

## ELDERLY SEX OFFENDERS: WHAT SHOULD BE DONE?

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*Elderly persons committing sexual offenses represent a growing group of individuals within the federal and state court systems, which creates a unique set of problems. Their advanced age sets them apart from other offenders in terms of their physical and mental needs during incarceration, as well as through society and the courts' perception of what constitutes a fair sentence for these individuals. This Note focuses on the sentences given to elderly sex offenders, the types of crimes for which offenders face punishment, and how their punishment differs from their younger counterparts. The Note addresses the history of elderly criminals, both generally and specifically for sexual offenses, and the law governing federal sex offenses. The Note discusses the methodology and results of the study before analyzing the data. Ms. Taylor evaluates the current policies in light of the analysis performed in this Note and proposes a combination of increased prison time, mandatory minimums with some exceptions for special circumstances, and rehabilitation programs catering to the elderly offender's specific needs.*

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I would like to express my appreciation to Nick and Mom for reading this Note several times. I also would like to thank them, as well as Dad, Andrew, and Grandma, for supporting my law school career.

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## I. Introduction

Six years ago, after his first and only criminal offense, Dale entered the Pennsylvania prison system at the age of fifty-seven.<sup>1</sup> His offense: sexual abuse of a minor.<sup>2</sup> His victim: his grandson.<sup>3</sup> Similarly, seventy-four-year-old Alan Reed committed the offense of sexual assault of a child in Bennington, Vermont.<sup>4</sup> However, because of Reed's advanced age, his negotiated plea deal required merely a ten-year sentence, the minimum, whereas the maximum sentence for aggravated sexual assault in Vermont is life.<sup>5</sup> In Secaucus, New Jersey, a slightly different story emerges, where police arrested eighty-two-year-old Hector Castro for allegedly masturbating while pressing against female customers at the local Wal-Mart.<sup>6</sup> Prosecutors charged Castro with lewdness for this particular incident, even though this was not the first time in his elder years that he found himself in trouble for a sex-related offense.<sup>7</sup> He previously served time in prison between 2003 and 2005 for a sexual assault.<sup>8</sup>

These three men are among the small group of elderly sex offenders who represent an increasing problem in both federal and state court systems.<sup>9</sup> Studies indicate that "sex offenders are more likely to start committing their crimes, or to keep committing them, in their elder years."<sup>10</sup> Although there appears to be a general societal distaste for any sex offense, multiple unique problems associated with the age

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1. Laura Sullivan, *Sex Offenders Fill Geriatric Wards of U.S. Prisons*, NAT'L PUB. RADIO, Jan. 3, 2007, at 1, available at [www.npr.org/templates/story/story.php?storyId=6718593](http://www.npr.org/templates/story/story.php?storyId=6718593).

2. *Id.*

3. *Id.*

4. *Equivalent of Life Sentence for Bennington Sex Offender*, WCAX NEWS, (Oct. 9, 2009), <http://www.wcax.com/Global/story.asp?S=11286021>.

5. VT. STAT. ANN. tit. 13, § 3253(b) (2009); *Equivalent of Life Sentence for Bennington Sex Offender*, *supra* note 4.

6. Kathy Carvajal, *Elderly Man Accused of Fondling: Cops: Hector Castro Touched Himself Near Women*, MY FOX NEW YORK, (Sept. 22, 2009, 7:40 AM), [http://www.myfoxny.com/dpp/news/local\\_news/090922\\_elderly\\_man\\_accused\\_fondling](http://www.myfoxny.com/dpp/news/local_news/090922_elderly_man_accused_fondling).

7. *Id.*

8. *Id.*

9. See generally Matt Hart, *The Geriatric Sex Offender: Senile or Pedophile?*, 32 LAW & PSYCHOL. REV. 153 (2008) (discussing the special problems and issues presented by elderly sex offenders); Lyle B. Brown, *The Joint Effort to Supervise and Treat Elderly Offenders: A New Solution to a Current Corrections Problem*, 59 OHIO ST. L.J. 259 (1998).

10. Hart, *supra* note 9, at 153.

of senior offenders set them apart.<sup>11</sup> For instance, the “traditional” punishment system of prison followed by parole or supervised release does not necessarily fit the mental and physical care needs of elderly offenders. This incongruence seems to indicate that more lenient sentences are suggested or supported in order to keep geriatrics out of prison.<sup>12</sup> Judges or juries often rule more leniently in favor of elderly criminals because of their advanced age.<sup>13</sup> At the same time, however, these individuals have committed sex offenses and are likely to commit further sex offenses despite their age.<sup>14</sup> As such, more lenient sentences for these particular older offenders do not fit within society’s theories of punishment.<sup>15</sup>

The purpose of this Note is to further investigate elderly sex offenders’ sentences and determine how their offenses are handled by our judicial system. Many speculate that elderly sex offenders receive more lenient sentences than younger offenders; however, there has been little investigation into the topic of the sentencing of elderly sex offenders. This Note addresses the punishment of elderly sex offenders, types of crimes for which elderly sex offenders face punishment, and how the punishment of elderly sex offenders differs compared with younger sex offenders.

Extensive research has been conducted into what mental health issues cause the elderly to commit sex offenses. This Note seeks to contribute to the field of elderly sex offender research by investigating the treatment of those individuals in the federal criminal system who committed a sex offense at an advanced age. Part II provides a background and history of elderly criminals, sex offenders, elderly sex offenders, and the laws governing federal sex offenses. Part III describes the methodology of this Note. Part IV presents the results found in the study. Part V explains and analyzes the results. Part VI

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11. J. Mark Watson, *Legal and Social Alternatives in Treating Older Child Sexual Offenders*, 13 J. OFFENDER COUNSELING, SERVICES & REHABILITATION 141, 142 (1989).

12. Brown, *supra* note 9, at 259. Maybe older sex offenders have more specialized needs due to special mental health issues associated not only with elderly sex offenders but also the elderly population generally. Hart, *supra* note 9, at 157.

13. Kelly Porcella, Note, *The Past Coming Back to Haunt Them: The Prosecution and Sentencing of Once Deadly but Now Elderly Criminals*, 81 ST. JOHN’S L. REV. 369, 375–76 (2007).

14. Hart, *supra* note 9, at 159. Experts indicate that sex offenses, compared with other crimes, are more likely to repeat as age increases. Sullivan, *supra* note 1, at 1. Also, the stubbornness that comes with old age is likely to play a role in recidivism. Hart, *supra* note 9, at 159.

15. RICHARD A. POSNER, *AGING AND OLD AGE* 130–33 (1995).

makes recommendations towards punishment strategies that the government might consider for older sex offenders.

## II. Background and History

### A. Elderly Criminals

#### 1. IN GENERAL

The population aged sixty-five and older generally exhibits a low crime rate.<sup>16</sup> Sometimes, however, headlines such as “Serious Crime by Elderly Is on the Rise”<sup>17</sup> give the improper impression that a large number of elderly individuals commit heinous crimes.<sup>18</sup> In truth, the elderly do not commit many crimes when compared with the larger criminal population.<sup>19</sup> The underlying causes for these crimes by older members of society vary but generally can be categorized into four groups: (1) mental or behavioral, (2) emotional, (3) physical, and (4) economic.<sup>20</sup> Of course, each elderly criminal experiences unique circumstances based on his or her “location in the social structure,”<sup>21</sup> so the underlying cause of a crime should not only be limited to one of the four categories.<sup>22</sup> For instance, women generally tend to commit more larceny or theft crimes compared with their male counterparts.<sup>23</sup> Studies suggest that these women commit offenses that coordinate with their gender role (e.g., going to purchase groceries) assigned by social standards.<sup>24</sup>

Judge Posner states, “[T]he percentage of arrests of persons 65 and over for the most serious crimes of violence—murder, forcible

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16. *Id.* at 128.

17. Francis T. Cullen et al., *The Rise of the Elderly Offender: Will a “New” Criminal Be Invented?*, 23 CRIME & SOC. JUST. 151, 152 (1985).

18. *Id.* at 152.

19. *Id.* at 155.

20. Brown, *supra* note 9, at 266. These four factors are explained further. First, psychological disorders may be the result of an organic brain disorder or otherwise simply the aging process. *Id.* Behavioral problems involve things such as alcoholism. *Id.* Second, emotional factors may be, for instance, “the individual’s emotional reaction to growing old” or to losses that occur later in life (such as the death of a spouse or the individual’s declining health). *Id.* Third, physical failure in the body of an older individual might lead one to commit crimes based on need. *Id.* Finally, “social status is a prominent factor in the elderly’s economic motivation to commit crimes generally,” because committing crimes does not require skills or power. *Id.*

21. Cullen et al., *supra* note 17, at 156.

22. Brown, *supra* note 9, at 266.

23. Cullen et al., *supra* note 17, at 156.

24. *Id.*

rape, robbery, and aggravated assault—is lower than for serious property crimes such as burglary, larceny-theft, motor vehicle theft, and arson.”<sup>25</sup> He notes that this percentage difference between types of crimes committed by those over sixty-five is quite miniscule. For instance, those over sixty-five commit only 0.6 percent of violent crime compared to 0.8 percent of property offenses.<sup>26</sup> Further, a comparative analysis, examining people between the ages of sixty and sixty-four and those over the age of sixty-five, finds no difference between property versus violent crime rates.<sup>27</sup>

## 2. PROPERTY CRIME

The elderly commit few property crimes when compared with the total adult criminal population. Contrary to previous studies, some argue that those over the age of sixty-five do not commit as much property crime, as a class, as they did in the past.<sup>28</sup> For example, arrests of those over the age of sixty-five for burglary between 1989 and 1995 decreased sixteen percent, which contrasts with a thirty-eight percent increase in burglary arrests for the total population.<sup>29</sup> Elder offenders constituted only 0.09% of burglary arrests in 1995.<sup>30</sup> Although the small size of this percentage perhaps makes it an insignificant indicator, another study that examines the Federal Bureau of Investigation’s Crime Index finds that persons over the age of sixty-five commit mostly larceny, theft, and shoplifting offenses, a total of 78.62% of the crimes for that offender population.<sup>31</sup> Ultimately, it appears older offenders do not commit much property crime when compared with the greater population but property offenses comprise the majority of crimes that the elderly do commit.

## 3. VIOLENT CRIME

Despite the recent increase in the number of elders who commit violent crime, the number still remains quite low.<sup>32</sup> The murder rate

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25. POSNER, *supra* note 15, at 128.

26. *Id.*

27. *Id.*

28. Edith Elisabeth Flynn, *Elders as Perpetrators*, in *ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM: MYTH, PERCEPTIONS, AND REALITY IN THE 21ST CENTURY* 43, 57, 74 (Max B. Rothman et al. eds., 2000).

29. *Id.* at 57.

30. *Id.* at 58.

31. Brown, *supra* note 9, at 265.

32. Flynn, *supra* note 28, at 53. For instance, only 1.9% of a sample of elderly offenders committed the offense of murder. Brown, *supra* note 9, at 265.

for elders does not significantly add to the national rate.<sup>33</sup> Those over the age of sixty-five committed 149 murder/homicide offenses in 1995 out of a total of 16,701.<sup>34</sup> Aggravated assault charges occurred at a higher rate, increasing nineteen percent between 1989 and 1995 for those between the ages of fifty-five and fifty-nine and increasing eleven percent for offenders between the ages of sixty and sixty-four.<sup>35</sup> Between 1989 and 1995, however, it appears that forcible rape declined for elders between the ages of fifty-five and fifty-nine, as well as those between the ages of sixty and sixty-four, but did not decline as much as the national average for all age groups for forcible rape.<sup>36</sup> A study of elder probationers and crimes committed finds "18.7% of offenders in the total sample were convicted of the primary offenses of abuse or assault, while another 21% were sentenced for 'sex offenses,' including aggravated criminal sexual assault, public indecency, indecent solicitation of a child, and lascivious acts with a child."<sup>37</sup>

#### 4. OTHER CRIMES

A number of elderly drivers face criminal prosecution for the offense of driving with a revoked license (6.5%).<sup>38</sup> Also, 32.2% of elderly probationers in one study committed the offense of driving while under the influence.<sup>39</sup> The study further showed that driving under the influence remained the most frequent crime committed by this age group.<sup>40</sup> Additionally, elders compose an increasing percentage of drug users and, consequently, drug offenders, with over an eleven percent increase in elder drug arrests between 1989 and 1995.<sup>41</sup> However, the number of elderly drug offenders remains small compared with the overall offender population.<sup>42</sup>

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33. Flynn, *supra* note 28, at 55 tbl.3.4, 56.

34. *Id.* at 55 tbl.3.4.

35. *Id.* at 56.

36. *Id.* at 56, 73. Forcible rapes by elders between the ages of fifty-five and fifty-nine decreased by five percent. *Id.* at 56. Forcible rapes by elders between the ages of sixty and sixty-four decreased by seven percent. *Id.* There was a small increase of 1.3% for those over age sixty-five but the result had no significance due to the small sample size. *Id.*

37. Brown, *supra* note 9, at 265.

38. *Id.*

39. *Id.*

40. *Id.*

41. See Flynn, *supra* note 28, at 67.

42. *Id.* The actual number of drug arrests for elders was 1859 in 1995 compared with total drug arrests equal of 1,144,228. *Id.*

## B. Elderly Sex Offenders

### 1. TYPICAL SEX CRIMES OF THE ELDERLY

In the United States, nearly half of the male prison population over the age of sixty consists of sex offenders.<sup>43</sup> About one-fourth of elderly inmates over the age of fifty-five who are also first time offenders have been convicted of a sex offense.<sup>44</sup> Further, in many major state prison systems (e.g., Michigan, Georgia, and Florida), approximately one-third of the prisoners over age fifty-five are also sex offenders.<sup>45</sup>

Within the group of offenders, however, the type of sex crime committed varies with age.<sup>46</sup> The United States Department of Justice indicates offenders above the age of thirty-four commit 28.4% of all sexual assaults.<sup>47</sup> Specifically, this category of offenders commits 23.4% of all forcible rape and 34.1% of all forcible fondling offenses (the highest percentage group).<sup>48</sup> Upon examining the nature of sexual acts committed, elderly sex offenders typically engage in more “passive” sexual activity, compared with a younger age group, rather than attempted penetration.<sup>49</sup> Age and the type of rape offense committed (as opposed to the more general sex offense) share a clear relationship; arrests for rape are concentrated in younger age groups, and arrests for crimes such as statutory rape are “more prevalent among older persons.”<sup>50</sup> Unlike rapists and non-sex offenders, child sex offenders tend to be older, more educated, white, married, and more likely to have a mental disorder.<sup>51</sup>

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43. Seena Fazel et al., *Risk Factors for Criminal Recidivism in Older Sexual Offenders*, 18 *SEXUAL ABUSE: J. RES. & TREATMENT* 159, 159 (2006).

44. Delores E. Craig-Moreland, *The Needs of Elderly Offenders*, in *CRIME & JUSTICE IN AMERICA: PRESENT REALITIES AND FUTURE PROSPECTS* 370, 370 (Wilson R. Palacios et al. eds., 2002).

45. Flynn, *supra* note 28, at 73.

46. See generally HOWARD N. SYNDER, U.S. DEP'T OF JUSTICE, *SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS* 8 tbl.5 (2000) (showing the age profile of sex offenders and an increase in each category of crimes listed, other than forcible rape).

47. *Id.*

48. *Id.*

49. See Hart, *supra* note 9, at 155. Older sex offenders are also less likely to use force or threatening behavior against their victims. *Id.*

50. Flynn, *supra* note 28, at 73.

51. *Id.*

## 2. MENTAL DISORDERS ASSOCIATED WITH ELDERLY SEX OFFENDERS

In a study of older violent offenders (not necessarily limited to sex offenders), fifty percent of elderly violent criminals suffered from a functional mental disorder (e.g., schizophrenia, manic depressive disorder, or paranoid psychosis).<sup>52</sup> The elderly more commonly develop organic brain syndromes, such as dementia, so this statistic concerning functional disorders might be misleading to those unaware of the difference between functional and organic brain disorders.<sup>53</sup> In total, organic and functional mental disabilities account for seventy-five percent of the group in the study.<sup>54</sup>

Looking more specifically at sexual offenses reveals that older offenders typically exhibit medical conditions, in particular mental health issues.<sup>55</sup> Generally, elderly prisoners more likely abuse or suffer from a dependency on alcohol,<sup>56</sup> but studies further suggest that at least half of those prisoners considered elderly suffer from "a diagnosable psychiatric disorder and up to 80 percent of older offenders have had psychiatric hospitalization."<sup>57</sup> A study by Seena Fazel et al. finds elderly sex offenders have high rates of psychiatric morbidity (mental illness).<sup>58</sup> Specifically, this mental illness could be a psychotic illness, a DSM-IV personality disorder (i.e., paranoid personality disorder, schizoid personality disorder, antisocial personality disorder, narcissistic personality disorder, or obsessive compulsive personality disorder),<sup>59</sup> or a DSM-IV depressive episode<sup>60</sup> (i.e., bi-polar disorder, dysthymic disorder, or cyclothymic disorder).<sup>61</sup> This particular study discovers lower rates of organic brain disorders (dementia) among

52. Stephen J. Hucker, *Psychiatric Aspects of Crime in Old Age*, in *ELDERLY CRIMINALS* 67, 73 (Evelyn S. Newman et al. eds., 1984). See generally AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. text revision 2000) [hereinafter *DSM-IV-TR*] (defining schizophrenia, manic depressive disorder, and paranoid psychosis).

53. Hucker, *supra* note 52, at 73. A functional disease prevents or obstructs a bodily organ from performing the special function without defect in the organ itself. *BLACK'S LAW DICTIONARY* 501 (9th ed. 2009). Organic disease is caused by an injury or malfunction to an organ. *Id.*

54. Hecker, *supra* note 52, at 73.

55. See *id.* at 69.

56. Catherine F. Lewis et al., *A Study of Geriatric Forensic Evaluatees: Who Are the Violent Elderly?*, 34 *J. AM. ACAD. PSYCHIATRY L.* 324, 324 (2006).

57. *Id.*

58. Seena Fazel et al., *Psychiatric, Demographic and Personality Characteristics of Elderly Sex Offenders*, 32 *PSYCHOL. MED.* 219, 223 (2002).

59. *DSM-IV-TR*, *supra* note 52.

60. *Id.*

61. *Id.*



older sex offenders than hypothesized.<sup>62</sup> Furthermore, the study found differences in the personality traits associated with various crimes.<sup>63</sup> Sex offenders tend to possess more schizoid traits, which generally include detachment from social relationships and few expressions of emotion, according to the Fazel study.<sup>64</sup> Overall, the Fazel study indicates that “sex offending may be more related to personality factors than acute mental illness or organic brain disease.”<sup>65</sup> In fact, a separate study suggests that elderly sex offenders do not suffer from organic brain disorders any more than the typical older adult population.<sup>66</sup>

Other studies suggest alcoholism may explain elderly sex offender behavior.<sup>67</sup> This specific explanation, however, pertains more to younger sex offenders than older sex offenders.<sup>68</sup> Twenty-one percent of a small sample of elderly sex offenders suffered from alcoholism, whereas twenty-six percent of the younger sex offenders suffered from alcoholism.<sup>69</sup> However, research links alcohol abuse and dependence in both the young and old to the commission of violent crimes.<sup>70</sup> A study conducted by Drs. Catherine Lewis, Cynthia Fields, and Elizabeth Rainey hypothesizes that geriatric offenders who committed violent crimes would be more likely to have alcohol-related diagnoses.<sup>71</sup> They find that the most common diagnosis for this group of offenders was alcohol dependence, at 67.7%.<sup>72</sup>

### 3. RECIDIVISM

A study investigating civil commitment shows that recidivism declines with age.<sup>73</sup> Criminological and sociological literature proves

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62. Fazel et al., *supra* note 58, at 223. Only one percent of the sample had been diagnosed with dementia. *Id.*

63. *Id.*

64. *Id.*; see also DSM-IV-TR, *supra* note 52, at § 301.20 (listing symptoms of schizoid personality disorder).

65. Fazel et al., *supra* note 58, at 223.

66. Hucker, *supra* note 52, at 71.

67. Hart, *supra* note 9, at 157; see also Hucker, *supra* note 52, at 68.

68. Hucker, *supra* note 52, at 69–70.

69. *Id.*

70. Lewis et al., *supra* note 56, at 324–32.

71. *Id.* at 325.

72. *Id.* at 327.

73. Richard Wollert, *Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators: An Application of Bayes's Theorem*, 12 PSYCHOL. PUB. POL'Y & L. 56, 72 (2006) (discussing how recidivism declines with age).

this argument repeatedly.<sup>74</sup> Further, the older the age of a person at the time of offense, the less likely that person will re-offend.<sup>75</sup> This repeated proposition tends to support a system of selective decarceration from prison to supervised release or other community-based sentences.<sup>76</sup> However, notably, the recidivism rate for sex offenses declines at a much slower rate compared with other crimes.<sup>77</sup> Further, Drs. Thorton and Doren find that the more times an older person offends, the probability that they fall into recidivism increases compared with a one-time convict.<sup>78</sup> Thus, sex offenders in their older years fail to follow the trend of low recidivism that applies to the rest of the criminal population.

### C. Treatment of Elderly Criminals by the Criminal Justice System

#### 1. SOCIAL VIEWS

Few want to imprison elderly, feeble individuals who committed a crime due to uncontrollable psychological factors.<sup>79</sup> For example, a seventy-six-year-old male in Illinois occasionally departed from his required medication and proceeded to drink heavily, causing him to become physically and verbally abusive.<sup>80</sup> While in this state, he twice committed homicide and received a guilty verdict but pled insanity and, therefore, received placement in a mental hospital.<sup>81</sup> After these homicides, he was diagnosed with a mental illness but stopped taking his prescribed medication and reverted to drinking, which led to another homicide.<sup>82</sup> He successfully pled the insanity defense again

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74. John J. Kerbs, *Arguments and Strategies for the Selective Decarceration of Older Prisoners*, in *ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM: MYTH, PERCEPTIONS, AND REALITY IN THE 21ST CENTURY* 229, 233 (Max B. Rothman et al. eds., 2000).

75. *Id.*

76. *Id.* at 234, 240.

77. Hart, *supra* note 9, at 159. A majority of sex offenders do not reoffend, but this is complicated by the fact that elderly sex offenders are more likely to experience recidivism. *Id.*

78. DAVID THORTON & DENNIS DOREN, *HOW MUCH SAFER ARE OLDER OFFENDERS* (2002).

79. Hart, *supra* note 9, at 158.

80. See, e.g., Sanford I. Finkel & Inez J. Macko, *Impact of the Criminal Justice Process on Older Persons*, in *ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM: MYTH, PERCEPTIONS, AND REALITY IN THE 21ST CENTURY* 105, 110 (Max B. Rothman et al. eds., 2000).

81. *Id.*

82. *Id.*

and used the legal system to his benefit with his display of humiliation and remorse.<sup>83</sup>

Although compassionate in some circumstances, society generally hesitates before allowing freedom to those who inflict harm upon others, especially those that inflict harm upon children.<sup>84</sup> Criminal responsibility and fair punishment require that criminals who commit such crimes, although elderly, be punished in accordance with the law.<sup>85</sup> Evidence shows that elderly offenders receive less harsh treatment in the criminal system compared with their younger counterparts.<sup>86</sup> One study investigating the topic indicates that for all crimes, offenders over the age of sixty received sentences and plea bargain agreements in the federal system that were, at most, half as severe as their younger counterparts.<sup>87</sup>

Leniency and feelings of compassion on the part of police, prosecutors, and judges cause many problems in the prosecution of elderly offenders.<sup>88</sup> For example, an elderly man with an alcohol problem was detained multiple times by the police for shoplifting, but the police chose not to prosecute the man out of sympathy for his life situation.<sup>89</sup> Police and prosecutors hold the discretion of charging individuals after the commission of crimes, and sometimes emotions sway the government representatives.<sup>90</sup> Judges often worsen the problems of the elderly criminal when trying to help "(1) by ignoring [the problems] altogether, or (2) by contributing to [them] through the choice of sentence."<sup>91</sup>

In particular, the public usually wants to disassociate themselves from sex offenders.<sup>92</sup> Generally, the public believes that "normal" older individuals experience a diminished sex drive and a reduction

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83. *Id.*

84. Hart, *supra* note 9, at 158.

85. LETITIA T. ALSTON, CRIME AND OLDER AMERICANS 209 (1986).

86. *Id.* at 207 (noting, however, that there were few cases of elder sex offenders for comparison, and they are not necessarily representative of all cases everywhere).

87. Dean J. Champion, *The Severity of Sentencing: Do Federal Judges Really Go Easier on Elderly Felons in Plea-Bargaining Negotiations Compared with Their Younger Counterparts?*, in OLDER OFFENDERS: PERSPECTIVES IN CRIMINOLOGY AND CRIMINAL JUSTICE 143, 154 (Belinda McCarthy & Robert Langworthy eds., 1988).

88. Brown, *supra* note 9, at 269-70.

89. See Finkel & Macko, *supra* note 80, at 110-11.

90. See Brown, *supra* note 9, at 270-71.

91. *Id.* at 270.

92. Watson, *supra* note 11, at 142.

in interest of sexual issues.<sup>93</sup> Because of this perception, a diminished capacity explanation for elderly sex offenders seems applicable in the minds of members of society.<sup>94</sup> The community feels that the age and diminished capacity of elderly sex offenders cause the commission of crimes, and therefore, the legal system should hold them less responsible.<sup>95</sup> Even with this societal perception, no serious movement ever has been made towards an old-age defense that essentially would function as an excuse<sup>96</sup> and result in a presumption of non-culpability in court settings for criminals past a certain age.<sup>97</sup> Regardless, consideration still should be given to how age affects the defendant in the court room, including the attitudes towards the defendant from the judge, jury, lawyers, and other courtroom personnel, because of the assumption that age can decrease the ability to engage in rational behaviors.<sup>98</sup> This assumption, however, only leads to further problems in the decision of how to handle elderly sex offenders,<sup>99</sup> because “[f]ailure to prosecute often severely limits other, nonlegal, alternatives for treatment.”<sup>100</sup>

## 2. PRISON BENEFITS AND DOWNSIDES

In response to increasing public outrage over sex offenses and child exploitation, prison sentences have become more prevalent for these types of crimes, even for elderly offenders.<sup>101</sup> Prison may seem like a proper and natural punishment in many situations, especially for sex offenders.<sup>102</sup> “[H]ard-line sentencing of one elderly offender to

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93. *Id.* This perception may not be necessarily true and is considered insulting to the aged population. See Kathleen S. Mayers & Dennis McBride, *Sexuality Training for Caretakers of Geriatric Residents in Long Term Care Facilities*, 16 *SEXUALITY & DISABILITY* 227, 230 (1998).

94. Watson, *supra* note 11, at 142.

95. *Id.*

96. “A defense that arises because the defendant is not blameworthy for having acted in a way that would otherwise be criminal.” *BLACK’S LAW DICTIONARY* 649 (9th ed. 2009).

97. William E. Adams, Jr., *Elders in the Courtroom*, in *ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM: MYTH, PERCEPTIONS, AND REALITY IN THE 21ST CENTURY* 87, 95 (Max B. Rothman et al. eds., 2000).

98. Watson, *supra* note 11, at 142–43.

99. *Id.*

100. *Id.* at 143. There are problems with instituting a non-prison program for older offenders. *Id.*

101. Hart, *supra* note 9, at 158.

102. *See id.*

jail time may send the message that the court intends to similarly punish other older offenders convicted of comparable crimes."<sup>103</sup>

Multiple concerns arise when considering whether to place elderly criminals in prison. First, some believe prison will have no reformatory effect on mentally ill offenders and these individuals need alternative treatment.<sup>104</sup> Second, the prison system cannot necessarily provide for the physical and mental health needs of elderly prisoners.<sup>105</sup> Even though older offenders pose considerably less danger while in prison, the geriatric inmate costs more money to taxpayers than younger prisoners.<sup>106</sup> Older prisoners' medical needs alone require more resources from taxpayers, averaging three times that of younger prisoners.<sup>107</sup> Mental disorders are increasingly common among the older population generally and also arise from adjusting to life in prison.<sup>108</sup> This effect on elderly criminals is due partly to institutionalization, which causes "greater anxiety, despondency, apprehension, and concern with physical functioning."<sup>109</sup>

Third, common ailments of the elderly create difficulties for prison systems that must absorb the needs of this population.<sup>110</sup> Prisons were designed for younger populations,<sup>111</sup> and, as such, placing elders in prisons causes concern over the "failure to provide legally mandated, safe, and fully accessible living environments and age-appropriate programs and services for this population."<sup>112</sup> One of the reasons that Elmer Johnson, a professor of crime delinquency and corrections at Southern Illinois University, supports segregated prison units by age is the disparity between the old and young and the conflict between the two groups.<sup>113</sup> Also, for those who commit their first

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103. Brown, *supra* note 9, at 270.

104. *See id.*

105. *Id.* at 274; John D. Burrow & Barbara A. Koons-Witt, *Elderly Status, Extraordinary Physical Impairments and Intercircuit Variation Under the Federal Sentencing Guidelines*, 11 *ELDER L.J.* 273, 276-77 (2003).

106. Hart, *supra* note 9, at 158.

107. Watson, *supra* note 11, at 143.

108. Brown, *supra* note 9, at 274.

109. Michael J. Sabath & Ernest L. Cowles, *Factors Affecting the Adjustment of Elderly Inmates to Prison*, in *OLDER OFFENDERS: PERSPECTIVES IN CRIMINOLOGY AND CRIMINAL JUSTICE* 178, 179 (Belinda McCarthy & Robert Longworthy eds., 1988).

110. Brown, *supra* note 9, at 273-74.

111. *Id.* at 272.

112. Joann Brown Morton, *Implications for Corrections of an Aging Prison Population*, 5 *CORRECTIONS MGMT. Q.* 78, 79 (2001).

113. Elmer H. Johnson, *Care for Elderly Inmates: Conflicting Concerns and Purposes in Prison*, in *OLDER OFFENDERS: PERSPECTIVES IN CRIMINOLOGY AND CRIMINAL JUSTICE* 157, 162 (Belinda McCarthy & Robert Longworthy eds., 1988).

prison eligible crime past the age of fifty-five, "it is easy to conclude that these individuals were maladjusted in society, and will present some management problems in the prison system."<sup>114</sup> Management problems also arise from the particular physical and mental care needs of the elderly, such as a modified living environment, that place demands on the already burdened prison system.<sup>115</sup> These particular inmates present a favorable argument towards segregated geriatric units.<sup>116</sup> Notably though, no consensus has emerged on the issue of segregation or consolidation of prisons systems.<sup>117</sup>

In federal criminal prosecutions, the Federal Bureau of Prisons takes custody of sentenced persons for the duration of the sentence.<sup>118</sup> The Federal Bureau of Prisons has instituted drug, alcohol, and mental health treatment programs in order to assist the needs of prisoners.<sup>119</sup> Also during the sentence duration, "the Bureau of Prisons shall make available appropriate treatment to sex offenders who are in need of and suitable for treatment."<sup>120</sup> The Bureau "shall establish non-residential sex offender management programs to provide appropriate treatment, monitoring, and supervision of sex offenders and to provide aftercare during pre-release custody"<sup>121</sup> and they "shall establish residential sex offender treatment programs to provide treatment to sex offenders who volunteer for such programs and are deemed . . . to be in need of and suitable for residential treatment."<sup>122</sup>

### 3. PRISON ALTERNATIVES BENEFITS AND DOWNSIDES

*a. Fines* Courts apply fines or economic sanctions (e.g., court costs) as an alternative punishment to prison. These fines, however, often create strain on an elder's fixed budget.<sup>123</sup> For instance, if an offender receives a fine for stealing and stole because he or she needed the item but could not afford it, the fine merely contributes to the

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114. Craig-Moreland, *supra* note 44, at 370.

115. *Id.*

116. *Id.*

117. R.V. Thivierge-Rikard & Maxine S. Thompson, *The Association Between Aging Inmate Housing Management Models and Non-Geriatric Health Services in State Correctional Institutions*, 19 J. AGING & SOC. POL'Y 39, 42 (2007).

118. 18 U.S.C. § 3621(a) (2006 & Supp. 2008).

119. FED. BUREAU OF PRISONS, *Inmate Matters*, [http://www.bop.gov/inmate\\_programs/index.jsp](http://www.bop.gov/inmate_programs/index.jsp) (last visited Nov. 26, 2010).

120. 18 U.S.C. § 3621(f)(1) (2006 & Supp. 2008).

121. 18 U.S.C. § 3621(f)(1)(A) (2006 & Supp. 2008).

122. 18 U.S.C. § 3621(f)(1)(B) (2006 & Supp. 2008).

123. Brown, *supra* note 9, at 270.

problem and may lead to more crime.<sup>124</sup> A similar result may occur for those convicted of any crime, not just theft or burglary, due to the economic constraints on a retired person's income, especially since ten percent of the elderly have income below the poverty line, with many more only slightly above it.<sup>125</sup>

*b. Probation* Rather than prison, probation or diversion programs might be better suited for a non-violent and non-dangerous individual, especially an older one.<sup>126</sup> Studies suggest that the number of older people on probation "may be four times the number of elderly in prison."<sup>127</sup> Even though probation in the federal system is not a common sentence,<sup>128</sup> many believe that probation offers the best method to track sex offenders out of prison; specifically, people favor probation as a way to best monitor sex offenders' rehabilitation progress.<sup>129</sup> Courts often will rule in favor of probation because of the belief that elderly offenders can receive better medical care while outside of prison.<sup>130</sup>

Despite the benefits, probation programs often do not sufficiently treat the special needs of older offenders equally, when compared with younger counterparts, in addressing and counseling them.<sup>131</sup> Older offenders often attempt to rationalize their behaviors and, without proper encouragement by probation officers, may refuse to change because of their age.<sup>132</sup> The older probationer, unfortunately, is neglected in exchange for the younger probationer and not supervised as necessary due to being "troubled with physical and health problems which limit his or her ability to report."<sup>133</sup> Because of the lack of appropriate supervision and the number of probationers who have committed sex offenses, "the likelihood exists that a new victim

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124. *See id.*

125. *See id.*; *see also* LAWRENCE A. FROLIK & ALISON MCCHRISTAL BARNES, *ELDER LAW: CASES AND MATERIALS* 28-30 (4th ed. 2007).

126. Brown, *supra* note 9, at 274-75.

127. Thomas Ellsworth & Karin A. Helle, *Older Offenders on Probation*, 58 *FED. PROBATION* 43, 44 (1994).

128. HENRY J. BEMPORAD, *AN INTRODUCTION TO FEDERAL SENTENCING* 5 (12th ed. 2010), *available at* <http://www.dcfpd.org/library/Introduction%20to%20Federal%20Sentencing%2012th%20Edition.pdf>. In fiscal year 2009, only 7.3% of cases received merely probation in the federal system. *Id.* at 5 n.12.

129. Brown, *supra* note 9, at 274-75.

130. Ellsworth & Helle, *supra* note 127, at 44.

131. Brown, *supra* note 9, at 275.

132. Ellsworth & Helle, *supra* note 127, at 50.

133. *Id.*

will emerge from a probation system . . . .”<sup>134</sup> In the federal system, a repeat offense violates the conditions of probation under 18 U.S.C. § 3563(a).<sup>135</sup> If a probationer commits a repeat offense, the court will revoke the violator’s probationary status, and the rest of the sentence will be carried out in prison.<sup>136</sup>

*c. Supervised Release* An alternative sentencing option for some crimes is a lesser prison term with post-prison supervision. The federal system calls this “supervised release,” which, like probation, is a non-incarcerated sentence.<sup>137</sup> Prison terms that exceed more than one year generally require supervised release and some statutes make it absolutely mandatory.<sup>138</sup> In particular, sex offenses and child pornography offenses require mandatory supervised release for at least five years past the prison sentence.<sup>139</sup>

*d. Pre-trial Diversion* Pre-trial diversion programs provide another sentencing alternative for minor offenses. These programs offer the opportunity for an “offender to complete a prescribed regimen.”<sup>140</sup> The regimen can include “counseling, referrals, educational activities and community voluntary work.”<sup>141</sup> In return for the offender’s participation, the court stays the sentence given at the outset and eventually expunges the conviction when the offender successfully completes the program.<sup>142</sup> Unfortunately, many of the diversion programs that do exist provide mostly for younger offenders, and few programs have been designed specifically for elderly offenders.<sup>143</sup>

*e. Family Placement* Family placement might also be utilized in order to keep elderly out of prison and help stop reoccurrences.<sup>144</sup> This system only works if the offender and victim do not live in the same household.<sup>145</sup> However, elderly sex offenders often have a familial relationship with their victim; this option, therefore, rarely is used and frequently serves as a last resort.<sup>146</sup>

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134. *Id.* at 47.

135. 18 U.S.C. § 3563(a) (2006 & Supp. 2008).

136. BEMPORAD, *supra* note 128, at 5.

137. *Id.*

138. *Id.*

139. *Id.*

140. Brown, *supra* note 9, at 285.

141. *Id.*

142. *Id.*

143. *Id.* at 286.

144. Watson, *supra* note 11, at 145.

145. *Id.*

146. *Id.* An inappropriate placement might occur where “Grandpa lives with the uncle and aunt of the victim, [and] there are frequent occasions for repeat of-



*f. Civil Commitment* Although an available option, civil commitment remains a controversial way to handle sex offenders.<sup>147</sup> A program like this requires an offender be sentenced to prison for an extended period of time beyond the original court imposed punishment.<sup>148</sup> Some sex offenders spend additional years in prison until they are no longer deemed to be a harm to society.<sup>149</sup> Civil commitment faces much criticism and not all states use it.<sup>150</sup> Despite the opposition, the Supreme Court has upheld the use of civil commitment for the purpose of rehabilitating a sex offender.<sup>151</sup>

#### D. Federal Sex Offense Statutes

Federal sex offense statutes remain a very fluid area of the United States Code. Constant changes occur due to new activities that become possible. For instance, constant advances in technology require that pornography statutes keep pace with current trends.<sup>152</sup>

##### 1. SEXUAL ABUSE

Statutes define sexual abuse as “knowingly caus[ing] another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping).”<sup>153</sup> Alternatively, sexual abuse occurs when a person “engages in a sexual act with another person” and the other person is either “incapable of appraising the nature of the conduct” or

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fenses.” *Id.* Also, the Hucker study indicated that older sex offenders chose victims that were at least known to the offender, if not a relative. Hucker, *supra* note 52, at 71.

147. See Bill Mears, *Can Sex Offenders Be Held After Serving Criminal Sentences?*, CNN, <http://www.cnn.com/2010/CRIME/01/12/scotus.sex.offender.law/index.html> (last visited Nov. 26, 2010); see also Bill Mears, *Supreme Court: Sex Offenders Can Be Held Indefinitely*, CNN, <http://www.cnn.com/2010/CRIME/05/17/scotus.sex.offenders/index.html?hpt=Sbin> (last visited Nov. 26, 2010).

148. *Id.*

149. *Id.*

150. *Id.* Some states call civil commitment “predator laws,” and the focus of these laws is to determine the risk of sex offenders and prevent recidivism.

151. *U.S. v. Comstock*, 130 S. Ct. 1949, 1965 (2010).

152. Federal sentencing guidelines were changed again on November 1, 2009, in order to accommodate recent changes in child pornography statutes that now include streaming video to the possible list of offenses of “producing a visual depiction.” 18 U.S.C. § 2251 (2006 & Supp. 2008); see also Paul S. Kish & W. Carl Liez III, *Federal Sentencing Guidelines Amendments Part I: Sex Crimes* (Oct. 29, 2009), <http://www.georgiafederalcriminallawyerblog.com/2009/10/>.

153. 18 U.S.C. § 2242(1) (2006).

“physically incapable of declining participation in, or communicating unwillingness to engage in that sexual act.”<sup>154</sup> Aggravated sexual abuse occurs whenever a force or threat is used against an individual.<sup>155</sup> It also can occur when the person “knowingly renders another person unconscious and thereby engages in a sexual act with that other person” or “administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct; and engages in a sexual act with that other person; or attempts to do so. . . .”<sup>156</sup> An individual who “knowingly engages in a sexual act with another person who has not attained the age of 12 years . . . shall be fined under this title and imprisoned for not less than 30 years or for life.”<sup>157</sup> Someone who intends to commit a sex crime on an individual under the age of twelve and who has been convicted of another aggravated sexual offense shall be sentenced to life in prison if the death penalty is not an option.<sup>158</sup>

The Adam Walsh Child Protection and Safety Act of 2006 represents a major piece of recent legislation in sex crimes. This law now requires multiple mandatory minimum sentences for child sex trafficking,<sup>159</sup> as well as child sex offenses.<sup>160</sup> According to Henry J. Bemporad, a federal public defender, the penalties stemming from the Adam Walsh Child Protection and Safety Act, as well as other sex offense statutes, “are among the most severe in the federal system.”<sup>161</sup>

## 2. PORNOGRAPHY

The federal system contains multiple pornography statutes concerning, among other things, ownership, production, and distribution

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154. 18 U.S.C. § 2242(2) (2006).

155. 18 U.S.C. § 2241(a)(1)–(2) (2006).

156. 18 U.S.C. § 2241(b) (2006).

157. 18 U.S.C. § 2241(c) (2006).

158. 18 U.S.C. § 2241(c) (2006).

159. Mandatory minimums were enacted for the purpose of eliminating any need of parole or probation and ensuring that nearly all of the prison term imposed was served in prison. BEMPORAD, *supra* note 128, at 2. Further the mandatory minimums were enacted in order to stop the judge from departing from the guidelines. *Id.* However, the Supreme Court in *United States v. Booker* determined that the mandatory minimum guidelines should be more advisory in nature. *Id.* at 1–2.

160. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006); BEMPORAD, *supra* note 128, at 5.

161. BEMPORAD, *supra* note 128, at 4.

of pornographic material. Only some of them will be included in this discussion. "Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction . . ." <sup>162</sup> shall be punished by "not less than 15 years nor more than 30 years." <sup>163</sup> Any person who "knowingly transports or ships . . . knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed . . . if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and such visual depiction is of such conduct . . ." <sup>164</sup> "shall be fined under this title and imprisoned not less than 5 years and not more than 20 years . . ." <sup>165</sup>

### 3. PROSTITUTION

Various federal prostitution statutes exist as well. For instance, under 18 U.S.C. § 2421, "[w]hoever knowingly transports any individual in interstate or foreign commerce . . . with the intent that such individual engage in prostitution, or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined . . . or imprisoned not more than 10 years, or both." <sup>166</sup> The same punishment applies in 18 U.S.C. § 2422, which concerns instances where an individual "persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce . . . to engage in prostitution . . ." <sup>167</sup> When the prostitution scheme involves minors, then punishment increases to "not less than 10 years or for life." <sup>168</sup>

### 4. FEDERAL SENTENCING GUIDELINES

The federal sentencing guidelines set forth in 28 U.S.C. § 994(d) allow for age, mental, and emotional conditions, as well as physical condition, to assist the judge in a sentencing decision. <sup>169</sup> It appears that judges who decide to impose a lesser sentence rely on a wide va-

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162. 18 U.S.C. § 2251(a) (2006 & Supp. II 2008).

163. 18 U.S.C. § 2251(e) (2006).

164. 18 U.S.C. § 2252(a)(1)-(2) (2006 & Supp. II 2008).

165. 18 U.S.C. § 2252(b)(1) (2006).

166. 18 U.S.C. § 2421 (2006).

167. 18 U.S.C. § 2422 (2006).

168. 18 U.S.C. § 2423(a) (2006).

169. 28 U.S.C § 994(d)(1), (4), (5) (2006).

riety of circumstances.<sup>170</sup> Frequently used departures from the federal sentencing guidelines for the elderly in particular include family ties in the community, physical condition, age, and even possibly gender.<sup>171</sup>

The United States Supreme Court in *United States v. Booker* indicated that sentencing guidelines now serve as “advisory guidelines” rather than mandatory guidelines.<sup>172</sup> A sentencing court should consider the guidelines but need not follow them exactly.<sup>173</sup> However, if a statute imposes a minimum sentence, the statutory requirement controls.<sup>174</sup> Since many of the federal sex offenses include statutorily required prison time, it follows that judges have less ability to stray from the statute.

### III. Methodology

#### A. Analysis of Archival Data

The present study uses a data set entitled “Monitoring of Federal Criminal Sentences,”<sup>175</sup> which the Inter-University Consortium for Political and Social Research (ICPSR) distributed on September 1, 2009.<sup>176</sup> Originally produced by the United States Sentencing Commission and compiled in 2008, the data set contains information on all criminal cases and sentences under the Sentencing Guidelines and Policy Statements of the Sentencing Reform Act of 1984.<sup>177</sup> The sentencing dates in the data include cases with constitutional sentences between October 1, 2007 and September 30, 2008.<sup>178</sup> Researchers collected data from all federal courts in the United States by utilizing presentence reports, judgments of convictions, statements of reason, plea agreements, and sentencing guideline worksheets.<sup>179</sup> In order to account for confidentiality issues, ICPSR conducted a confidentiality review

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170. John D. Burrow & Barbara A. Koons-Witt, *supra* note 105, at 318.

171. *Id.* at 319–20; *see also* Janet B. Johnston et al., *Gender Differences in the Sentencing of Felony Offenders*, 51 *FED. PROBATION* 49, 53 (1987).

172. *United States v. Booker*, 543 U.S. 220 (2005).

173. *See id.* at 259–60.

174. *BEMPORAD*, *supra* note 128, at 5 (citing *Edwards v. United States*, 523 U.S. 511, 515 (1998)).

175. INTER-UNIVERSITY CONSORTIUM FOR POLITICAL & SOCIAL RESEARCH, *MONITORING OF FEDERAL CRIMINAL SENTENCES* (2008).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

and made the appropriate alterations when necessary.<sup>180</sup> ICPSR also processed the data set by performing consistency checks, recoding or recalculating derived variables, and checking the codes in the data that were undocumented or not in the correct range.<sup>181</sup>

The data file contains a total of 76,478 cases,<sup>182</sup> not all of which will be used in this analysis. As with any set of data, certain limitations apply. For instance, the largest problem with this study involves the unclear coding of persons sentenced for multiple crimes (or more than one count in an indictment). As a result, this study's analysis inevitably fails to include sex offenders who cannot be located in the data (e.g., someone who committed murder and sexual assault may be coded under manslaughter only instead of manslaughter and sexual abuse, therefore, providing a lower sample size).

## B. Empirical Models

### 1. PRISON MODEL

The collected data are divided initially by the type of sentence imposed (this study's concern is only prison or probation). The prison model (a linear model)<sup>183</sup> looks at the length of the prison sentence imposed upon the defendant. The dependent variable, LENGTH OF SENTENCE, indicates the different prison term sentences given to defendants, based on the number of months sentenced. The prison model follows in Eq. 1 and explanations of the independent variables follow in Table 1.

$$\text{LENGTH OF SENTENCE} = \beta_1 + \beta_2\text{AGE} + \beta_3\text{GENDER} + \beta_4\text{REASON} + \mu$$

### 2. PROBATION MODEL

The probation model essentially mirrors the prison model, except the dependent variable here, LENGTH OF PROBATION, indicates the total number of months of probation given to defendants.

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180. *Id.*

181. *Id.*

182. *Id.*

183. A linear model is a basic statistical device that is generally used for applied and social science research. RAMU RAMANATHAN, *INTRODUCTORY ECONOMETRICS WITH APPLICATIONS* 6 (2002). A linear model includes a dependent variable and any number of independent variables. *Id.* The constant term and the error term, known as population parameters, help to estimate the true average relationship in the equation. *Id.* at 7.

The probation model follows in Eq. 2 and explanations of the independent variables follow in Table 1.

$$\text{LENGTH OF PROBATION} = \beta_1 + \beta_2\text{AGE} + \beta_3\text{GENDER} + \beta_4\text{REASON} + \mu$$

### C. Description of Variables and How Each Is Operationalized

**Table 1**  
**Variable Definitions and Expected Signs**

VARIABLE	DEFINITION	EXPECTATION
<b>Dependent variables-</b>		
LENGTH OF SENTENCE	Total number of months of prison term imposed	
LENGTH OF PROBATION	Total number of months of probation term imposed	
<b>Offense Variables-</b>		
OFFENSE TYPE	Primary offense type for the case generated from the county of conviction with the highest statutory minimum	
-PORNOGRAPHY	Pornography or prostitution offense; data set limited by this variable	
-SEXUAL ABUSE	Sexual abuse offense as defined by U.S.C.; data set limited by this variable	
<b>Judicial Decision Variables-</b>		
REASON	First reason given by the court for disparity of sentence imposed and typical range of sentence	
-OLD AGE	Defendant's age; omitted for comparison purposes	
-SERIOUSNESS	Reflecting the seriousness of the offense; 1=applied; 0=otherwise	+

*(Continued on next page)*

**Table 1—Continued**

-DETERRENT	Afford adequate deterrent to crimes of the defendant; 1=applied; 0=otherwise	+
-PUBLIC PROTECTION	Protect the public from further crimes of defendant; 1=applied; 0=otherwise	+
-MENTAL CONDITION	Mental and emotional condition; 1=applied; 0=otherwise	+
-PHYSICAL CONDITION	Physical condition of the defendant; 1=applied; 0=otherwise	-
-AGE & HEALTH SEX OFFENDERS	Age and health of sex offenders; 1=applied; 0=otherwise	-
-COMMERCIAL SEX	Engaged in sexual activity for commercial purposes; 1=applied; 0=otherwise	+
-PRIORS	Prior criminal record and risk of future criminal conduct; 1=applied; 0=otherwise	+
-AGE OF PRIORS	Age of priors; 1=applied; 0=otherwise	-
-FIRST FELONY	First felony conviction; 1=applied; 0=otherwise	-
-LOW RECIDIVISM	Low likelihood of recidivism; 1=applied; 0=otherwise	-
-MINORS INVOLVED	Minors involved; 1=applied; 0=otherwise	+
-SAVINGS OF GOV'T	Savings on the part of the government; 1=applied; 0=otherwise	-
-NUMBER OF IMAGES	Number of images; 1=applied; 0=otherwise	+
-NO INAPPROPRIATE CONDUCT	No inappropriate conduct with children / not a pedophile; 1=applied; 0=otherwise	-
-DID NOT DISTRIBUTE	Defendant did not distribute child pornography; 1=applied; 0=otherwise	-

*(continued on next page)*

**Table 1—Continued**

Demographic Variables-		
AGE	Age of the defendant at time of offense	
-AGE 18–24	Ages 18 to 24; 1=18 to 24; 0=otherwise	+
-AGE 25–34	Ages 25 to 34; 1=25 to 34; 0=otherwise	+
-AGE 35–44	Ages 35 to 44; 1=35 to 44; 0=otherwise	+
-AGE 45–54	Ages 45 to 54; omitted to compare to	
-AGE 54–64	Ages 55 to 64; 1=55 to 64; 0=otherwise	-
-AGE 65–74	Ages 65 to 74; 1=65 to 74; 0=otherwise	-
-AGE 75–84	Ages 75 to 84; 1=75 to 84; 0=otherwise	-
-AGE 85–94	Ages 85 to 94; 1=85 to 94; 0=otherwise	-
-AGE 95+	Ages 95 plus; 1=95 plus; 0=otherwise	-
MALE	Gender; dummy variable; 1=male; 0=female	+

### 1. OFFENSE VARIABLES

*Offense type.* Offense type refers to the primary offense type generated from conviction with the highest statutory maximum. This paper measures offense type as a categorical dummy variable (meaning if someone committed the offense, they are in the “yes” category, and if they have done anything else other than commit the offense, they are in the “no” category). The highest statutory maximum computation comes directly from the federal statutes. The only offenses with which this Note concerns itself include sexual abuse and pornography/prostitution (SEXUAL ABUSE and PORNOGRAPHY). These two variables are not included in the regressions; rather, they serve as variables that limit the data set, so that the study concerns itself only with these individuals.



## 2. JUDICIAL DECISION VARIABLES

Broadly, this category of independent variables accounts for the first reason the court gives when a disparity occurs in the sentence length imposed upon a particular defendant for a specific crime compared with other defendants who committed the same basic crime. Old age (OLD AGE) is one of these reasons and has been excluded from the regression for the purpose of comparisons. Several of the reasons that judges provide should theoretically display a positive relationship (meaning that the sentence length increases). These variables include mental and emotional conditions (MENTAL CONDITION), the seriousness of the offense (SERIOUSNESS), the deterrent effect of a longer sentence for a defendant (DETERRENT), public protection considerations in keeping the defendant in custody (PUBLIC PROTECTION), whether the defendant engaged in a sexual activity for commercial purposes (COMMERCIAL SEX), prior offenses and the record that one has accumulated (PRIORS), involvement of minors in the crime (MINORS INVOLVED), and the number of pornographic images found (NUMBER OF IMAGES). Judges consider several additional factors in sentencing that might support the imposition of a lighter sentence, including physical condition of the defendant (PHYSICAL CONDITION), age and health generally of sex offenders (AGE & HEALTH SEX OFFENDERS), age of prior crimes (AGE OF PRIORS), consideration of whether this was the defendant's first felony (FIRST FELONY), likelihood of low recidivism (LOW RECIDIVISM), the amount of government savings for imposing a small sentence (SAVINGS OF GOV'T), whether the defendant personally performed inappropriate conduct with children and if he or she can be excluded as a pedophile (NO INAPPROPRIATE CONDUCT), and whether the defendant participated in the distribution of pornography (DID NOT DISTRIBUTE).

## 3. DEMOGRAPHIC VARIABLES

*Age.* Age (AGE) describes the defendant's age at the time of arrest. The data includes ages fifteen through 105. In this study, only those persons over the age of eighteen will be included; all others will be excluded from the analysis since this study focuses on adult offenses. The data provides age by year; however, this study categorizes ages. These categories are AGE 18-24, AGE 25-34, AGE 35-44, AGE 45-54, AGE 55-64, AGE 65-74, AGE 75-84, AGE 85-94, and AGE

94+. AGE 45-54 will be omitted from the regression analysis for comparison purposes.

*Gender.* Gender (MONSEX) splits into both male and female categories. In the model, gender is represented by MALE and the results will represent the male sample population in comparison to the female sample population.

#### D. Number of Observations in Sample Populations (Frequencies)

One of the major limitations of this study is the inclusion of federal data only. Therefore, the study only concerns federal offenses and does not consider the many cases involving the elderly tried in state court. Additionally, the categories of criminal offenses available in the data set are very broad and difficulties arise when defendants who commit criminal sexual assault in addition to a more serious offense (e.g., murder) are coded into the data set. As a result, only 795 cases exist for those over the age of forty-five. (See Table 2). The percentage of males within those who committed a sex offense is a remarkable 97.7%, suggesting that gender should be significant in the regression. (Male includes all males convicted of federal sex crimes regardless of age.)

**Table 2**

**Data Frequencies of Age and Gender Among *Only* Sex Offenders**

VARIABLE	FREQUENCY	PERCENTAGE OF TOTAL GROUP
<b>Age--</b>		
AGE 18 TO 24	200	9.3%
AGE 25 TO 34	558	26.0%
AGE 35 TO 44	588	27.4%
AGE 45 TO 54	455	21.2%
AGE 55 TO 64	259	12.1%
AGE 65 TO 74	66	3.1%
AGE 75 TO 84	15	0.7%
AGE 85 TO 94	0	0.0%
AGE 95 PLUS	0	0.0%
<b>Gender--</b>		
MALE	2091	97.7%

Upon breaking down sex offenses into categories of sexual abuse and pornography and prostitution, as shown in Table 3 and Table 4, the selected data contains only 131 cases of sexual abuse by those over the age of forty-five. For pornography and prostitution, however, the number of offenders over the age of forty-five is 664. Again, the percentage of males committing these specific offenses remains high and is slightly higher for pornography and prostitution (98.1%) compared with sexual abuse (96.5%).

**Table 3**  
**Frequencies of Sexual Abuse Offenses in Data Set**

VARIABLE	FREQUENCY	PERCENTAGE OF TOTAL GROUP
<b>Age--</b>		
AGE 18 TO 24	65	13.4%
AGE 25 TO 34	159	32.7%
AGE 35 TO 44	131	27.0%
AGE 45 TO 54	85	17.5%
AGE 55 TO 64	36	7.5%
AGE 65 TO 74	10	2.1%
AGE 75 TO 84	0	0.0%
AGE 85 TO 94	0	0.0%
AGE 95 PLUS	0	0.0%
<b>Gender--</b>		
MALE	485	96.5%

**Table 4**  
**Frequencies of Pornography or Prostitution Offenses in Data Set**

VARIABLE	FREQUENCY	PERCENTAGE OF TOTAL GROUP
<b>Age--</b>		
AGE 18 TO 24	135	8.1%
AGE 25 TO 34	399	24.1%
AGE 35 TO 44	457	27.6%
AGE 45 TO 54	370	22.3%
AGE 55 TO 64	223	13.5%
AGE 65 TO 74	56	3.4%
AGE 75 TO 84	15	0.9%
AGE 85 TO 94	0	0.0%
AGE 95 PLUS	0	0.0%
<b>Gender--</b>		
MALE	1623	98.1%

### E. Means

The calculated means demonstrate the average number of months any individual spends in prison or on probation for committing a sex crime. This chart indicates the mean number of months sentenced for all combined sex offenders, without limiting for age or any other variable. The mean takes into account all possible explanations for sentences, including statutory minimums and aggravation factors not necessarily included in this study.

**Table 5**

**Calculated Means: All Convicted of a Sex Crime**

	Number of Cases	Mean number of Months
Total Prison in Months	2090	116.07
Total Probation in Months	2142	.95

**Table 6**

**Calculated Means: Convicted of a Sex Crime (Ages 45 to 54)**

	Number of Cases	Mean number of Months
Total Prison in Months	488	129.19
Total Probation in Months	455	.29

## IV. Results

This analysis ran six separate Ordinary Least Squares (OLS) linear regressions.<sup>184</sup> OLS analysis is appropriate since the dependent variables are not binary.<sup>185</sup> Model 1 concerns all sex offenders in the data and the total amount of time they were sentenced to prison (in

184. An Ordinary Least Squares regression is the most commonly used procedure in econometrics. *Id.* at 41. The purpose of the regression is to help to understand the relationship between the dependent and independent variables through estimation of the parameters of a regression model. *Id.* at 42.

185. Binary numbers are used in some analyses, where two numbers, usually one and zero, can represent any amount desired. *Id.* at 291. For example, when male and female responses are grouped into separate groups and compared. *Id.* This Note does not consider any binary dependent variables, so an Ordinary Least Squares regression is an acceptable method of testing.

months). Model 2 includes all sex offenders in the data and the amount of probation that these individuals received (in months). Model 3 only measures the length of prison sentences for those convicted of a sexual abuse offense. Similarly, Model 4 measures only those convicted of a sexual abuse offense; however, this model also considers the length of probation. Model 5 measures the length of prison sentences that offenders convicted of pornography or prostitution receive in number of months. Finally, Model 6 measures the length of probation given to those convicted of pornography or prostitution. The coefficients for all of these models are interpreted as the additional months of probation or prison sentenced compared to the categories that were intentionally left out of the regression. (See Table 1). Part V further explains the regression results.

**Table 7****Regression Results**

VARIABLE	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
(Constant)	85.47* (1.85)	3.66*** (3.55)	70.39*** (2.48)	6.75*** (4.27)	87.88 (1.43)	2.08 (1.59)
SERIOUSNESS	20.730 (0.31)	2.16 (1.39)	25.47 (0.46)	-1.57 (-0.44)	20.45 (0.25)	2.78 (1.59)
DETERRENT	-78.22 (-0.37)	-1.01 (-0.21)	---	---	-83.92 (-0.37)	-1.17 (-0.23)
PUBLIC PROTECTION	---	59.47*** (8.58)	---	59.52*** (9.84)	---	---
MENTAL CONDITION	-63.50 (-0.73)	4.24*** (2.11)	---	---	-67.78 (-0.70)	4.22** (2.03)
PHYSICAL CONDITION	-71.13 (-0.60)	6.894*** (2.61)	---	---	-75.48 (-0.57)	6.88** (2.51)
AGE & HEALTH OF SEX OFFENDERS	---	59.10*** (8.53)	---	---	---	59.02*** (8.23)
COMMERCIAL SEX	---	---	---	---	---	---
PRIORS	---	---	---	---	---	---
AGE OF PRIORS	---	---	---	---	---	---
FIRST FELONY	---	---	---	---	---	---
LOW RECIDIVISM	-64.79 (-0.32)	-1.19 (-2.42)	---	---	-67.26 (-0.30)	-1.37 (-0.27)
MINORS INVOLVED	---	---	---	---	---	---

*(Continued on next page)*

**Table 7—Continued**

VARIABLE	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
SAVINGS OF GOV'T	---	---	---	---	---	---
NUMBER OF IMAGES	104.75 (0.52)	-0.71 (-0.15)	---	---	95.59 (0.42)	-0.77 (-0.15)
NO INAPPROPRIATE CONDUCT	-70.21 (-.025)	-0.15 (-0.02)	---	---	-76.24 (-2.37)	-.11 (-0.02)
DID NOT DISTRIBUTE	-79.81 (-0.28)	-0.90 (0.13)	---	---	-85.745 (-0.27)	-.98 (-0.14)
AGE 18 TO 24	-44.81* (-1.82)	0.46 (0.79)	-11.46 (-0.73)	0.93 (0.93)	-53.64* (-1.65)	.155 (0.22)
AGE 25 TO 34	-26.40 (-1.44)	0.74* (0.09)	-13.76 (-1.07)	0.29 (0.36)	-26.49 (-1.13)	.864* (1.67)
AGE 35 TO 44	13.48 (0.75)	0.38 (0.88)	-3.42 (-0.26)	0.14 (0.16)	19.83 (0.88)	.453 (0.90)
AGE 55 TO 64	-30.44 (-1.35)	1.33*** (2.46)	3.74 (0.20)	-0.52 (-0.43)	-37.47 (-1.36)	1.66*** (2.73)
AGE 65 TO 74	-38.55 (-1.00)	2.74*** (2.98)	-18.44 (-0.57)	3.42 (1.67)	-43.21 (-0.91)	2.683*** (2.59)
AGE 75 TO 84	-84.87 (-1.13)	-0.15 (-0.08)	---	---	-90.90 (-1.07)	-.113 (0.06)
AGE 85 TO 94	---	---	---	---	---	---
AGE 95 PLUS	---	---	---	---	---	---
MALE	44.74 (0.99)	-3.51*** (-3.50)	32.44 (1.18)	-6.41*** (-4.30)	48.35 (0.80)	-1.97 (-1.54)
R <sup>2</sup>	.007	.081	.008	.201	.008	.057

\*Significant at the .1 level; \*\*Significant at the .05 level; \*\*\*Significant at the .01 level; (t-statistics in parentheses)

## V. Analysis of Results

The results of Model 1 indicate that all sex offenders spend an average of 85.47 months (roughly seven years) in prison when imprisonment is the punishment imposed. The only significant variable is AGE 18 TO 24. Analyzing this result indicates that compared to those between the ages of forty-five and fifty-four, eighteen to twenty-four

year old sex offenders spend 44.81 fewer months in prison, contrary to what was hypothesized based on the literature.

Model 2, relating to all sex offenders sentenced to probation, includes several significant factors considered during sentencing. The constant variable in this regression rests much lower than anticipated, since it indicates that sex offenders spend only 3.66 months on probation without the consideration of any other factors. This seeming anomaly potentially can be explained by mandatory minimums for sex offenses, as described earlier in this Note, as well as the combination of all sex offenders (and the following discrepancies in the types of sentences for pornography versus sexual abuse) for this particular model.<sup>186</sup> Notably, when compared with OLD AGE, the judicial decision making justification of PUBLIC PROTECTION increases the amount of probation by 59.47 months (slightly less than five years). Also, the AGE & HEALTH OF SEX OFFENDER increased the number of months of probation by 59.10 months.

The age categories are slightly troublesome in this regression, especially when compared with anticipated results. For instance, sex offenders between the ages of fifty-five and sixty-four spend 1.33 more months on probation than those in the group AGE 45 TO 54. Those between the ages of sixty-five and seventy-four spend 2.74 more months on probation than those between forty-five and fifty-four. The results of this test carry highly statistically significant results but are contrary to what Table 1 anticipated. The total number of months of probation remains quite small (between one and three). The low percentage of federal crimes with probation sentences most likely causes this low number.<sup>187</sup>

Model 3, for the most part, is insignificant and provides no results of importance to this study. The lack of significance here most likely correlates with the small number of those offenders who committed sexual assault and consequently faced prison sentences. That is, the small sample size fails to produce any significant results.

Model 4 considers only those sentenced to probation for sexual assault. In making that decision, it appears that PUBLIC PROTECTION as a consideration for sentencing on the part of the judge led to 59.52 more months of probation compared with those who had OLD AGE factor into their sentencing determination. Interestingly, in

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186. See *infra* Part II.D.1.

187. BEMPORAD, *supra* note 128, at 5.

Model 4, MALE is significant and negative, indicating that men receive fewer months of probation than women. At first glance, this may appear incorrect, or at least contrary to the hypothesized result. A logical explanation for this discrepancy is that men more likely faced prison sentences rather than probation, and thus, the resulting number of months of probation for men would be substantially lower.<sup>188</sup>

Model 5, like Model 3, provides very little information of statistical significance. However, those in the AGE 18 TO 24 category compared with AGE 45 TO 54 spent 53.64 fewer months in prison (about four and half years). Again, this is contrary to what Table 1 anticipated.

Model 6 provides several highly significant results. When sentencing those convicted of pornography or prostitution, judges who imposed probation and considered MENTAL CONDITION sentenced an additional 4.22 months of probation when compared with OLD AGE. PHYSICAL CONDITION increased the sentence of prison six months when compared with OLD AGE, and AGE & HEALTH OF SEX OFFENDER increased the probation sentence 59.02 months (roughly five years). This increase in probation sentencing almost exactly mirrors the same variable's results in Model 2. AGE 55 TO 64 and AGE 65 TO 74 are highly significant although they indicate only a small number of months of increased probation. However, like Model 2, the age variables contradict what Table 1 anticipated.

## VI. Recommendation

### A. What Do the Results Indicate About Elderly Sex Offenders?

On the whole, it appears that elderly sex offenders receive probation more than prison, contrary to literature that indicates people want sex offenders to be punished more severely.<sup>189</sup> This result, however, aligns with the opinion that older individuals deserve more lenient treatment in sentencing compared with their younger counterparts.

Unfortunately, the application of the results of this study is limited, because it is not entirely proper to cross-compare results with

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188. Janet B. Johnston et al., *supra* note 171, at 58 (indicating that men were twice as likely to be sentenced to prison compared with women, and women receive more alternative sentences or probation).

189. Watson, *supra* note 11, at 142.



different dependent variables (prison/probation) and make final conclusions. Nonetheless, the results indicate that when sex offenders receive prison sentences, they remain in prison for a substantially longer period of time (several years) compared with the sex offenders put on probation (for merely several months). Statutory mandatory minimums, that judges find difficult to ignore, most likely cause this large discrepancy. Notably, those convicted of a sex offense and then put on probation based upon the judge's determination of the age and health of the sex offender spend around fifty-nine more months on probation,<sup>190</sup> so perhaps the mandatory minimum fails to create much of a barrier if probation is appropriate. The results also appear to trend as predicted for less abusive or heinous crimes (pornography or prostitution). For these crimes, more probation seems to be the punishment imposed, rather than prison.

### B. What Is the Best Sentencing Method?

Many factors must be considered when deciding how to handle the increasing number of older sex offenders. Although substantial medical costs are associated with the elderly in prison,<sup>191</sup> perhaps prison is advantageous compared to the alternative of merely sentencing probation. Prison might be considered superior, because it provides longer periods of punishment than found with probation. When sentenced to a federal crime, inmates only get back fifteen percent of their time served if they demonstrate good behavior while in prison.<sup>192</sup> Consequently, this sentencing regime mandates eighty-five percent of a sentence served while in prison.<sup>193</sup>

An increase in the amount of time spent behind bars leaves less time for these older sex offenders to return to their old ways while on

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190. See *infra* Part V.

191. Watson, *supra* note 11, at 143. The older population's health care costs in prison average about three times the amount of a younger offender. *Id.*

192. FAMILIES AGAINST MANDATORY MINIMUMS, *Frequently Asked Questions About Federal Good Time Credit*, 3 (Oct. 21, 2008), available at [http://www.famm.org/Repository/Files/FINAL\\_Good\\_Time\\_FAQs\\_10.21.08%5B1%5D.pdf](http://www.famm.org/Repository/Files/FINAL_Good_Time_FAQs_10.21.08%5B1%5D.pdf). The statute regulating good time credit is 18 U.S.C. § 3624(b). *Id.* at 1.

193. The federal regime requires more time served than some state regimes. Compare 18 U.S.C. § 3624(b) (2006 & Supp. II 2008) with 730 ILL. COMP. STAT. 5/3-6-3(a)(2.1) (2010). For instance, in Illinois, good time credit cuts the amount of time served in half for some crimes. *Frequently Asked Questions*, ILLINOIS DEPARTMENT OF CORRECTIONS, <http://www.idoc.state.il.us/subsections/faq/default.shtml> (last visited Oct. 4, 2010). However, for sex offenders in Illinois, no good conduct credit is allowed unless the offender is participating or has completed a sex offender treatment program. 730 ILL. COMP. STAT. 5/3-6-3(a)(4.6) (2010).

the outside. Probation has failed older offenders in many respects,<sup>194</sup> and because of that failure, many sentenced to probation suffer from recidivism, because they do not recognize their problem. Obviously, the last thing that society wants is for sex offenders to repeat their crimes, since the general concept of sex offenders already troubles society generally.<sup>195</sup> Consequently, after a prison sentence ends or when the sex offender reaches parole eligibility, civil commitment programs can keep the sex offender in prison if he or she continues to pose a threat to society. These practices, however, often face harsh questions and may not apply to those sentenced only to probation.<sup>196</sup> One of the limitations of this Note is that the data analysis does not account for mandatory minimum sentences. Theoretically, when the imposition of mandatory minimums occurs, probation is generally not even an option, and this may account for the greater number of months of prison sentence imposed compared with the relatively low number of months of probation found in the results.

### C. How Might Policies Be Changed or Not Changed?

As mentioned earlier in this Note, the law in this area changes frequently and sentencing provisions need to account for that fluidity.<sup>197</sup> Currently, federal sentencing trends toward mandatory minimums for many sex crimes.<sup>198</sup> At the same time, those sentencing guidelines allow for judges to take into account the age and health of offenders to some extent.<sup>199</sup> These mandatory minimums are difficult to avoid in sentencing and, as a result, those sentenced under a mandatory minimum generally receive the minimum number of months or years. If a judge is allowed to consider not only the crime committed but also outside factors like age and health, then these sentences potentially can decrease. The results of this study suggest that leniency on mandatory minimums for older sex offenders takes place, since

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194. Brown, *supra* note 9, at 275; Ellsworth & Helle, *supra* note 127, at 50.

195. Watson, *supra* note 11, at 142.

196. *Can Sex Offenders Be Held After Serving Criminal Sentences?*, *supra* note 147. The issue was presented to the Supreme Court of the United States in *United States v. Comstock* and on May 17, 2010, the Court held that indefinite civil commitment is allowable. *United States v. Comstock*, 130 S. Ct. 1949, 1965 (2010).

197. See *supra* Part II.D.

198. See 18 U.S.C. § 2241 (2006 & Supp. II 2008); BEMPORAD, *supra* note 128, at 5.

199. 28 U.S.C. § 994(d)(1), (4)-(5) (2006); Burrow & Koons-Witt, *supra* note 105, at 319-20.

a significant relationship exists between the number of months of probation (rather than prison, which is given in the overwhelming majority of cases) and the sentencing factor that statutes permit judges to use, which is the age and health of a sex offender. Whereas this lenient sentencing regime may appear beneficial for the seemingly old and feeble inmate, societal fears increase, because it allows a sex offender to continue living outside prison walls regardless of their crime and simply based on age.<sup>200</sup> Disallowing judges to make any sort of decision in sentencing and disallowing counsel to make any sort of arguments or motions in support of or in disagreement of recommended sentencing represents the most prevalent solution to this dilemma. Sentencing simply could be statutory alone, which would eliminate all potential emotional considerations in the decision-making process for all federal sex offenses.

A disadvantage to such a rigid calculated system would be that it fails to consider the special factors accepted by our government. Further, one of the major downsides of putting elderly criminals in prison is the higher cost that each of these prisoners requires due to their different physical health and mental health concerns.<sup>201</sup> Perhaps in the instance of older sex offenders, it makes more sense to maintain the current sentencing system with mandatory minimums but more easily allow for diversions away from that minimum when required by special circumstances.

An option aside from imposing only a mandatory minimum without any sentencing considerations would be helping those sentenced to prison by providing specific sex offender programs for rehabilitation. Currently, the Bureau of Prisons provides sex offender treatment.<sup>202</sup> Instituting a sex offender program like that of the Bureau of Prisons in all prisons or revamping the current system already established in many prisons would help those convicted of sex offenses, because it potentially could help the inmates find the root of their problems. Successful completion of a sex offender program should be mandatory before an inmate becomes eligible for supervised release based on good time credit. This creates safeguards with-

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200. Watson, *supra* note 11, at 142; *see also* Brown, *supra* note 9, at 269-70.

201. Brown, *supra* note 9, at 273-74; Morton, *supra* note 112, at 79, 82.

202. OFFICE OF THE INSPECTOR GEN. AUDIT DIV., U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF PRISONS INMATE RELEASE PREPARATION AND TRANSITIONAL REENTRY PROGRAMS 14 (2004), *available at* <http://www.justice.gov/oig/reports/BOP/a0416/final.pdf>.

in the system to ensure that prisons make the maximum effort to prevent recidivism and to keep potentially dangerous persons from inflicting further harm to the public. Without successful completion of a program, sex offenders should be required to remain in prison for the entire length of their sentence, or possibly even longer (like in civil commitment), until they complete a sex offender program and officials find that the potential for recidivism is exceptionally low.<sup>203</sup>

Although this counseling and rehabilitation system will support sex offenders who need help, it also creates financial burdens inherent in running any program, which requires money that the prison system does not have.<sup>204</sup> At the same time, however, rehabilitation programs like this cut down on recidivism rates,<sup>205</sup> which ultimately saves money, because when the current offender does not reoffend long term court and prison costs decrease.<sup>206</sup> Furthermore, this proposal only functions for those sentenced to prison, because there is more accountability with the prison programs than with a probationary counseling program.<sup>207</sup> Thus, the elderly probationers remain out in the world without proper participation in sex offender treatment programs and capable of reoffending.

Some will argue it is inappropriate to punish people who do not understand the consequences of their actions or do not even understand their actions, due to mental incapacities.<sup>208</sup> This concern especially arises among the older offender population because of the mental issues correlated with the age group. However, even if these individuals do not understand the consequences of their actions and successfully prove an insanity defense at trial, these individuals

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203. A program ideally might mirror Illinois's sex offender policies, which indicate that no release occurs before a prison term has fully expired unless an offender demonstrates successful completion of a sex offender program. 730 ILL. COMP. STAT. 5/3-6-3(a)(4.6) (2010).

204. See, e.g., Alison Stateman, *California's Prison Crisis: Be Very Afraid*, TIME (Aug. 14, 2009), <http://www.time.com/time/nation/article/0,8599,1916427,00.html>.

205. Harley G. Lappin, *The Federal Bureau of Prisons and Reducing Recidivism: Making a Difference Is No Simple Matter*, THE FED. MANAGER, Spring 2009, at 5, available at [http://www.fedmanagers.org/pdfs/FMA%20Spring%2009\\_MAG\\_WEB.pdf](http://www.fedmanagers.org/pdfs/FMA%20Spring%2009_MAG_WEB.pdf).

206. See, e.g., Adam Serwer, *When Slim Budgets Mean Better Prisons*, THE AM. PROSPECT (Mar. 18, 2009), [http://www.prospect.org/cs/articles?article=when\\_slim\\_budgets\\_mean\\_better\\_prisons](http://www.prospect.org/cs/articles?article=when_slim_budgets_mean_better_prisons).

207. Brown, *supra* note 9, at 277 (suggesting attendance at a probationary rehabilitation program is more difficult to ensure than attendance at an in-prison program).

208. Hucker, *supra* note 52, at 71-74.

should be placed in a mental health institution, either by means of a prison sentence or civil commitment. Ensuring that people who harm others remain locked off from the rest of society provides peace of mind for many. This argument holds especially true when discussing people who potentially do not realize the harm that they do.

#### D. Further Research Questions

This Note considers a very small part of the literature potential. Some further topics that might be of interest to investigate include considering the different treatment of elderly sex offenders during incarceration (e.g., the costs associated with housing these criminals, the special needs of sex offenders while in prison and how those special needs are accounted for). A major limitation of this Note is that the data analysis fails to consider mandatory minimum sentences. Research into this area would be especially important given all of the mandatory minimums imposed for sex-related offenses of even a few years.<sup>209</sup>

### VII. Conclusion

Older sex offenders represent an ever-growing group in the United States. Understanding the unique problems that they present for judicial administration requires untangling an often complex web of issues. The results of this Note indicate that when older sex offenders receive prison sentences, the duration of the sentence far exceeds the comparatively short term of probation, contrary to the idea that older offenders receive more lenient sentences than younger offenders. This sentencing regime appears correct based on society's interests, because it emphasizes the sex offender status rather than the status of elderly. The current sentencing regime, however, might fall short in helping to ensure that elderly sex offenders, once released from prison, do not re-offend, and government officials should take notice. As this age group of sex offenders becomes a larger concern in the prison system, society inevitably will demand new procedures to assist these individuals in rehabilitation and provide further protection for society.

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209. See generally 18 U.S.C. § 2241 (2006 & Supp. 2008).



