIA, *supra*.

<sup>724</sup> *See* AT AMERICA’S EXPENSE, *supra* note 38, at vi, vii.

<sup>725</sup> Many states have not taken steps in this direction. However, certain states grant prisoners who reach a certain age the automatic right to go before the parole board to be considered for early conditional release. *See, e.g.*, MD. CODE ANN. CRIM. LAW §14–101 (g) (West 2012); VA. CODE ANN. § 53.1-40.01

from considering these inmates for early release. They would not be released solely on their health status, but could be granted conditional release if their health concerns are combined with other key indicators, particularly a low risk to public safety.<sup>726</sup>

The greatest challenge with health status judgments, however, is deciding how an inmate's "medical future" will be measured for early release purposes. Typically, corrections institutions will base this decision on the prognosis offered by facility doctors and, at times, outside specialists.<sup>727</sup> Their primary concern traditionally focuses on how much longer an inmate can be expected to live with a particular severe illness.<sup>728</sup> Yet Brie Williams, a criminal justice professor at University of California-San Francisco and lead author of the article "Balancing Punishment and Compassion for Seriously Ill Prisoners," believes that this reliance on prognosis can be the early release system's downfall.<sup>729</sup> "Physicians are horrible at prognostication," Williams said, "and yet that is what these early release programs look at. So it's a faulty system by definition."<sup>730</sup>

A more medically accurate picture, Williams said, can be gained from examining how people experience the malady in question.<sup>731</sup> "You want to look more at how the illness affects functions, not just how long you can live with it," she explained. "Right now, there are multiple prisoners in American who are in a persistent vegetative state. You can live like that for years. But if your compassionate release laws are based only on prognosis, then the prisoner in the vegetative state might not be able to qualify because his condition might not change and he won't die soon enough."<sup>732</sup> On the flip side, she continued, certain diseases can kill a person rather quickly, but still leave them with a level of functioning that could make them a risk to society.<sup>733</sup>

Worst of all, Williams said, are diseases with unpredictable prognoses.<sup>734</sup> "You can be released," she said, "and then all of a sudden, you can start getting better again. Then you can

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(2012). The most recent development in this area came in 2011, when Louisiana enacted a law creating a parole program dedicated to elderly prisoners. *See* H.B. 138, 2011 Leg. Reg. Sess. (La. 2011).

<sup>726</sup> Even without a debilitating ailment, elderly individuals are still much less likely to recidivate than their younger counterparts. *See* AT AMERICA'S EXPENSE, *supra* note 38, at vi, vii; OLD BEHIND BARS, *supra* note 14, at 81–82.

<sup>727</sup> Interview with Brie Williams, *supra* note 573.

<sup>728</sup> *See, e.g.*, ARK. CODE ANN. § 12-29-404 (West 2012) (requiring a doctor's judgment of whether the inmate is "permanently and irreversibly incapacitated" or "terminally ill"); N.J. STAT. ANN. 30:4-123.51c (2012) (allowing early release for an inmate suffering a terminal illness, and defining "terminal" as "six months or less to live").

<sup>729</sup> Interview with Brie Williams, *supra* note 573.

<sup>730</sup> *Id.*

<sup>731</sup> *Id.*

<sup>732</sup> *Id.*

<sup>733</sup> *Id.*

<sup>734</sup> *Id.*

suddenly get worse again.”<sup>735</sup> Some states, such as Maryland and Montana, deal with these issues by requiring that a medical parolee must be returned to incarceration if the parolee’s condition improves enough so that he or she could pose a threat to society.<sup>736</sup> Yet Williams argues that this is not an acceptable solution. “What are you going to do?” she asked rhetorically. “Keep shuttling the person back and forth between their home and the prison every time their condition changes one way or the other?”<sup>737</sup>

Overall, Williams said, health status criteria for early release tends to be flawed.<sup>738</sup> “To me, it means that the right people weren’t sitting at the table when these policies were crafted,” she said. “This does not lead to informed, rational policies. There are so many different jobs reflected here, and all of them need to be involved in making these policies. You need to have that exchange of information.”<sup>739</sup>

Thankfully, some states have revised their early release policies so that life expectancy is just one of a group of factors reviewed by the board.<sup>740</sup> Given the risks of relying too heavily on estimating the amount of time that a person has left to live, this is a prudent move, one that all states should make in crafting their early release policies.

## **b. Low Threat To Society**

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<sup>735</sup> Interview with Brie Williams, *supra* note 573. The poster child for this scenario is Abdelbaset Ali Mohamed al-Megrahi, convicted of killing 270 people in a 1988 plane bombing. *See Lockerbie Bomber Freed From Jail*, BBC, Aug. 20, 2009,

[http://news.bbc.co.uk/2/hi/uk\\_news/scotland/south\\_of\\_scotland/8197370.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/south_of_scotland/8197370.stm). Diagnosed with prostate cancer, he was granted early release on the grounds that he had only three months left to live. *Id.*

However, al-Megrahi lived for nearly three more years before his death on May 20, 2012. *Lockerbie Bomber Dies in Tripoli*, BBC, May 20, 2012, <http://www.bbc.co.uk/news/world-africa-18137896>. Not surprisingly, this is a case that is frequently cited by opponents of early release programs.

<sup>736</sup> *See, e.g.*, MONT. CODE ANN. § 46-23-210 (6) (2012) (“If either the board or department determines that the person’s *medical condition has improved to the extent that the person no longer requires extensive medical attention or is likely to pose a detriment to the person, victim, or community*, a hearing panel may revoke the parole and return the person to the custody of the department.”) (emphasis added); *Three Years*, *supra* note 719, at 5 (describing Maryland’s requirement that “if the State Parole Commission believes a medical parolee’s condition has improved so that he or she could present a danger to society, they must return a parolee to a correctional facility.”).

<sup>737</sup> Interview with Brie Williams, *supra* note 573; *see also* Interview with Robert Greifinger, *supra* note 77 (describing the importance of looking “beyond how many years they (prisoners) have left to live” in making these judgments).

<sup>738</sup> Interview with Brie Williams, *supra* note 573.

<sup>739</sup> *Id.*

<sup>740</sup> *See, e.g.*, ALASKA STAT. § 33.16.085 (West 2012) (looking at whether the inmate has a “severe medical or cognitive disability” rather than trying to attach a life expectancy label to the prisoner); COLO. REV. STAT. ANN. § 17-22.5-403.5 (West 2012) (studying whether the offender has “special needs” that make him or her a low threat of becoming a repeat offender); MO. ANN. STAT. § 217.250 (West 2012) (requiring that the inmate be “afflicted with a disease which is terminal, *or* is advanced in age to the extent that the offender is in need of long-term nursing home care, *or* when confinement will necessarily greatly endanger or shorten the offender’s life” in order to qualify) (emphasis added).

A low risk of recidivism is obviously a fundamental consideration of early release programs. The advantage of focusing on elderly inmates is that older people generally tend to experience “criminal menopause” — an “aging out” of their desire to commit future crimes.<sup>741</sup> However, this is still a criterion for early release that correctional systems must examine carefully, even for inmates of advanced age.<sup>742</sup>

Forensic psychologists have developed multiple peer-reviewed tests which can be employed to “estimate” an inmate’s likelihood of breaking the law again.<sup>743</sup> The Project for Older Prisoners, for instance, uses two separate recidivism tests and then compares the results to determine whether a particular elderly inmate is a good candidate for early release.<sup>744</sup> Even without the use of such tests, though, certain aspects of a prisoner’s life and record can become prominent signals for or against release. For example, inmates who participate actively (or, in the case of some older inmates, have previously participated actively) in prison education programs are less likely to commit another crime after release.<sup>745</sup> A clean or mostly clean disciplinary record while in prison also commonly correlates to a reduced risk of recidivism.<sup>746</sup> Assuming that the prison is providing adequate active treatment and programming to the elderly inmate, interviews with staff who commonly work with the inmate can also be beneficial in making this assessment.<sup>747</sup>

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<sup>741</sup> See note 688, *supra*.

<sup>742</sup> All of the state statutes, as well as the federal statute, that are listed above include requirements about low risk of committing further crimes. See notes 711 & 712, *supra*.

<sup>743</sup> See MICHAEL D. MALTZ, RECIDIVISM 68–86 (2001); The Forensic Panel, *Prisoner Recidivism Assessment*, [http://www.forensicpanel.com/expert\\_services/psychiatry/criminal\\_law/classification\\_and\\_recidivism\\_potential.html](http://www.forensicpanel.com/expert_services/psychiatry/criminal_law/classification_and_recidivism_potential.html).

<sup>744</sup> *Promoting Inmate Rehabilitation and Successful Release Planning: Hearing before the House Subcomm. On Crime, Terrorism, and Homeland Security*, Dec. 6, 2007 (statement of Prof. Jonathan Turley, Executive Director of the Project for Older Prisoners), at 12.

<sup>745</sup> See generally MILES D. HARER, PRISON EDUCATION PROGRAM PARTICIPATION AND RECIDIVISM: A TEST OF THE NORMALIZATION HYPOTHESIS (Federal Bureau of Prisons 1995) (using empirical data to show that inmates who actively participate in prison education programs are much less likely to recidivate than those inmates who do not participate in such programs); WILLIAMS, *supra* note 49, at 8 (“Inmates reluctant to become involved in civic activities, such as religious organizations, volunteer programs, or work programs, are more likely to return to criminal behavior.”).

<sup>746</sup> See JAKO SALLA & SIIM VAHTRUS, ASSESSMENT OF RECIDIVISM RISK IN DIFFERENT STAGES OF PROCEEDINGS 12, 15 (2010); DAVID E. OLSON & GIPSY ESCOBAR, A PRELIMINARY ASSESSMENT OF RISK AND RECIDIVISM OF ILLINOIS PRISON RELEASEES 8, 20 (2010).

<sup>747</sup> Under a “True Grit” type of format, the people providing that inmate with individualized active treatment will be working with him or her on a very frequent basis. See Part IIA(3)(g), *supra*. Therefore, given their frequent contact with the inmate in a personalized setting, they should be consulted about their opinions of the individual’s chances of succeeding in the community.

Whenever possible, interviews with the inmate can also be illuminating in gauging risk of recidivism.<sup>748</sup> Additionally, the correctional institution should always make a meaningful effort to contact the victim of the elderly inmate's crime. This is a central feature of case planning for the Project for Older Prisoners, as well as other early release programs focusing on elderly individuals, and should be adopted by all states in their conditional release evaluation process.<sup>749</sup> George Washington University School of Law Professor Jonathan Turley, the founder and director of the Project for Older Prisoners, explained on the project's website that "[v]ictim interviews can reveal inconsistencies in an inmate's account or simply show a level of violence or aggression that does not appear in a written record."<sup>750</sup> Furthermore, it provides the victim an opportunity to explain his or her side of the story, and discuss possible conditions of the inmate's early release with the victim. An open, honest discussion with the victim about the elderly inmate's chance at early release — and the reasons why this conditional release seems appropriate — can help avoid the victim's shock and anger if the person who wronged him or her is later released from prison.

The assessment of an inmate's recidivism risk ultimately comes down to a certain degree of guesswork. Nobody can ever be completely certain that a particular individual will never commit a crime again. Yet for elderly inmates, who historically pose a much lower rate of re-offending, the type of thorough review described here will increase the odds that the right people will receive early release.

### **c. A Place To Go**

. Anyone who has ever seen the movie *The Shawshank Redemption* probably remembers the character of Brooks, played by James Whitmore, an elderly man who has been in prison for most of his life.<sup>751</sup> To the surprise of everyone, including himself, the parole board grants him

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<sup>748</sup> An inmate who clearly shows no remorse whatsoever, for instance, is not likely to be somebody who should be given early release (unless, of course, the person is suffering from a cognitive impairment that prevents him or her from this degree of understanding).

<sup>749</sup> See Davies, *supra* note 716.

<sup>750</sup> See *POPS The Project for Older Prisoners*, available at <http://elderlyrelease.wordpress.com/pops-project-for-older-prisoners/> (also noting that POPS was one of the first programs in the nation to make victim interviews mandatory prior to pursuing a case). Certain states involve the victim in the process by inviting them to submit a "victim impact statement" before the decision is made to grant the inmate early release. See, e.g., COLO. REV. STAT. ANN. § 17-22.5-403.5 (West 2012). However, the give-and-take of an interview would seem to produce a more even-handed, level-headed result than simply asking the victim to write a statement and submit it to the parole board.

<sup>751</sup> See Roger Ebert, *Movie Review: The Shawshank Redemption*, CHICAGO SUN-TIMES, Sept. 23, 1994, available at <http://www.webcitation.org/5oxEFQdTw>.

release from prison.<sup>752</sup> Yet freedom fails to work out for Brooks.<sup>753</sup> With no conception of how to live outside the prison walls, he becomes despondent, and ultimately commits suicide.<sup>754</sup>

This is why the final step in determining whether an elderly inmate should receive early release focuses on what he or she will do next. A key goal of early release for any inmate is providing a smooth transition into the free world.<sup>755</sup> For elderly prisoners, particularly older inmates who have spent the majority of their life in prison, this can be exceptionally difficult.<sup>756</sup> By re-entering society, they are leaving behind whatever status and protection they have acquired among the prison population.<sup>757</sup> In the free world, they are just another conditionally released criminal, someone to be avoided and even ridiculed.<sup>758</sup> And while younger prisoners typically are able to adapt to their new life, this flurry of sudden changes can be difficult for an elderly individual released from prison.<sup>759</sup>

Therefore, correctional officials must give significant consideration to how an elderly inmate will live after receiving early release.<sup>760</sup> For people who often are at retirement age, and who often are estranged from their families and former friends on the outside, elderly prisoners often do not have many places to go in the world beyond prison. “They face a tough battle when they get out,” said Deerfield Correctional Facility Warden Keith Davis. “A lot of them have outlived any resources that they may have had.”<sup>761</sup>

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<sup>752</sup> *Id.*

<sup>753</sup> *Id.*

<sup>754</sup> *Id.*

<sup>755</sup> See, e.g., HANEY, *supra* note 584, at 86–87.

<sup>756</sup> Brie Williams & Rita Abraldes, *Growing Older: Challenges of Prison and Reentry for the Aging Population*, in PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES 67 (Robert Greifinger, ed., 2007) (“On release, geriatric ex-prisoners may face unique challenges reentering the community.”); OLD BEHIND BARS, *supra* note 14, at 80 (“[R]eentry poses special challenges for the elderly.”); IT’S ABOUT TIME, *supra* note 70, at 11 (“More information is also necessary to develop and implement effective reentry programs and supervision plans for elderly people who are released from prison.”); Abner, *supra* note 14, at 11 (“[S]ome cost savings associated with early release programs (should) be used to assist with the community re-entry transition.”).

<sup>757</sup> See Williams & Abraldes, *supra* note 756, at 68; OLD BEHIND BARS, *supra* note 14, at 80.

<sup>758</sup> See Interview with Brian Fischer, *supra* note 109 (“Sometimes, when a guy leaves prison, he’s giving something up. People might know him, might respect him in the prison world. He’s nothing on the outside. He’s going to have a tough time unless there are supports in place for him.”).

<sup>759</sup> See note 756, *supra*.

<sup>760</sup> See Williams & Abraldes, *supra* note 756, at 69 (examining measures which prisons should take before sending an elderly inmate back out into the community on early release. These measures include training in independent living skills from cooking to money management and establishing a network of community supports which are available to assist the inmate in his or her transition back to the free world).

<sup>761</sup> Interview with Keith Davis, *supra* note 52.

Before granting early release, the correctional system must ensure that the elderly individual will have a stable place to live,<sup>762</sup> a legal method of obtaining enough money to live on,<sup>763</sup> a way to access proper medical care,<sup>764</sup> and some type of support system in the outside world. The last of these categories is just as important as the other three. Without somebody to look out for him or her — family members, reliable friends, a faith community, or some other means of support — an older individual released from prison can be placed in a position of extreme personal risk.<sup>765</sup>

It is important to remember that early release of elderly inmates is about more than just cutting costs from corrections budgets. While this is a key benefit, the move needs to be about people, first and foremost. Societal needs are considered in ensuring that the inmate poses a low risk of recidivism. Here, in this final step, the inmate’s personal needs must also be thoroughly addressed before he or she is sent out into the world.

## 2. Efficiency

When Carl Wade was diagnosed with terminal heart and lung diseases in 2007, doctors at the California prison where he was incarcerated recommended his early release under state law.<sup>766</sup> The state parole board investigated and determined that Wade was a proper candidate for release to the care of his family.<sup>767</sup> Yet a county court judge blocked his release, questioning the accuracy of the doctors’ findings.<sup>768</sup> On review, though, the First District Court of Appeals in San Francisco overruled the county judge, calling his ruling a “manifest miscarriage of justice” and ordering Wade’s immediate release.<sup>769</sup>

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<sup>762</sup> Stability includes not only the home environment itself, but also the neighborhood in which the home is located. *See Williams & Abraldes, supra note 756, at 67* (noting that living in an unsafe neighborhood is something that should be avoided for elderly inmates when they are released from prison).

<sup>763</sup> Prison officials need to consider more than just “employability,” or potential to be employed. Instead, they should look at whether the individual, if in a condition that would enable him or her to work, actually has some prospect to get a job after release. *See Interview with Brian Fischer, supra note 109.* If the individual is too old and/or infirm to hold a job, then the prison officials need to establish a plan by which the inmate can receive a different legal means of financial support (i.e., public assistance, military benefits, etc.). *See IT’S ABOUT TIME, supra note 70, at 11–12.*

<sup>764</sup> This includes discharging the inmate from prison with an adequate supply of medicine. Often, an inmate cannot schedule a medical appointment immediately after getting out of prison. Therefore, the prison has a responsibility to give the inmate enough medicine to last until the appointment can be made. *See Williams & Abraldes, supra note 756, at 68.*

<sup>765</sup> *See HANEY, supra note 584, at 86–87; Davies, supra note 716; Williams & Abraldes, supra note 756, at 68–69;*

*Mitchell, supra note 584.*

<sup>766</sup> Bob Egelko, *Killer, Due Compassionate Release, Dies in Prison*, SAN FRANCISCO CHRONICLE, June 8, 2012, <http://www.sfgate.com/crime/article/Killer-due-compassionate-release-dies-in-prison-3606391.php>.

<sup>767</sup> *Id.*

<sup>768</sup> *Id.*

<sup>769</sup> *Id.*

Yet the appellate court's ruling came too late.<sup>770</sup> In June 2012 — five years after he had first been recommended for early release by prison doctors — Wade died in prison at the age of 66.<sup>771</sup> “He should have been released in November (of 2011),” Wade’s lawyer told the San Francisco Chronicle. “The system did not deliver justice to him.”<sup>772</sup>

Unfortunately, Carl Wade’s situation is not particularly unusual in the United States today.<sup>773</sup> Too often, elderly and infirm inmates who are granted early release die before they actually are released.<sup>774</sup> Other elderly early release applicants pass away while they are still waiting for the parole board to hear their case.<sup>775</sup> In New York State, for instance, more than 950 inmates have died before release since the state adopted medical parole in 1992 — nearly three times the number of inmates who have actually been granted medical parole during that same time period.<sup>776</sup> During the 2011 fiscal year alone, 78 inmates in Texas died while waiting for their medically based early release applications to be processed.<sup>777</sup>

Sometimes, of course, an inmate is so sick that no administrative process could release him or her in time. And the importance of a thorough review of the inmate’s qualifications and capacity for early release, as described in the preceding section, is unquestioned. However, in too many instances, lengthy procedural hurdles appear to be the only things keeping an otherwise qualified and capable inmate from early release.<sup>778</sup> For example, in Texas, there were 1,125 inmates eligible for medically based early release in fiscal year 2011, but only 349 of these cases

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<sup>770</sup> *Id.*

<sup>771</sup> *Id.*

<sup>772</sup> Egelko, *supra* note 766.

<sup>773</sup> See, e.g., Cara Buckley, *Law Has Little Effect on Early Release for Inmates*, N.Y. TIMES, Jan 30, 2010, <http://www.nytimes.com/2010/01/30/parole.html?pagewanted=print> (discussing the number of New York inmates who are eligible for early release but who still never make it out of prison alive); Julie Stewart, *Let’s End the Death Rattle Rule*, THE CRIME REPORT, May 24, 2012, <http://www.thecrimereport.org/viewpoints/2012-05-lets-end-the-death-rattle-rule> (stating that many federal inmates who should be approved for compassionate release are prevented from getting out by bureaucratic holdups); Emily Ramshaw, *Few Texas Inmates Get Released on Medical Parole*, TEXAS TRIBUNE, June 3, 2010, <http://www.texastribune.org/texas-dept-criminal-justice/texas-department-of-criminal-justice/few-texas-inmates-get-released-on-medical-parole/>; IT’S ABOUT TIME, *supra* note 70, at 10 (describing delays in “geriatric release” in Alabama and Texas).

<sup>774</sup> See Russell, *supra* note 686, at 800 (stating that the early release process for elderly and infirm prisoners is too often “overly rigid and protracted.”).

<sup>775</sup> *Id.*; see also Ramshaw, *supra* note 773 (“Thirty-one inmates (in Texas) who’d been recommended by medical staff for release died while awaiting the parole board to take up their case; another 26 died after the parole board rejected them for release. Twelve inmates were approved for medical parole but died before they could be sent home.”); Stewart, *supra* note 773 (referring to the Federal Bureau of Prisons’ early conditional release program for aging and sick inmates as being “wasteful and cruel” because so few qualified prisoners are actually released).

<sup>776</sup> See Buckley, *supra* note 773.

<sup>777</sup> See Kelley Shannon, *Few Seriously Ill Texas Inmates Being Released On Medical Paroles*, DALLAS MORNING NEWS, Feb. 19, 2012, <http://www.dallasnews.com/news/state/headlines/20120219-fewer-seriously-ill-texas-inmates-being-released-on-medical-paroles.ece>.

<sup>778</sup> See Russell, *supra* note 686, at 800.

were presented to the parole board for consideration.<sup>779</sup> In New York, 106 new requests for medical parole were received in 2011.<sup>780</sup> During that same year, seven applications were granted and 11 applications were denied.<sup>781</sup> It is unclear what happened to the other requests from that year, along with the unheard applications from previous years.

Part of the problem seems to stem from multi-step systems in many states. In Louisiana, for instance, the medical parole process begins with the unit's medical director filling out a form justifying the need for early release on medical grounds.<sup>782</sup> This form, along with supporting documentation, is then submitted to the facility's warden for consideration.<sup>783</sup> If the warden approves medical parole for this inmate, his or her written approval, along with supporting documentation, is sent to the Secretary of the Department of Corrections and the Department's Medical/Mental Health Director.<sup>784</sup> The Health Director reviews the request for compliance with applicable law and policy and returns the request to the Secretary with his remarks. If the Secretary of the Department of Corrections agrees with all of the previous recommendations, then the request is forwarded to the state parole board for its review.<sup>785</sup>

The most daunting gauntlet for an inmate seeking early release on medical grounds, though, seems to be in Oklahoma, where every parole decision must be signed by the governor before it becomes effective.<sup>786</sup> Too often, Oklahoma Department of Corrections Director Justin Jones said, sick and elderly inmates who have been otherwise approved for early release die behind bars while waiting for the governor's signature.<sup>787</sup>

Such situations are tragic whenever they occur, and need to be avoided. While it is obviously important to thoroughly review early release applications, it also should not be an unduly burdensome process. For elderly and ill inmates, time is of the essence. States with early release statutes should review them with an eye toward eliminating unnecessary hurdles and streamlining the process as much as possible, just as Oklahoma is currently doing with its law requiring the governor's signature.<sup>788</sup> In addition, states should consider following the lead of

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<sup>779</sup> Shannon, *supra* note 777.

<sup>780</sup> N.Y. DEP'T OF CORRECTIONS AND COMMUNITY SUPERVISION, MEDICAL PAROLE REPORTS 2008-2011 (sent to the author by Commissioner Brian Fischer on June 26, 2012).

<sup>781</sup> *Id.*

<sup>782</sup> Interview with James LeBlanc, *supra* note 196.

<sup>783</sup> *Id.*

<sup>784</sup> *Id.*

<sup>785</sup> *Id.*

<sup>786</sup> See Office of Okla. Gov. Mary Fallon, *What is the Difference Between a Pardon, a Parole, and a Commutation, and How is the Governor's Office Involved with These?*,

<https://www.ok.gov/governor/parole/faqs.php>.

<sup>787</sup> Interview with Justin Jones, *supra* note 23.

<sup>788</sup> Michael McNutt, *Voters to Decide on Cutting Oklahoma Governor from Parole Process for Nonviolent Offenders*, TULSA WORLD, Feb. 15, 2012, [http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20120215\\_16\\_A13\\_OKLAHO976348](http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20120215_16_A13_OKLAHO976348).

Louisiana, which in 2011 instituted one of the first parole boards dedicated specifically to elderly inmates.<sup>789</sup> Given that procedural delays can prove fatal — literally — for aged and sick inmates, providing an expedited means of review for this population is certainly appropriate.

### 3. Social Acceptance

A final challenge regarding the early conditional release of certain elderly inmates is achieving social acceptance of this practice. It is unlikely that anybody will ever be overjoyed to see convicted criminals returned to the community, regardless of how old and incapacitated they may be. Yet an utter refusal on the part of the public to accept the early release of certain elderly inmates will lead to the failure of this entire initiative.<sup>790</sup> For this reason, correctional officials, political leaders, and other major stakeholders in this issue will need to do some positive public relations work whenever they implement or expand an early release process.<sup>791</sup> With an early release program for elderly inmates, it will be important to emphasize that the release is conditional, not total; that the process for release is thorough; that only elderly inmates with health problems who are deemed to pose a very low threat to society are selected; that discussions are held with victims before the release is granted; and that this will lead to tremendous savings in corrections budgets, meaning that taxpayer dollars can be allocated for other functions.<sup>792</sup>

This is not merely a “soft” aspirational goal. Without some degree of societal understanding of these conditional release initiatives, many elderly inmates will not be able to gain release because they will have no place to go.<sup>793</sup> These programs target older prisoners who are experiencing significant health problems, sometimes even leading to their total incapacitation.<sup>794</sup> If there is no place in free society that is willing to provide them care, then prison systems will have no alternative but to keep the elderly inmates behind bars.

Nursing homes provide the classic example of social challenges that correctional systems can face when looking to grant certain elderly inmates conditional release. Many elderly inmates eligible for early release are disabled to the point where they need the constant care that nursing homes provide.<sup>795</sup> Many nursing homes refuse to allow these convicted criminals in the door,

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<sup>789</sup> See H.B. 138, 2011 Leg. Reg. Sess. (La. 2011).

<sup>790</sup> Simply put, early release will not work if the general public does not accept it and allow these released inmates to move on with whatever remains of their lives. See Aldenberg, *supra* note 229, at 555–56.

<sup>791</sup> This is not meant to be “spin doctoring” PR work. However, corrections officials, politicians, and other stakeholders in this issue do need to explain to people precisely why early release of certain high-cost, low-risk inmates is for the public’s overall benefit.

<sup>792</sup> See note 228, *supra*.

<sup>793</sup> See Part IIIB (1)(c) (discussing the importance of “a place to go” for anyone who is granted early release from prison).

<sup>794</sup> See, e.g., Williams & Abraldes, *supra* note 756, at 68–69.

<sup>795</sup> See Part II, *supra* (discussing the poor physical and/or mental condition of many elderly inmates, as well as the need for them to receive a greater degree of medical attention and care).

even when they are greatly incapacitated and not even alert.<sup>796</sup> Those nursing homes which do provide a bed for conditionally released older inmates often face a stiff backlash from residents, family members of residents, and long-term care patients advocates.<sup>797</sup> A January 2012 New York Times article described the heated debate over a California nursing home's decision to accept four conditionally released individuals, people who were medically no different from anybody else in the facility.<sup>798</sup> "When you're looking to place a loved one, I think you'd be surprised if you heard about prisoners on parole," one long-term care ombudsman told the Times. "It wouldn't be a good selling point for you."<sup>799</sup>

Oklahoma Department of Corrections Director Justin Jones said that many early release-eligible elderly inmates remain in prison because no nursing home will accept them.<sup>800</sup> In Oklahoma, nursing homes that accept a patient with a criminal record must post a sign in their lobby stating that one of the residents has a criminal history.<sup>801</sup> "Good luck trying to place an inmate (in a nursing home) in that situation," he said.<sup>802</sup> In a 2010 interview, Lester Wright — serving as New York's Chief Medical Officer at that time — attributed the state's poor medical parole statistics in part to the difficulty of finding nursing home placements.<sup>803</sup> "The problem is, when we start trying to put people out, there are others in the community who are sure we're trying to make more crime in the community," Wright said in that interview. "We're also competing for beds. Some people think my patients aren't as valuable as other people in society."<sup>804</sup>

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<sup>796</sup> See, e.g., Arielle Levin Baker, *State Seeking Nursing Home to Take Sick, Disabled Prisoners*, CT MIRROR, Feb. 27, 2012, <http://ctmirror.org/story/15565/state-seeking-nursing-home-take-sick-disabled-prisoners> ("A commonly cited reservation is that offenders placed in nursing homes may prey upon an already vulnerable population."); Fellner, *Assisted Living—Behind Bars*, N.Y. DAILY NEWS, Mar. 26, 2012, [http://articles.nydailynews.com/2012-03-26/news/31241757\\_1\\_younger-prisoners-state-and-federal-prisons-long-sentences/2](http://articles.nydailynews.com/2012-03-26/news/31241757_1_younger-prisoners-state-and-federal-prisons-long-sentences/2) ("[I]t is increasingly difficult to find private facilities that will take former prisoners"); OLD BEHIND BARS, *supra* note 14, at 80 ("One of the biggest obstacles they (corrections officials) face is finding nursing home care for the former prisoners who need it.").

<sup>797</sup> See note 796, *supra*.

<sup>798</sup> Katherine Mieszkowski, *When the Nursing Home Resident in the Next Room is a Convicted Criminal*, N.Y. TIMES, Jan. 19, 2012, <http://www.nytimes.com/2012/01/20/us/prisoners-on-medical-parole-housed-in-california-nursing-homes.html?pagewanted=all>.

<sup>799</sup> *Id.* Interestingly, though, there can be a financial benefit for nursing homes that decide to accept elderly and infirm individuals on conditional release. The state can offer to pay the nursing home up to 30% more than the Medicare fee schedule for the care of the elderly parolees. *Id.* Also, the state may receive reimbursement from the federal government for some of the medical care of these conditionally released individuals, looking to programs like Medi-Cal, Medicare, Social Security, and, where applicable, veterans' benefits to help offset costs of care in nursing home facilities. *Id.*

<sup>800</sup> Interview with Justin Jones, *supra* note 23.

<sup>801</sup> *Id.*

<sup>802</sup> *Id.*

<sup>803</sup> Mieszkowski, *supra* note 798.

<sup>804</sup> *Id.*

A growing number of states, however, are now looking to nursing homes as part of the early release process for elderly inmates. In February of this year, for instance, Connecticut corrections officials announced that they were looking to contract with a nursing home willing to care for a number of disabled elderly inmates who were eligible for early release.<sup>805</sup> Louisiana Department of Corrections Secretary James LeBlanc said that his agency is presently exploring ways to establish a working relationship with more nursing homes that are willing to accept medical parolees.<sup>806</sup> New York State Department of Corrections Chief Medical Officer Carl Koenigsmann said that similar discussions are underway in New York.<sup>807</sup> Vermont is presently in talks about using a wing of an existing nursing home for the care of elderly inmates that pose minimal risk.<sup>808</sup>

The question is whether these state correctional bodies will actually find one or more nursing homes with which they can partner.<sup>809</sup> Success in this area would be an important piece to the early conditional release of low-risk elderly inmates. It is certainly understandable that people might be nervous about the idea of somebody with a criminal record in a nursing home with their loved ones. However, corrections officials must work to assure the public that the elderly individuals obtaining early release are old men and women whose days of crime are behind them. In addition, they are men and women who are sick and in need of quality care — the same type of care that anybody entering a nursing home environment needs to receive.

#### **IV Final Thoughts**

*“There is a level of humanity and care that we are called upon to provide human beings, regardless of where they are and what they did.”*

*-- Keith Davis, Warden of Deerfield Correctional Center,  
Virginia’s primary geriatric prison facility<sup>810</sup>*

The unprecedented rate at which America’s prison population is aging presents multiple challenges and concerns for a wide range of people. These issues need to be dealt with effectively and efficiently by the nation’s state and federal policymakers. Doing so will require a careful examination of existing issues on both the inside and the outside of the prison walls in every prison system in the nation. Each state, as well as the federal government, has a unique

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<sup>805</sup> Baker, *supra* note 796.

<sup>806</sup> Interview with James LeBlanc, *supra* note 196 (“We are . . . working to further develop relationships with nursing homes in Louisiana to accept releasing offenders who have a need for nursing home care.”).

<sup>807</sup> Interview with Carl Koenigsmann, *supra* note 76 (describing this as an “important goal” that he has for corrections in New York State).

<sup>808</sup> Interview with Andy Pallito, *supra* note 196.

<sup>809</sup> See notes 796 & 798, *supra* (describing the difficulties that corrections leaders often face in trying to establish such relationships with nursing homes, even when the individuals in question are at an extraordinarily low risk of causing anyone harm).

<sup>810</sup> Interview with Keith Davis, *supra* note 23.

situation in their correctional system, and solutions unique to their particular circumstances will be necessary to best address these many questions.

However, there are common threads which run through every jurisdiction. Constitutional requirements regarding the requisite care of prison inmates place a high burden on the shoulders of correctional facilities. Costs of meeting the distinctive needs of elderly inmates in accordance with legal and humanitarian standards will be high. Exceptions to general prison rules will be necessary in order to accommodate the challenges that most people will face as they age, and will need to be tailored so that they do not dilute the safety and security of the prison. Improved training of correctional staff in appropriate interactions with elderly individuals is important, as corrections officers will now be dealing with people who will likely act much differently than the “typical” prison inmate. Enhanced access to specialized medical care — including age-appropriate active treatment and programming for elderly inmates — will also increase in importance as the prison population ages. Prisons will need to account for a growing number of inmates with disabilities, which will lead to accessibility concerns at corrections facilities and to strategies for meeting the integration requirements of the ADA. Correctional systems must also develop systems for determining whether a particular elderly inmate should be housed in a mainstream living situation or a congregate living situation. Finally, the aging of the prison population inherently means that more people will be dying behind bars, and provisions must be made to keep these final moments as peaceful and dignified as possible.

The good news is that the federal government and the states are already taking action regarding many of these issues. Geriatric prison units or separate facilities are already in operation in some states, and are planned for construction or expansion in many more. Medical staffs in several states are implementing new policies involving more frequent checkups of elderly inmates. Older, less-accessible facilities are constructing new cell blocks for inmates with physical disabilities. The rise of telemedicine offers access to certain specialists that was previously impractical in prison systems. An increased use of inmate-to-inmate services provides elderly inmates with care benefits and the companionship of a younger friend, while also giving the younger inmate a greater sense of responsibility and self-worth. Prison hospice programs help make an inmate’s last days more comfortable, as do policies allowing the dying inmate privileges such as more frequent visitors.

Certain areas, though, still demand much more attention. In particular, the apparent lack of active treatment for the elderly at many facilities is a significant problem which needs to be remedied. Better training for staff in working with the elderly also should become a priority. Of course, certain jurisdictions and certain facilities offer better care to elderly inmates than do other prisons. Creating a greater nationwide uniformity of improved care for older prisoners is and will remain a key issue.

Yet focusing solely on the inside of prisons will not be enough. A thorough review of sentencing policies is also necessary to determine whether certain offenders are staying behind

bars longer — and, consequently, getting older in prison — than what really is necessary. Appropriate use of incarceration alternatives for certain criminals, particularly non-violent offenders and first-time offenders, may help reduce the number of people aging behind the prison walls. Judges should also be encouraged to take age-related factors into account in sentencing, although mitigating sentences based on advanced age alone does not appear to be a proper solution. Use of early conditional release programs for high-cost, low-risk elderly inmates appears to be another important means of reducing the elderly prison population and should be implemented — but only with proper controls to ensure that the right people are released and that they have an appropriate place to go.

In the end, there is no single best set of policies for addressing all of these issues. The best results, however, will be reached by seeking a balance between security goals of prisons, penological and rehabilitative objectives of the criminal justice system, unique physical and mental needs of elderly human beings, financial and budgetary interests of the government and the general public, and human rights considerations regarding the dignity of all people.

Accomplishing this will involve bringing a variety of stakeholders to the table. Voices of political leaders, corrections officials, medical professionals (particularly geriatrics specialists), judges and attorneys, victims' advocates, and other major players who are involved with the American prison systems must be heard. Additionally, the voices of the elderly prisoners themselves cannot be ignored.

The process of doing this has clearly been started to some extent in every state in America. Yet it is just as clear that every state has a long way to go in dealing with this sharp increase of elderly inmates. Given that the “gray tsunami” in U.S. prisons will not recede anytime soon, determining what to do regarding the aging population behind bars has become an issue of paramount importance. Legal standards demand solutions to these questions. Even more importantly, standard of human decency demand it as well.

“The degree of civilization in a society can be judged by entering its prisons,” wrote Fyodor Dostoyevsky more than a century ago. Today, and for at least the next 20 or 30 years, anyone entering America's prisons will find a greater number of elderly people than ever before. The way in which our nation deals with these elderly prisoners will determine the way that our civilized society is judged for many years to come.