

A CELL FOR A HOME: ADDRESSING THE CRISIS OF BOOMING ELDER INMATE POPULATIONS IN STATE PRISONS

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Elder inmates are now the fastest growing population segment in state prisons. This unprecedented demographic shift brings with it changing needs for the state prison system and for the criminal justice system more broadly. In this Note, the author examines the legislative and historical factors that have contributed to the graying of American state prisons. Next, the Note investigates three states attempting to adapt their prison systems, implementing unique statutory and structural changes to better care for elder inmates. Finally, based on the strengths and weaknesses of past changes, the author makes a recommendation to help state prisons adjust to caring for the growing elder demographic.

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I. Introduction

The United States correctional system faces an unprecedented crisis as a rapidly growing elder inmate population threatens to consume prison resources and state budgets. The elder prisoner population is currently growing at a rate faster than the elder general population,¹ and elder prisoners are the fastest growing sector within state prisons.² The Human Rights Watch provides a succinct and visceral summary of the crisis:

Prisons in the United States contain an ever growing number of aging men and women who cannot readily climb stairs, haul themselves to the top bunk, or walk long distances to meals or the pill line; whose old bones suffer from thin mattresses and winter's cold; who need wheelchairs, walkers, canes, portable oxygen, and hearing aids; who cannot get dressed, go to the bathroom, or bathe without help; and who are incontinent, forgetful, suffering chronic illnesses, extremely ill, and dying.³

The "graying of American prisons," as it has been termed, poses unique financial and ethical questions for the country.⁴ In order to solve the problems posed by incarcerating elder inmates, it is vital to understand how the prison system arrived at this critical juncture.

Take for example, the experience of elder inmate Joseph Henry.⁵ Henry was convicted of criminal possession of a controlled substance when he was forty-nine years old and he was sentenced to forty years to life.⁶ Now seventy, Henry, like many elder inmates, has suffered severe medical problems since being incarcerated. He lost both his legs due to diabetic complications and he has spent the last

1. 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>.

2. Carrie Abner, *Graying Prisons*, COUNCIL OF STATE GOV'TS 8, 9 (2006), available at <http://www.csg.org/knowledgecenter/docs/sn0611GrayingPrisons.pdf>; 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>.

3. HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES, 4 (2012) [hereinafter OLD BEHIND BARS], available at http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf.

4. Abner, *supra* note 2, at 8.

5. Amy Neff Roth, *Growing Old Behind Bars: Aging Prison Population Strains System*, UTICAOD.COM (June 25, 2012, 5:00 AM), <http://www.uticaod.com/news/x425595532/Growing-old-behind-bars-Aging-prison-population-strains-system>.

6. *Id.*

three-and-a-half years in the maximum-security Walsh Regional Medical Unit at the Mohawk Correctional Facility.⁷ When interviewed about the time he has spent incarcerated, Henry said, “I almost look forward to (death). I’ve had enough.”⁸ In 2011, he refused a potentially life-saving pacemaker.⁹ Despite being a low-risk, non-violent elderly inmate whose medical problems tax an already strained prison system, Henry will not be eligible for parole for another nineteen years.¹⁰ His story is not unusual.

Many historical factors have contributed to the surge of ailing elder inmates like Henry.¹¹ Traditionally, the American criminal justice system was thought to serve four primary purposes: retribution, incapacitation, deterrence, and rehabilitation.¹² However, the tough on crime movement made incarceration a favorable result but only tenuously tied to these goals.¹³ The sheer quantity of prisons and resources allowed the United States “the ability to enforce things that would otherwise be unenforceable.”¹⁴ The increasing trend of “felonization” of drug-related offenses, immigration offenses, and civil and corporate misdeeds has also contributed to the crisis, causing prison populations and the necessary infrastructure to house them to swell as more crimes became incarceration-worthy.¹⁵ Through a combination of aggressive anti-crime policies, mandatory minimum sentencing guidelines, parole eliminations, and general over-sentencing, aging prisoners remain incarcerated without much regard to their non-violent tendencies and lower rate of recidivism.¹⁶

Elder prisoners are routinely the most difficult to care for and the most expensive to house.¹⁷ In general, not much is known about

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. OLD BEHIND BARS, *supra* note 3, at 24–25.

12. ACLU, AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY, 45 (2012), available at http://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf.

13. Max Raskin & Ilan Kolet, *U.S. Jails More People Than Any Other Country: Chart of the Day*, BLOOMBERG (Oct. 15, 2012, 5:00 AM), <http://www.bloomberg.com/news/2012-10-15/u-s-jails-more-people-than-any-other-country-chart-of-the-day.html>.

14. *Id.*

15. ACLU, *supra* note 12, at 54; Raskin & Kolet, *supra* note 13.

16. ACLU, *supra* note 12, at 41.

17. *Id.* at 27.

administering geriatric healthcare in the prison system.¹⁸ Many prison officials and facilities are unaccustomed to managing these populations,¹⁹ and prison staff often lack the specialized training required to properly care for aging prisoners.²⁰ Furthermore, prisons themselves are typically constructed to serve a younger population.²¹ While prisoners are constitutionally guaranteed adequate healthcare, the standard of care and facilities for elder prisoners still does not always conform to this requirement.²² Often times, only a court-ordered mandate will get prison healthcare up to par.²³ Despite facing ill-suited correctional facilities and an exploding elder prison population, few effective measures have been taken to address these crises.²⁴

Historically, most attempted solutions have failed.²⁵ While forty-one states have some sort of release program for elder prisoners, these programs are “rarely if ever used.”²⁶ In fact, despite passing legislation to enact early release programs for elderly inmates, some states have yet to release a single prisoner.²⁷ The reasons are manifold.

First, the public generally opposes such programs.²⁸ Public perception and fear forces prisons to keep these elders locked up without acknowledging the high costs associated with continued incarceration of these low-risk individuals.²⁹ Second, such programs are narrowly tailored and greatly restrict the eligibility requirements for consideration.³⁰ Third, current programs often involve excessive application processes and bureaucratic red-tape.³¹ Nevertheless, many states are in dire need of an effective solution.

18. Brie A. Williams et al., *Caregiving Behind Bars: Correctional Officer Reports of Disability in Geriatric Prisoners*, 57 J. AM. GERIATRIC SOC'Y 1286, 1286 (2009).

19. ACLU, *supra* note 12, at 26.

20. *Id.* at 29.

21. *Id.* at 28.

22. *Id.*

23. *Id.*

24. Williams, *supra* note 1.

25. Tina Maschi, *The State of Aging: Prisoners and Compassionate Release Programs*, THE HUFFINGTON POST (Aug. 23, 2012, 4:00 PM), http://www.huffingtonpost.com/tina-maschi/the-state-of-aging-prisoners_b_1825811.html.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

It is the states and taxpayers that end up bearing the brunt of the financial burden for elder prisoners.³² Outside of Medicare, correctional spending is the fastest-growing state budgetary area.³³ This financial strain has forced states to cut other social programs at the expense of supporting their prison systems.³⁴ Additionally, elder inmates are also ineligible for important federal benefits.³⁵ Programs like Medicare and Social Security do not traditionally cover the increased costs associated with aging prisoners,³⁶ leaving prisons without valuable cost-cutting measures. With expensive aging inmates bankrupting state budgets, many state legislatures are searching for a sustainable solution to the financial and ethical problems posed by the burgeoning elder prisoner population.³⁷

This Note examines the historical and legislative factors that resulted in unprecedented incarceration rates and a rapidly aging population in state prisons.³⁸ Part II elucidates the current state of American prisons and examines the unique challenges presented by an aging prison population. Part III investigates and analyzes the attempts of three state legislatures and their prisons to accommodate the increasingly complex needs of elderly prison inmates. These efforts include: (1) Louisiana's conditional release law, (2) Texas' medical parole program, and (3) California's prison renovations. Part IV recommends a three-pronged approach, combining aspects of all three state solutions, to address the current and future problems posed by the incarceration of elder inmates.

32. OLD BEHIND BARS, *supra* note 3, at 6.

33. John Tierney, *For Lesser Crimes: Rethinking Life Behind Bars*, N.Y. TIMES, Dec. 12, 2012 at A1, available at <http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?partner=rss&emc=rss>.

34. *Id.*

35. OLD BEHIND BARS, *supra* note 3, at 6.

36. 42 C.F.R. § 411.4 (2013); Amy Zietlow, *Our Aging Prison Population: Should Criminals Die Free?*, THE ATLANTIC (Feb. 15, 2012, 8:07 AM), <http://www.theatlantic.com/health/archive/2012/02/our-aging-prison-population-should-criminals-die-free/252962>.

37. See 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, 500 (2007).

38. For the sake of practicality, this Note focuses on only challenges presented to state prison systems.

II. Background

The United States has the highest incarceration rate in the world.³⁹ America houses nearly one quarter of the world's prison population, despite making up less than five percent of the world's population.⁴⁰ States alone spent over \$52 billion maintaining their correctional systems in 2011.⁴¹ Nonetheless, the high incarceration rates and longer prison terms show no signs of abating.⁴² Between 1990 and 2009, the state and federal prison population doubled,⁴³ and the elder inmate population is now growing six times faster than the general prison population.⁴⁴ Uncontrolled prison growth rates, coupled with the unique challenges posed by an elderly prisoner population, must now be confronted by state governments across the nation.

A. Historical Factors that Created the Current Elder Prisoner Population Crisis

The shift in political ideology to a punitive, "tough on crime" approach has created an enormous challenge in addressing the aging prison population.⁴⁵ During the past thirty years, strong political incentives have generated longer prison terms and higher incarceration rates.⁴⁶ Politicians advocated the notion that "the best way to protect the public was to put more people in prison."⁴⁷ The strength and popularity of the tough on crime movement encouraged higher incarceration rates and more time served.⁴⁸ The assumption that longer sentences were necessary to ensure that crime rates dropped went unquestioned.⁴⁹ The financial and ethical questions posed by the move-

39. Raskin & Kolet, *supra* note 13.

40. *Id.*; Tierney, *supra* note 33.

41. Raskin & Kolet, *supra* note 13.

42. Katie Gleason, *Pew report: The High Cost, Low Return of Longer Prison Terms*, JOURNALIST'S RESOURCE (Aug. 27, 2012), <http://journalistsresource.org/studies/government/criminal-justice/cost-benefit-longer-prison-terms/>.

43. *Id.*

44. Williams, *supra* note 1.

45. See Maschi, *supra* note 25.

46. ACLU, *supra* note 12, at viii.

47. Gleason, *supra* note 42.

48. Abner, *supra* note 2, at 9.

49. PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 7 (2012) available at http://www.pewstates.org/uploaded/Files/PCS_Assets/2012/Pew_Time_Served_report.pdf [hereinafter TIME SERVED].

ment went unanswered as crime rates appeared to drop.⁵⁰ As the tough on crime movement entrenched itself deeper into the public psyche, it created devastating consequences for state policy and prisons.

Tough on crime initiatives resulted in state governments enacting stricter policies, harsher sentences, and implementing “mandatory minimum” sentencing guidelines that forced inmates to remain in prison well into their elder years.⁵¹ Mandatory minimum laws required convicted parties to serve a statutorily mandated number of years.⁵² Such laws reduced judicial discretion and the ability to sentence a defendant according to the details and severity of their crime.⁵³ These laws and guidelines continue to lengthen the sentences for many other types of crime and disproportionately affect drug offenses.⁵⁴ As one conservative federal judge put it, mandatory sentencing rules and sentencing guidelines have created a “draconian” environment which “breeds injustice.”⁵⁵

Beyond instating mandatory minimums, many state governments also implemented “three strikes” laws that punish repeat offenders with excessively harsh sentences.⁵⁶ Individuals convicted of a third felony charge are handed disproportionately stricter sentences, which can result in life in prison.⁵⁷ The nature or severity of the third offense typically does not influence sentencing under three strikes laws and even minor crimes “such as shoplifting or simple drug possession” can result in a life sentence.⁵⁸ Judges involved in three strikes felony cases have little discretion in sentencing defendants and some are forced to impose sentences of life without parole, despite personal misgivings.⁵⁹ In addition, because lesser crimes have been increasingly felonized,⁶⁰ three-strikes statutes apply to many more individuals.⁶¹

50. *Id.*

51. ACLU, *supra* note 12, at viii.

52. *Id.* at 54.

53. TIME SERVED, *supra* note 49, at 42.

54. Tierney, *supra* note 33; ACLU, *supra* note 12, at 41.

55. Tierney, *supra* note 33.

56. ACLU, *supra* note 12, at viii.

57. *Id.* at 41.

58. E.g. FAQs, FIX THREE STRIKES, <http://www.fixthreestrikes.com/faq> (last visited Apr. 24, 2014).

59. Tierney, *supra* note 33.

60. Raskin & Kolet, *supra* note 13.

61. ACLU, *supra* note 12, at 41.

These overreaching statutes punish even “low-level, nonviolent offenses” with disproportionately tougher sentences or even life in prison.⁶²

Finally, state governments reduced parole eligibility and enacted greater restrictions in parole programs, again, causing longer incarceration terms for inmates.⁶³ “Truth-in-sentencing” laws implemented on the state level typically forced inmates to serve “at least 85%” of their sentences before being eligible for parole.⁶⁴ Consequently, inmates’ parole eligibility was restricted and they spent significantly more time behind bars.⁶⁵ Studies show that current prisoners over the age of fifty are “much more likely to have served at least 20 years behind bars” than their counterparts were in the 1970s.⁶⁶ By reducing “good credit” opportunities to earn parole and increasing the bureaucratic red-tape for parolees, state governments ensured that these prisoners remain locked up for most of their lives.⁶⁷ As a result of these policies, despite overall crime rates falling, the nation’s prison population has increased six-fold since 1980.⁶⁸

B. Public Opinion and Ethical Considerations of Continued Incarceration

While the tough on crime movement was exceptionally successful in achieving its goals, public opinion no longer favors these initiatives.⁶⁹ A study by the Pew Center on the States discovered that a majority of Americans believe too many people are incarcerated.⁷⁰ Specifically, 73 percent of Americans who have never encountered violent crime believe too many people are imprisoned.⁷¹ More surprisingly, 70 percent of violent crime victims also believe that the United States incarcerates too many people.⁷² Nevertheless, many of these statutory, historical “successes” continue to result in longer sentences

62. *Id.* at ix–x.

63. *Id.* at viii; Tierney, *supra* note 33.

64. ACLU, *supra* note 12, at 55.

65. Maschi, *supra* note 25.

66. ACLU, *supra* note 12, at viii, 43.

67. *Id.* at 41.

68. OLD BEHIND BARS, *supra* note 3, at 24.

69. ACLU, *supra* note 12, at ii.

70. *Id.*

71. *Id.*

72. *Id.*

and an aging prison population.⁷³ Over roughly three decades, the United States prison population has ballooned by 400 percent,⁷⁴ with the population for state and federal inmates growing eleven times faster than the rest of the general population.⁷⁵ The trend is not only a result of more arrests and convictions but also sentencing guidelines that require inmates to spend longer periods of time incarcerated.⁷⁶ In short, more inmates are spending more time in prison and “increasingly remain in prison into old age,”⁷⁷ despite broad public support for reductions in the severity of prison sentences.

The elder prisoner population presents an ethical quandary for the criminal justice system as well.⁷⁸ Historically, the criminal justice system and the subsequent punishments it served were aimed at retribution, incapacitation, deterrence, or rehabilitation.⁷⁹ Tying incarceration to these goals validated the existence of the punishment-oriented criminal justice system.⁸⁰ But America’s prolonged incarceration of prisoners no longer “serve[s] the four traditional goals of punishment and incarceration.”⁸¹ In fact, proponents of reform argue that many older prisoners have served “far more time behind bars than their crimes warrant.”⁸² Systemic over-sentencing and prolonged incarceration go far beyond the scope of a healthy retributory system.⁸³ Similarly, as elder inmates pose a minimal risk of recidivism, incapacitation and deterrence are irrational justifications for keeping the elderly in the prison system.⁸⁴ This is particularly true, given that the cur-

73. *Id.* at 43; Tierney, *supra* note 33.

74. ACLU, *supra* note 12, at i.

75. *Id.*

76. *Id.* at vi.

77. *Id.*

78. See OLD BEHIND BARS, *supra* note 3, at 87–89 (explaining the ethical problems with prolonged incarceration of elder inmates).

79. ACLU, *supra* note 12, at 45.

80. See *id.*

81. ACLU, *supra* note 12, at 45.

82. *Id.* at 45.

83. *Id.*

84. *Id.* at vii, 45. “It is hard to believe that a person about to commit murder because of overwhelming rage would desist from the crime because of the possibility that if caught and convicted he might be required to serve not just a long sentence, but one that would keep him in prison even after he has Alzheimer’s disease.” OLD BEHIND BARS, *supra* note 3, at 93.

rent prison system is not structured or prepared to rehabilitate elder inmates.⁸⁵

Although rehabilitation efforts are required under human rights law,⁸⁶ “[t]he United States is nearly alone among the nations of the world in abandoning [its] obligation to rehabilitate offenders.”⁸⁷ This sad reality is all the more true in light of the unique rehabilitation needs of elder prisoners.⁸⁸ In atypical circumstances when prison programming has not been cut, the curriculum often fails to address the “educational, physical, psychological, social, and rehabilitative needs” of elder inmates.⁸⁹ Incarceration is not the only form of punishment that serves the goals of the United States criminal justice system and the legitimacy of prolonging it for the rehabilitation of elder inmates is questionable.⁹⁰ High incarceration rates coupled with the aging of the nation has resulted in something that more closely resembles a network of “nursing homes” than a correctional system.⁹¹

C. Current Challenges Presented by the Elder Prisoner Population

The cost of incarcerating ailing elder inmates is disproportionately draining prisons and state budgets.⁹² Elder inmates are the most costly population segment of prisoners to provide care for.⁹³ Furthermore, the terrible conditions and stresses of prison life often result in a sped up, premature aging for prisoners,⁹⁴ so much so that states struggle to define the age at which a prisoner qualifies as “elderly.”⁹⁵ The National Institute of Corrections acknowledges this phenomenon and defines elderly at age fifty to account for the premature aging and

85. ACLU, *supra* note 12, at 45.

86. OLD BEHIND BARS, *supra* note 3, at 93.

87. Tierney, *supra* note 33, at 5.

88. See generally OLD BEHIND BARS, *supra* note 3, at 10 (explaining that elder inmates have a “right to rehabilitation” which involves “age-appropriate educational, recreational, and vocational opportunities.”).

89. *Id.* at 68.

90. *Id.* at 93–94.

91. ACLU, *supra* note 12, at i.

92. See OLD BEHIND BARS, *supra* note 3, at 75–79 (illustrating the disproportionate costs of elder prisoners on state budgets).

93. ACLU, *supra* note 12, at 27–28.

94. John J. Kerbs, *The Older Prisoner: Social, Psychological, and Medical Considerations*, in ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM 207, 213 (Max B. Rothman et al. eds., Springer, 2000).

95. Abner, *supra* note 2, at 8.

stresses of incarceration. Most correctional facilities and criminologists agree.⁹⁶ This means a “typical 50-year-old inmate [is] physiologically similar to an average 60-year-old person outside of prison.”⁹⁷ As these prisoners age, they increasingly lose touch with family and friends and, consequently, lose any form of an outside support system.⁹⁸ Elder prisoners also lose trust in their fellow inmates and become vulnerable to “abuse and predation.”⁹⁹ The national phenomenon of an aging population, coupled with the premature aging of many older prisoners, has created a sizable population of elder inmates requiring extensive care and accommodation.¹⁰⁰

Elder inmates experience prolonged, chronic diseases that are costly to treat.¹⁰¹ It is estimated that, on average, elder prisoners experience at least three chronic illnesses during their incarceration.¹⁰² Common examples include conditions such as diabetes, arthritis, cardiovascular illnesses, and pulmonary diseases.¹⁰³ These common elder issues are complex, expensive to treat, and require long-term care.¹⁰⁴ These prisoners also require the same assistive devices to deal with the aging process as normal elders would, including “walkers, canes, hearing aids, eyeglasses, dentures and geriatric chairs.”¹⁰⁵ The reality is, many prisons remain poorly equipped to deal with prolonged, chronic illnesses from which elder inmates suffer.¹⁰⁶ In general, the majority of prisons were built to manage a population of younger inmates.¹⁰⁷ Similarly, prison hospitals, medical facilities, and staffing structures were designed to deal with temporary illnesses and acute issues.¹⁰⁸ The treatment of acute illness requires markedly different facilities and personnel than the treatment of the chronic illnesses present in many aging prisoners.¹⁰⁹ The rapid growth of this population

96. ACLU, *supra* note 12, at 1.

97. Kerbs, *supra* note 94.

98. Abner, *supra* note 2, at 8, 9.

99. *Id.* at 8, 9–10.

100. *Id.* at 9, 10–11.

101. OLD BEHIND BARS, *supra* note 3, at 73–75.

102. Abner, *supra* note 2, at 10.

103. *Id.*; Kerbs, *supra* note 94, at 213–14.

104. Abner, *supra* note 2, at 9–10.

105. *Id.* at 10.

106. Kerbs, *supra* note 94, at 214; OLD BEHIND BARS, *supra* note 3, at 74.

107. ACLU, *supra* note 12, at 28–29.

108. Kerbs, *supra* note 94, at 214.

109. OLD BEHIND BARS, *supra* note 3, at 74.

requires that prisons “reconfigure the existing system and make both physical plant and clinical services delivery changes to accommodate the specialized needs of the elderly population.”¹¹⁰

As the aging of prisoners outpaces the resources of prisons, these elder prisoners become increasingly susceptible to human rights violations.¹¹¹ The Human Rights Watch notes, “[w]hile age does not change the rights of people who are incarcerated, it may change what prison officials must do to ensure those rights are respected in particular cases.”¹¹² In general, as prisoners age, the daily routine of prison becomes more trying.¹¹³ Elder inmates also require special programming and activities to support their rehabilitation.¹¹⁴ However, elder inmates are typically housed with the general prison population, leaving them more susceptible to abuse from other inmates.¹¹⁵ Additionally, few prison officials receive training regarding some of the behavioral differences and needs of elder inmates.¹¹⁶ Correctional staffs often lack the training required to diagnose the physical or cognitive impairments of elder inmates. As a result, prison staff members are unable to adequately address problems concerning their elder prison population.¹¹⁷ Prisons suffering from financial shortages and lacking political support often have difficulty ensuring that this vulnerable population is protected from abuse and human rights violations.¹¹⁸

The fact that elder inmates are less of a danger to the public than their younger counterparts is incontrovertible.¹¹⁹ Age is thought to be, “the one accurate predictor of recidivism.”¹²⁰ In fact, age is inversely related to committing future crimes,¹²¹ and people over the age

110. *Id.*

111. *Id.* at 6, 10 (explaining that after investigating twenty prisons, the Human Rights Watch became convinced “that many older prisoners suffer from human rights violations.”).

112. *Id.* at 43.

113. *Id.* at 45.

114. *Id.* at 43.

115. *Id.* at 48.

116. *Id.* at 63.

117. *Id.*

118. See generally OLD BEHIND BARS, *supra* note 3, at 44 (finding that “[I]ncidents of neglect, mistreatment, and even cavalier disregard for the well-being of aging and vulnerable inmates occur.”).

119. Maschi, *supra* note 25.

120. RON H. ADAY, AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS 212 (2003).

121. OLD BEHIND BARS, *supra* note 3, at 92.

of fifty are considerably less likely to commit crimes.¹²² A recent study noted that “arrest rates drop to just over 2% at age 50 and are almost 0% at age 65.”¹²³ Most elder prisoners remain incarcerated because of lengthy sentences, not because of crimes committed in old age.¹²⁴ Furthermore, many experts believe that “mass incarceration is no longer a cost-effective way to make the streets safer, and may even be promoting crime instead of suppressing it.”¹²⁵ There is significant evidence that elder inmates have a far lower rate of recidivism,¹²⁶ yet efforts to grant early release to elder inmates remain stalled.

D. Financial Consequence of Incarcerating Elder Prisoners

States bear the full burden in paying for the mental and medical health needs of prisoners.¹²⁷ More money is now spent on healthcare and increasing staff to care for elder inmates.¹²⁸ Because prison staffs lack the specialized training to deal with age-related, chronic illnesses, prisons often transport sick elder inmates to outside hospital facilities.¹²⁹ As one prison physician noted, “[p]risons aren’t geared to the needs and vulnerabilities of older people.”¹³⁰ Outside treatment not only incurs extra cost for the hospitalization itself, but the prison must also pay for the transportation, security, and escorting guards for these prisoners.¹³¹ Correctional officers are posted twenty-four hours a day when elder inmates are treated in hospitals outside of the prison campus.¹³² Consequently, the prison system is acting like a “nationwide long-term care facility—something it was never designed to be.”¹³³ This is a costly, ineffective means of dealing with a booming elder prisoner population.

The elder prisoner population remains the most expensive to house, costing states \$16 billion every year to incarcerate prisoners

122. ADAY, *supra* note 120, at 212.

123. *Id.*

124. ACLU, *supra* note 12, at vi.

125. Tierney, *supra* note 33, at 1.

126. ACLU, *supra* note 12, at vii.

127. OLD BEHIND BARS, *supra* note 3, at 78.

128. ACLU, *supra* note 12, at 28.

129. *Id.* at 29.

130. Abner, *supra* note 2, at 8, 10 (quotations omitted).

131. ACLU, *supra* note 12, at 29.

132. OLD BEHIND BARS, *supra* note 3, at 79.

133. Maschi, *supra* note 25.

who are age fifty and older.¹³⁴ Also, as a result of their incarceration, elder inmates often, sometimes, etc. lose eligibility for important federal programs.¹³⁵ Programs like Medicare and Social Security, for example, offer public benefits to help regular citizens pay for the increased cost of medical and living expenses as they age.¹³⁶ Without these benefits, the entire cost of caring for aging inmates is passed on to strained state correctional facilities.¹³⁷ According to an ACLU study, while the average prisoner costs less than \$35,000 per year, it costs nearly \$70,000 to house an elder prisoner during that same year.¹³⁸ Such disproportionate spending is becoming increasingly unsustainable.¹³⁹

As a result, states are being forced to reevaluate their current prison systems. It will require extensive funding and renovation in order for the American prison system to adapt to the needs of its elder prison population and many states have begun exploring alternative means of caring for aging prisoners.¹⁴⁰ For example, some states, such as Louisiana, have adopted conditional release programs that allow early release on parole for eligible elder prisoners.¹⁴¹ Texas offers medical parole for ailing elder inmates,¹⁴² and California is overhauling prisons and constructing multi-million dollar prison-hospitals to cater to their elder prison population.¹⁴³ These solutions attempt to solve the financial and ethical problems associated with humanely caring for an exploding elder prison population.

134. ACLU, *supra* note 12, at 28.

135. Abner, *supra* note 2, at 8, 11.

136. ACLU, *supra* note 12, at 38–39.

137. *See id.*, at 33.

138. *Id.* at vii.

139. *See, e.g., id.* at vii, 26–38.

140. LA. CODE CRIM. PROC. ANN. art. 658 (2012); *E.g.* Diane Jennings, *Texas Unlikely to Use More Medical Parole for Inmates Despite Budget Pressures*, DALLAS MORNING NEWS (Mar. 25, 2011, 11:04 PM), <http://www.dallasnews.com/news/politics/texas-legislature/headlines/20110325-texas-unlikely-to-use-more-medical-parole-for-inmates-despite-budget-pressures.ece>; Williams, *supra* note 1.

141. LA. CODE CRIM. PROC. ANN. art. 658 (2012).

142. *E.g.* Jennings, *supra* note 140.

143. Williams, *supra* note 1.

III. Analysis of Proposed Solutions to the Aging Prisoner Population

“States . . . should question whether the continued incarceration of those who are well advanced in age and are infirm is a sensible use of limited financial and human resources.”¹⁴⁴ Prison populations are determined by both the rate of incarceration and the length of sentences,¹⁴⁵ and a “significant reduction in the overall prison population, in the number of elderly prisoners, and/or a significant increase in funding are required if prison systems are to be able to house their elderly inmate populations in conditions that respect their rights.”¹⁴⁶ Conditional release programs, medical parole, and adapted facilities and policies are three possible solutions to caring for elder inmates.

A. Early Release Programs in Louisiana Prisons

Under an earlier parole program, prisons have the opportunity to release qualifying elder prisoners who present little concern to the general public.¹⁴⁷ Conditional release programs are founded on the idea that states have the tools to determine the risk posed by elder prisoners and thus, may release those prisoners who they deem low risk.¹⁴⁸ By releasing qualifying elder inmates, the state spends less on incarceration, taxpayers save money, and the newly released elders are able to find family members and medical facilities that are better prepared to care for their aging condition.¹⁴⁹

Louisiana is an example of a state historically plagued with unjust sentencing laws that is now attempting to provide a meaningful, swift solution to their aging prisoner problem.¹⁵⁰ Besides having the highest incarceration rate in the country,¹⁵¹ Louisiana also possesses some of the most antiquated sentencing laws and the highest percentage of citizens serving a life sentence without parole.¹⁵² Twelve per-

144. OLD BEHIND BARS, *supra* note 3, at 96.

145. TIME SERVED, *supra* note 49, at 8.

146. OLD BEHIND BARS, *supra* note 3, at 10.

147. A DAY, *supra* note 120, at 212.

148. ACLU, *supra* note 12, at ii.

149. *Id.* at vii.

150. *Id.* at iii.

151. Zietlow, *supra* note 36.

152. Cindy Chang, *Angola Inmates are Taught Life Skills Then Spend Their Lives Behind Bars*, THE TIMES-PICAYUNE (May 15, 2012, 5:10 AM), <http://www.>

cent of Louisiana's offenders are sentenced to life without parole;¹⁵³ a rate almost "four times the national average."¹⁵⁴ In 2009, 70 percent of Louisiana admissions were for drug or property crimes, and 45 percent of the prison population consisted of those convicted of non-violent crimes.¹⁵⁵ Between 1997 and 2006, Louisiana's elder inmate population grew by almost 200 percent.¹⁵⁶ With elder inmates presenting a serious financial drain on the state, Louisiana representatives attempted to implement their own conditional release program.

In 2011, a "bipartisan coalition" proposed an early release program for qualified elder inmates.¹⁵⁷ The bill was passed by a wide margin and lauded by politicians and the public alike.¹⁵⁸ Under the new law, inmates are eligible for early parole if they are at least sixty years old, were previously convicted of non-violent crimes, have served at least ten years of their sentence, and satisfy certain conditions.¹⁵⁹ Other conditions include being free of disciplinary offenses within the past twelve months, completing at least 100 hours of "pre-release programming," having to earn a General Education Development (GED) before or after release from prison, and being designated as a "low-risk level" before release.¹⁶⁰ This set of criteria represents an attempt to properly prepare elder inmates for re-entry into society while alleviating some of the strain caused by the state's booming elder prisoner population.

nola.com/crime/index.ssf/2012/05/angola_inmates_are_taught_life.html; Zietlow, *supra* note 36.

153. Chang, *supra* note 152.

154. Inimai Chettiar & Rebecca McCray, *The High Costs of Going Gray in Louisiana and Nationwide*, ACLU (May 24, 2011, 5:26 PM), <https://www.aclu.org/blog/prisoners-rights-criminal-law-reform/high-costs-going-gray-louisiana-and-nationwide>.

155. Bill Barrow, *Louisiana Legislature Takes Steps Toward Reducing Incarceration for Nonviolent Crimes*, THE TIMES-PICAYUNE (June 10, 2012, 8:30 AM), http://www.nola.com/politics/index.ssf/2012/06/louisiana_legislature_takes_st.html.

156. ACLU, *supra* note 12, at 6 fig. 4.

157. LA. REV. STAT. ANN. § 15:574.4(A)(b)(v)(4) (2013).

158. Ed Anderson, *Louisiana House Approves Bill Making it Easier for Inmates Over 60 to Get Parole*, THE TIMES-PICAYUNE (June 8, 2011, 9:30 AM), http://www.nola.com/politics/index.ssf/2011/06/house_approves_bill_making_it_1.html.

159. LA. REV. STAT. ANN. § 15:574.4(A)(b)(v)(4) (2013).

160. *Id.*

1. ADVANTAGES OF CONDITIONAL RELEASE PROGRAMS

The most important advantage of a conditional release program is the savings of money and resources. As discussed earlier,¹⁶¹ because of their chronic illnesses and age-related issues, elder prisoners cost twice as much to house and lose significant federal benefits once incarcerated, leaving the entire cost of their care in the hands of the state prison system.¹⁶² Additionally, each elder inmate costs, on average, nearly \$70,000 a year to manage.¹⁶³ However, upon release, elder inmates are once again eligible for the federal programs they were denied while incarcerated.¹⁶⁴ Such programs include Medicare, Social Security, and Veterans benefits.¹⁶⁵ Often, the costs of their care and housing shifts to family members and facilities better equipped to support with their age-related issues.¹⁶⁶ A large contingent of released prisoners end up living with friends or family—elder parolees are even more likely to do so because of their age and condition.¹⁶⁷

Conditional release programs also help confront some of the ethical issues presented by imprisoning aging inmates. Parole represents a progressive continuation of an inmate's rehabilitation as they are allowed to reenter society while still being held accountable with the government and under risk of having to return to prison if they violate the terms of their release.¹⁶⁸ Parole offers a more flexible punishment program that is adaptable to the special needs of elder offenders.¹⁶⁹ Aging prisoners released under conditional release programs will be able to seek treatment for their age-related conditions in facilities better equipped to care for them.¹⁷⁰ As a result, elder parolees commonly experience an "increased well-being and improved quality of life."¹⁷¹

161. See discussion in Part II.C., *supra*.

162. Abner, *supra* note 2, at 8, 11.

163. ACLU, *supra* note 12, at vii.

164. Abner, *supra* note 2, at 8, 11.

165. *Id.*

166. ACLU, *supra* note 12, at 39.

167. *Id.*

168. *Id.* at 47.

169. *Id.* at 40.

170. Maschi, *supra* note 25.

171. ACLU, *supra* note 12, at 40.

2. DISADVANTAGES OF CONDITIONAL RELEASE PROGRAMS

Conditional release programs are often criticized for their undue restrictions.¹⁷² All but nine states have some sort of program on the books, yet these programs go largely unutilized.¹⁷³ Many states, including Louisiana, have restricted eligibility so severely that few inmates meet the initial qualifications.¹⁷⁴ Those inmates who do qualify face a mountain of additional requirements and bureaucratic red tape.¹⁷⁵ For example, while 803 inmates qualified under Louisiana's new bill at the time of its passage, only 15 satisfied all of the bill's requirements.¹⁷⁶ Often, roadblocks come in the form of prisons lacking adequate funding and resources to help elder inmates meet qualifications.¹⁷⁷ Completing an educational or prerelease program may be impossible if they've been cut from a prison's budget.¹⁷⁸ Furthermore, factors such as previous crimes committed and completion of prerelease programming are not only unnecessarily restrictive parole criteria, but are also an "inaccurate proxy" for determining future public safety hazards.¹⁷⁹

Additionally, conditional release programs require significant infrastructure and resources to support.¹⁸⁰ As the executive director of the American Probation and Parole Association illustrates, "[a]lthough corrections may reduce costs through early release, the cost to the taxpayer doesn't necessarily go away."¹⁸¹ At minimum, released elder prisoners will require food, housing, parole programs, and medical care.¹⁸² They face undeniable barriers to finding gainful employment while trying to escape the stigma of having been incarcerated,¹⁸³ forcing many of them to seek public benefits from the government.¹⁸⁴ This taxes not only already strained federal programs, but

172. *Id.* at 47.

173. Maschi, *supra* note 25.

174. ACLU, *supra* note 12, at 47; *Id.*

175. Maschi, *supra* note 25.

176. Anderson, *supra* note 158.

177. ACLU, *supra* note 12, at 50.

178. *Id.*

179. *Id.* at 49–50.

180. ADAY, *supra* note 120, at 213.

181. *Id.* at 11.

182. ADAY, *supra* note 120, at 213.

183. Chang, *supra* note 152.

184. ACLU, *supra* note 12, at 34.

also continues to burden the taxpayer and community.¹⁸⁵ Furthermore, released elder inmates may strain the local communities in the form of vagrancy if they are unable to care for themselves.¹⁸⁶ Studies show that released prisoners have a higher likelihood of becoming homeless post-release.¹⁸⁷ At best, it is “difficult to estimate the governmental housing costs for aging parolees.”¹⁸⁸ Even advocates of early release programs recognize that their successful implementation requires adequate funding and planning post-release, and “it can be the difference between zero recidivism and greater recidivism.”¹⁸⁹

An additional risk of early release programs is that of recidivism.¹⁹⁰ While elder prisoners tend to significantly lower risk, the risk of new crimes being committed by them cannot be discounted entirely.¹⁹¹ Furthermore, parole boards are highly discretionary bodies.¹⁹² They do not have to release an individual no matter how much evidence of their reformation is presented during parole hearings.¹⁹³ Thus, stigma surrounding prisoners and recidivism may prevent release of highly eligible elder inmates. Finding the balance between releasing eligible elder prisoners and minimizing risk of public safety hazards poses a challenge for all early release programs.

States must also confront ethical issues created by conditional release programs. Opponents of these release programs often argue that placing an aging prisoner back into society is irresponsible.¹⁹⁴ Elder inmates lack the support network an average elder person possesses.¹⁹⁵ Early release programs presuppose that released elder parolees will find stable housing either through friends, family, or public assistance.¹⁹⁶ However, many prisoners lose connection to their outside friends and family as time passes.¹⁹⁷ This is particularly true for

185. *Id.*

186. *Id.*

187. *Id.*, at 39.

188. *Id.* at 40.

189. Abner, *supra* note 2, at 8, 11 (parentheses omitted).

190. ACLU, *supra* note 12, at 25.

191. *Id.*

192. *Id.* at 51.

193. *Id.*

194. See OLD BEHIND BARS, *supra* note 3, at 80–81

195. See *id.* (explaining that prison officers feel extra attention must be given to released aging inmates, as they often lack supportive families and have trouble resettling).

196. See ACLU, *supra* note 12, at 39–40.

197. *Id.* at 39.

aging prisoners who have spent longer periods incarcerated—the exact type of prisoner most qualified for early release programs.¹⁹⁸ Older inmates who are released find it “extremely difficult” to acclimate and face the formidable challenges of finding housing, work, and healthcare, among other concerns.¹⁹⁹ Elder prisoners should not reenter society completely unprepared to handle these challenges.

B. Use of Medical Parole Programs in Texas Prisons

Another possible solution to the elder prisoner crisis is the implementation of medical parole programs. Also known as “compassionate release,” medical parole laws base the decision to release a prisoner on the prisoner’s medical conditions, not their age.²⁰⁰ Compassionate release programs typically allow prisoners who are physically incapacitated, terminally ill, or dying to apply for early release.²⁰¹ Deciding which prisoners are “sick enough” to qualify for medical parole can be a difficult task.²⁰² The physical condition and ailments of an elder inmate may be flux.²⁰³ They are released to family members, nursing homes, or other types of medical or mental treatment facilities that then care for their conditions.²⁰⁴ In theory, these institutions and programs are better equipped to care for released elder inmates in a compassionate, efficient manner.²⁰⁵

The current political battle in Texas demonstrates the advantages and controversies surrounding compassionate release programs.²⁰⁶ While elder inmates in Texas represent only 5.4 percent of the state’s total prison population, they consume over 25 percent of hospitalization resources.²⁰⁷ Texas is expected to spend more than \$50 million on prison medical care this year.²⁰⁸ In 2011, the state legislature passed a bill requiring inmates seeking medical care to pay a \$100

198. Abner, *supra* note 2, at 8–9.

199. OLD BEHIND BARS, *supra* note 3, at 80.

200. ADAY, *supra* note 120, at 210.

201. *Id.*

202. Jennings, *supra* note 140.

203. *Id.*

204. *Id.*

205. Maschi, *supra* note 25.

206. Cindy Horswell, *State Caught in Middle in Medical Parole Debate*, HOUSTON CHRONICLE (Nov. 18, 2012), <http://www.chron.com/news/houston-texas/houston/article/State-caught-in-middle-in-medical-parole-debate-4048680.php>.

207. OLD BEHIND BARS, *supra* note 3, at 77.

208. Horswell, *supra* note 206.

annual fee.²⁰⁹ Despite the new fee, prison medical costs continue to drain the state budget.²¹⁰ Simultaneously, the popularity of the state's medical parole program has grown.²¹¹ Under current Texas law, inmates who are "elderly, physically disabled, mentally ill, terminally ill, or mentally retarded or having a condition requiring long-term care" may apply for intensive medical supervision or medical parole.²¹² This program does not have a mandatory time-served requirement, but it does require that a parole panel assess the public safety risk of an applicant prisoner.²¹³ Released inmates must remain on parole under electronic monitoring, "super-intensive supervision," or some other form of oversight.²¹⁴

During the past five years, applications to the Texas medical parole program have nearly doubled with more than 1800 referrals in 2012.²¹⁵ Regardless, the Texas Board of Pardons and Parole has denied more than 90 percent of applicants for medical parole.²¹⁶ The board only approves about 100 applicants a year, despite a public and political push for more releases.²¹⁷ Advocates believe the state could save \$76 million every two years if the board caught up on its applicant backlog.²¹⁸ On January 14, 2013, a state legislator introduced a bill, which if passed, would alter the eligible pool of prisoners to exclude "elderly" inmates but include those with conditions requiring long-term care or physical disability.²¹⁹ The original medical parole law allowed almost any inmate over age sixty-five to apply for release, but some felt this created an overly large pool of applicants and prevented meaningful, efficient review of applications.²²⁰

209. *Bill Analysis HB26*, HOUSE RESEARCH ORG. (June 16, 2011), <http://www.hro.house.state.tx.us/pdf/ba821/hb0026.pdf>.

210. Maurice Chammah, *Lawmakers Look to Medical Parole to Cut Prison Costs*, THE TEX. TRIB. (Jan. 20, 2013), <http://app1.kuhf.org/articles/1358518719-Lawmakers-Look-to-Medical-Parole-to-Cut-Prison-Costs.html>.

211. Horswell, *supra* note 203.

212. TEX. GOV'T CODE ANN. §508.146 (West 2012).

213. *Id.*

214. *Id.*

215. Horswell, *supra* note 206.

216. *Id.*

217. *Id.*

218. *Id.*

219. H. R. 512, 2013 Leg., 84th. Sess., (Tex. 2013); Chammah, *supra* note 210. House Bill 512 is currently pending in committee. *Id.*

220. Chammah, *supra* note 210.

1. ADVANTAGES OF COMPASSIONATE RELEASE PROGRAMS

The most obvious advantage of compassionate release programs is the salvaging of state money and resources. These programs are designed to release the “oldest, sickest and most expensive” prisoners.²²¹ It is estimated that Texas spends almost \$2 million every year caring for the medical needs of the state’s ten most expensive patient-prisoners.²²² One official explains, “[t]here are a lot of people who are taking up a ton of money from the state’s budget with very little risk [to the public]” and expanding the use of the state’s medical parole program will “free up a huge amount of money.”²²³ By releasing the sickest or most disabled prisoners, the state is spared the exorbitant cost of caring for those individuals,²²⁴ leaving more money and resources to better serve those who remain in prison.²²⁵

In theory, medical parole programs also answer the ethical questions posed by the continued incarceration of ailing and elder inmates. Incarceration is not the only form of punishment available in the U.S. criminal justice system.²²⁶ Prolonged incarceration of infirm, elder inmates does not serve the criminal justice system’s rehabilitation goal.²²⁷ Some advocates of release programs even believe that when the original sentence imposed is proportional to the crime, “increasing age and infirmity may change the calculus against continued incarceration and in favor of some form of release.”²²⁸ As with conditional release programs, the compassionate release offers a form of punishment that better reflects the ailing condition and low-risk nature of elder inmates,²²⁹ allowing them to seek out better medical care and facilities to suit their needs.²³⁰

221. *Id.*

222. *Id.* at 1.

223. *Id.*

224. *See generally* Jennings, *supra* note 140 (reporting that the state refuses to save money by releasing “terminally ill or incapacitated prisoners.” *Id.*)

225. *Id.*

226. OLD BEHIND BARS, *supra* note 3, at 91.

227. *Id.* at 88.

228. *Id.*

229. *Id.*

230. *Id.* at 73.

2. DISADVANTAGES OF COMPASSIONATE RELEASE PROGRAMS

The requirements of compassionate release eligibility are often unnecessarily or unfairly restrictive.²³¹ Compassionate release laws, like those in Texas, determine release based on a prisoner's medical conditions, not their age.²³² By nature, the programs are "necessarily limited in their ability to depopulate prisons of the elderly."²³³ Many programs require eligible prisoners to be terminally ill or dying, then further restrict how prisoners may qualify as "terminally ill."²³⁴ Equally vexing, compassionate release programs often do not address incapacitating chronic illness.²³⁵ Many elder prisoners suffer from costly chronic diseases.²³⁶ These illnesses incapacitate elder inmates and further reduce their risk of recidivism.²³⁷ Nevertheless, such inmates remain ineligible for most current compassionate release programs.²³⁸ Legislators in Texas are attempting to loosen the eligibility requirements to include long-term illnesses with House Bill 512.²³⁹ It remains to be seen whether the Bill will be adopted. Similar changes proposed in 2012 failed to pass.²⁴⁰

Medical parole programs also do not eliminate the burdens of caring for aging prisoners; instead, they pass the responsibilities and costs of care onto the federal government and local communities.²⁴¹ Many medical parole programs focus on saving states money without regard to where costs are passed on.²⁴² Similar to the disadvantages of conditional release programs, medical parole is premised upon the severity of an inmate's medical condition.²⁴³ These released inmates may qualify for Medicare, Social Security, or other federal and state

231. ADAY, *supra* note 120, at 210.

232. *Id.*

233. ACLU, *supra* note 12, at 51.

234. ADAY, *supra* note 120, at 210. *See also* ACLU, *supra* note 12, at 51 (explaining that in Hawaii, for example, "terminally ill" prisoners must suffer from an "illness that by its nature, can be expected to cause a patient to die within 1 year.>").

235. *See* ACLU, *supra* note 12, at 51.

236. *See* Abner, *supra* note 2, at 8, 9.

237. ACLU, *supra* note 12, at 51.

238. *Id.*

239. H. B. 512, 2013 Leg., 83rd Sess. (Tex. 2013).

240. Chammah, *supra* note 210.

241. *Id.*

242. *Id.* (explaining that "[m]any of those released in the [medical parole] program save the state money because their hospital bills are paid by federal programs or family members.>").

243. Jennings, *supra* note 140.

benefits in spite of being sick and elderly.²⁴⁴ Furthermore, even if elder inmates are released via medical parole programs, there may not be an appropriate place to house them outside of prison.²⁴⁵ Nursing homes and long-term care facilities may be reluctant to accept ex-felons and many elder inmates lack a support network outside of prison.²⁴⁶ Even if an ailing elder inmate has family outside of prison, the family may lack the time and resources to adequately care for the inmate after release.²⁴⁷

Finally, as with all parole programs, medical parole programs cannot eliminate the risk of prisoner recidivism entirely. While elder inmates pose a low safety risk and rate of recidivism, these medical parole programs are not age-specific.²⁴⁸ Some compassionate release programs, like those in Texas, allow violent offenders to qualify for release.²⁴⁹ As the chairwoman of the Texas Board stated, “[s]ome prisoners can make miraculous recoveries, including dying inmates who recover enough to commit new crimes.”²⁵⁰ The Texas medical parole program has released 1,498 prisoners during the past ten years, 42 committed new crimes after release.²⁵¹ Although this equates a recidivism rate of less than 0.03 percent; this negligible rate proves that releasing prisoners will always carry a risk of them committing new crimes.²⁵² Deciding whether a prisoner is sufficiently incapacitated to allow for an early release is difficult at best.

C. Adapting Facilities, Policies, and Legislation in California Prisons

Alternatively, many states have proposed financial and legislative overhauls in order to better accommodate aging prisoners.²⁵³ Proposed legislative changes often reduce prison populations while

244. Abner, *supra* note 2, at 11.

245. ADAY, *supra* note 120, at 210.

246. OLD BEHIND BARS, *supra* note 3, at 80.

247. ADAY, *supra* note 120, at 210.

248. ACLU, *supra* note 12, at 51.

249. Horswell, *supra* note 206.

250. *Id.*

251. *Id.*

252. *Id.*

253. See OLD BEHIND BARS, *supra* note 3, at 49–50 (describing the attempts by three states to accommodate elder inmates through adapted facilities and stating that as of 2008, over a dozen states had attempted specialized units for older prisoners).

also saving the state money.²⁵⁴ These efforts often take the form of creating specialized housing units for elder inmates or those with unique medical needs.²⁵⁵ Specialized housing units typically offer higher levels of care and attention for aging inmates but less than what they would receive in a long-term care unit at a hospital or in a nursing home.²⁵⁶ Some facilities go even further and provide an array of care for elder prisoners, ranging from assisted living units to hospice care.²⁵⁷ Simple changes to prison policy, such as offering frail inmates lower bunks, and allowing older inmates to take short cuts around the prison campus, can also greatly improve living conditions for elder prisoners.²⁵⁸

The California prison system demonstrates both the consequences of the current crisis and promising solutions to caring for the elder inmate population. Notably, California has both the largest state prison system,²⁵⁹ and the highest number of elderly prisoners in the country.²⁶⁰ The number of elder prisoners in California has skyrocketed by more than 500 percent between 1999 and 2009.²⁶¹ While elder prisoners represent only 7 percent of the state's inmate population, they use 38 percent of its prison medical beds.²⁶² California's elder prisoner population will continue to consume resources at an unsustainable rate if conditions do not change.²⁶³ Moreover, notorious for their overcrowding and inadequate care,²⁶⁴ California's prisons have been plagued with controversy in recent years.²⁶⁵ In 2005, the Northern District of California ruled that the state's prison system was "broken beyond repair" and placed it under a federal receivership, in hopes of

254. See e.g. Aaron Sankin, *California Prop 36, Measure Reforming State's Three Strikes Law, Approved by Wide Majority of Voters*, THE HUFFINGTON POST (Nov. 7, 2012, 3:13 PM), http://www.huffingtonpost.com/2012/11/07/california-prop-36_n_2089179.html.

255. OLD BEHIND BARS, *supra* note 3, at 49–50.

256. *Id.* at 48–49.

257. *Id.* at 50–51.

258. *Id.* at 7, 10.

259. Williams et al., *supra* note 18, at 1286.

260. ACLU, *supra* note 12, at 5.

261. OLD BEHIND BARS, *supra* note 3, at 22.

262. *Id.* at 74.

263. *Id.* at 76.

264. California had only three prison hospitals as of 2012. Williams, *supra* note 1.

265. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011); ACLU, *supra* note 12, at 5, 8.

repairing the grossly inadequate prison healthcare system.²⁶⁶ This, however, has not been a lasting solution to California's trouble. In 2011, the U.S. Supreme Court reviewed California's prison overcrowding and held that a "court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights."²⁶⁷

As a result, California began a massive overhaul of its prison system and has implemented some of the boldest correctional policies in the country.²⁶⁸ The state legislature passed Assembly Bill 900, authorizing more than \$7 billion of state prison projects, including creation of specialized housing and programs.²⁶⁹ One example of California's progressive programming and housing is the Silver Fox program at the Central California Women's Facility.²⁷⁰ The Silver Fox program began as an initiative to better accommodate elder women prisoners; as a result of its success, the state is constructing a Senior Living Unit (SLU).²⁷¹ The SLU aims to "address the emotional and physical needs of the older inmate population," and accommodate the unique needs of elder women inmates.²⁷²

California voters also recently passed Proposition 36 (Prop 36), to significantly reform the state's Three Strikes Law.²⁷³ California's former Three Strikes Law, passed in 1994, was one of the strictest sentencing laws in the country.²⁷⁴ Under that law, any individual convicted of a third felony could be sentenced twenty-five years to life in prison, regardless of the felony's severity.²⁷⁵ The "new" Prop 36 however, requires that an individual's third felony be a serious or violent

266. *Plata v. Schwarzenegger*, No. C01-1351 THE, 2005 U.S. Dist. LEXIS 43796, at *1 (N.D. Cal. Oct. 3, 2005).

267. *Brown v. Plata*, 131 S. Ct. at 1923. The constitutional rights at issue involved Eighth Amendment cruel and unusual punishment claims, resulting from the excessive overcrowding and lacking resources. *Id.* at 1947.

268. CAL. DEP'T OF CORRS. & REHAB., THE FUTURE OF CALIFORNIA CORRECTIONS 10, available at <http://www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf>.

269. CAL. DEP'T OF CORRS. & REHAB., AB 900 CONSTRUCTION UPDATE (Oct. 2011), available at <http://www.cdcr.ca.gov/fpcm/docs/ab-900-construction-update-fact-sheet.pdf>.

270. OLD BEHIND BARS, *supra* note 3, at 48.

271. *Id.*

272. *Id.*

273. Sankin, *supra* note 254. In November 2012, Prop 36 passed by a margin of 68.6% to 31.4%. *Id.*

274. *Id.*

275. *Id.*

crime in order to be sentenced to twenty-five-years-to-life.²⁷⁶ This “eliminate[s] unintended and ineffective life sentences currently imposed for nonviolent, non-serious crimes [and] restore[s] the original intent and core purpose of the Three Strikes Law: to keep dangerous and violent criminals behind bars.”²⁷⁷ Prop 36 also allows inmates convicted under the old Three Strikes Law to be resentenced and released.²⁷⁸ Proposition 36 is estimated to save the state up to \$90 million per year.²⁷⁹

1. ADVANTAGES OF ADAPTING FACILITIES, POLICIES AND LEGISLATION

Arguably, the critical benefit to adapting current facilities and programs is allowing sentences to be served to completion, eliminating the risk of recidivism. Although elder inmates statistically pose the lowest risk within prison populations, that risk cannot be eliminated.²⁸⁰ Unlike in conditional release and medical parole programs, under this proposal, elder inmates are not released before their sentences are served. Instead, they live in facilities that are arguably better suited to support their physical and mental disabilities.²⁸¹

A second advantage of adaptation is the ability of prisons to meet the basic physical and mental accommodations needed for elder inmates.²⁸² At California’s new SLU, older inmates will be allowed “additional mattresses upon request, unlimited access to the phone, designated space in the dayroom for small plants, and the ability to purchase a fan,” as well as “special age-sensitive programs and support groups.”²⁸³ Furthermore, the Silver Fox program allows aging inmates special benefits, such as “shortcuts when walking from one place to the next, extra pillows and blankets, and extra time for doing

276. *Id.*

277. *Three Strikes Reform Act*, FIX THREE STRIKES, <http://www.fixthreestrikes.com> (last visited Apr. 24, 2014).

278. *About Proposition 36*, FIX THREE STRIKES, <http://www.fixthreestrikes.com/about> (last visited Apr. 24, 2014).

279. Sankin, *supra* note 254.

280. OLD BEHIND BARS, *supra* note 3, at 81. Perhaps obviously, there is never a guarantee that released ex-felons will not commit new crimes. The Human Rights Watch noted, “[o]lder people can and do commit crimes, including older people who have been released from prison.” *Id.*

281. *See generally id.* at 48–51.

282. *See id.* at 48 (explaining that some states have implemented policies, programs, and facilities to accommodate the needs of elder inmates).

283. OLD BEHIND BARS, *supra* note 3, at 48.

laundry.”²⁸⁴ Basic adaptation of prison facilities and policies may improve the quality of life greatly for aging prisoners and sidestep concerns about inadequate care within traditional prisons.²⁸⁵

Prisons can further adapt their facilities to provide more extensive care for infirm elder inmates, if needed. For instance, the California Men’s Colony constructed a special housing unit for inmates suffering from severe dementia.²⁸⁶ This special housing unit runs a special needs program that addresses the environmental and social routines for older inmates suffering from dementia.²⁸⁷ The program is notable for the success it had in improving the mental health of its inmates.²⁸⁸ California also constructed the first licensed prison hospice in the country.²⁸⁹ The hospice’s director says the goal of the program is to address the “physical, emotional, and spiritual needs” of dying inmates, ensuring “they can die with dignity and respect.”²⁹⁰ Inmate volunteers who work in the hospice—having received fifty hours of specialized training—sit with inmates while they are dying so they do not die alone.²⁹¹ By creating special age-specific housing and programs, prisons are better able to care for more fragile elder inmates in an efficient and holistic manner.

2. DISADVANTAGES OF ADAPTING CURRENT FACILITIES, POLICIES, AND LEGISLATION

The most obvious drawback of building new facilities and adapting old ones is the cost. Since many prisons were designed with a younger population in mind, extensive renovations and spending are often required to make facilities suitable to elder inmates.²⁹² For example, three decades ago, California spent only 3 percent of its annual budget on maintaining its prison system.²⁹³ Now, prison spending exceeds 10 percent of the state budget.²⁹⁴ In 2010, California began

284. *Id.*

285. *Id.* at 44.

286. *Id.* at 54.

287. *Id.*

288. *Id.*

289. *Id.* at 84.

290. *Id.* (internal quotations omitted).

291. *Id.*

292. *See generally id.* at 45–47 (illustrating the common hardships suffered by elder inmates trying to navigate prison life).

293. Tierney, *supra* note 33.

294. *Id.*

construction on a \$906 million prison hospital to better accommodate aging inmates.²⁹⁵ While some may balk at the high price tag, the alternative was to continue outsourcing elder inmate care to local hospitals, paying upwards of \$850,000 a year for each sick prisoner.²⁹⁶ In either situation, states are required to spend millions of dollars each year to care for their elder inmate population.

Adapting current prison facilities to better care for elder inmates presents logistical nightmares as well.²⁹⁷ For instance, California Assembly Bill 900 involves updating over a dozen prisons throughout the state, nearly simultaneously.²⁹⁸ The Bill's ambitious plans created its own problems, as some of these construction projects involve adapting facilities that currently house high-risk prisoners.²⁹⁹ Furthermore, because these overhauls are extensive, the projects often take years to complete.³⁰⁰ This likely means years of displaced prisoners and heightened security. States interested in overhauling their prison systems must recognize that this solution offers almost no immediate relief to the problem of caring for elder inmates.

Finally, adapting current facilities results in continued incarceration and raises uncomfortable ethical questions about the American criminal justice system and the true goals of punishment.³⁰¹ As discussed earlier, the ideas of incarceration and punishment are tied to the four theories of criminal justice.³⁰² Proportional sentencing in accordance with lawful investigation and procedures serves the goals of punishment.³⁰³ Disproportionate sentences and prolonged incarceration diminish the ties of punishment to the theoretical goals; this is particularly true as prisoners enter old age.³⁰⁴ Similarly, "increasing age and infirmity may change the calculus against continued incarcer-

295. AB 900 CONSTRUCTION UPDATE, *supra* note 269, at 2–3.

296. Williams, *supra* note 1.

297. See OLD BEHIND BARS, *supra* note 3, at 52 (explaining the various obstacles prison staff face in caring for the elderly as prison officials admit they "struggl[e] to keep their heads above water" in trying to house elder inmates).

298. AB 900 CONSTRUCTION UPDATE, *supra* note 269, at 1–5.

299. THE FUTURE OF CALIFORNIA CORRECTIONS, *supra* note 268, at 44.

300. AB 900 CONSTRUCTION UPDATE, *supra* note 269, at 1–5.

301. OLD BEHIND BARS, *supra* note 3, at 87.

302. See Part II.B.

303. OLD BEHIND BARS, *supra* note 3, at 87–90 (suggesting that disproportionate, continuing incarceration is "inconsistent with respect for human dignity").

304. ACLU, *supra* note 12, at 54.

ation and in favor of some form of conditional release.”³⁰⁵ Adapting prison facilities and policies to keep elder prisoners in a prison setting does not reflect the changing needs of this population, nor does it achieve the goals of criminal justice.³⁰⁶

IV. Recommendation

States should adopt a three-prong approach in addressing their elder prisoner populations: releasing low-risk elder inmates, better accommodating those who cannot be released, and repealing strict, antiquated sentencing laws. At the same time, this proposal addresses concerns over recidivism and public safety while keeping focused on the financial and ethical concerns elder prisoners pose.

A. Enacting a Conditional Release Program for Aging Inmates

Enacting a conditional release program for non-violent, elder inmates offers the most responsible and immediate solution to the current crisis. More than half of all current prisoners are incarcerated for non-violent offenses.³⁰⁷ Many of these prisoners were victims of overly zealous sentencing guidelines and three strikes laws.³⁰⁸ In California alone, there are more than 4,000 “third strikers” sentenced to twenty-five-years-to-life in prison for committing non-violent offenses.³⁰⁹ An ideal conditional release program would also allow eligibility beginning at age fifty. It is at this age when, due to sped up, premature aging caused by living in prison, prisoners become physically and mentally elderly.³¹⁰ While recidivism can never be fully eliminated, a “significant” portion of state prisoners could be released early with a nominal impact on public safety.³¹¹ Furthermore, elder prisoners pose a statistically lower risk for recidivism, which “suggests that their continued incarceration adds little to public safety.”³¹²

An ideal conditional release program must also account for a prisoner’s successful transition back into society, as seen in Califor-

305. OLD BEHIND BARS, *supra* note 3.

306. *Id.* at 87.

307. Tierney, *supra* note 33.

308. OLD BEHIND BARS, *supra* note 3, at 29.

309. *Id.*

310. See Part II.C., *supra*.

311. TIME SERVED, *supra* note 49, at 36.

312. OLD BEHIND BARS, *supra* note 3, at 82.

nia's Prop. 36.³¹³ Theoretically, this can be achieved by creating a volunteer-based application process, and educating released prisoners on the availability of community resources and federal benefits.³¹⁴ However, in reality, it is often times the public defender who finds eligible inmates, though the inmates still consent or volunteer to pursue early release. By making these programs voluntary and integrating the informed perspective of the public defender, it ensures that only those elder inmates who have the potential means to succeed outside of prison apply for parole.³¹⁵ Studies indicate that between 63 percent and 88 percent of released elder prisoners will live with family or friends.³¹⁶ Prisoners who already possess an existing support network would be best suited for a conditional release program.³¹⁷ Prisoners who lack this sort of network but are eligible for resentencing may still have a successful application through the assistance of a public defender's office. An outside resource like a public defender can help create an appropriate transition plan for such prisoners, even find full-time housing and suspension.

Furthermore, providing information regarding basic public assistance programs before parole hearings would allow elder inmates to make an informed decision as to whether they should apply for release.³¹⁸ Thus, if prisoners fear they lack a supportive network, are unable to find housing, or are unable to provide for themselves, such prisoners may either decide not to apply to the early release program or be found to be unsuitable candidates by the public defender's office.³¹⁹ A conditional release program cannot succeed without also educating the general public: Studies suggest that the public is "broadly supportive" of reducing prison sentences if public safety can be maintained and offenders are still held accountable for their crimes.³²⁰ A public education program can prevent an alarmist reaction by informing the community about the low-risk nature of elder inmates selected

313. ADAY, *supra* note 120, at 213.

314. *See Id.*

315. *See* ACLU, *supra* note 12, at 40.

316. *Id.*

317. *Id.*

318. *Id.* at 50 (recommending that eligible inmates be given a "simple form explaining public benefits information during the parole hearing").

319. *Id.* at 39-40.

320. TIME SERVED, *supra* note 49, at 5.

for conditional release. Other states, such as California, may not need such a program.

Although enacting conditional release programs is, essentially, a cost-shifting measure, the cost of caring for elder inmates outside of the prison system is lower than caring for them inside the system.³²¹ Incarcerating elder inmates remains undoubtedly more expensive than release, to include the added costs stemming from release.³²² In fact, the costs associated with releasing elder prisoners are relatively minimal. According to a recent Pew study, the average cost of parole is \$7.50 per day.³²³

The estimated costs of public benefits and government assistance are also considerably low.³²⁴ On average, it is estimated that an elder parolee receives \$289 in benefits each year.³²⁵ This estimate accounts for “Medicaid, Supplemental Security Income (SSI), food stamps, cash public assistance, and energy assistance.”³²⁶ Some released elder parolees may not take advantage of these programs at all if they have the support of spouses, families, and friends.³²⁷ The ACLU estimates that states could save, on average, \$66,294 per year—including release expenses—for each elder inmate they release.³²⁸ Plus, public assistance programs are, overall, better equipped to care for the elderly.³²⁹ It is undeniably more efficient to care for the aging in proper hospitals and medical facilities.

B. Adapting Facilities and Policies to Better Accommodate Elder Inmates

Adapting facilities ensures that the unique medical needs of elder inmates are met. Not all elder prisoners will be eligible for conditional release, but steps could be taken to mitigate the harms caused by prison life. Most importantly, prison staff and officials who deal with elder inmates need to undergo specialized training to better recognize the care needs of aging inmates. Experts strongly support the

321. See Maschi, *supra* note 25.

322. ACLU, *supra* note 12, at ii.

323. *Id.* at 31.

324. See *id.* at 33.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* at ii.

329. Maschi, *supra* note 25.

need for such training,³³⁰ as elder inmates remain particularly vulnerable to human right violations and abuse.³³¹ Prison staffs are the “front line” of care and have an opportunity to act as a liaison between elder prisoners and healthcare staff.³³² Training should involve gaining an understanding of, and developing sensitivity to, the needs of elder prisoners.³³³ Without such training, prison officials may be callous and impatient when dealing with elder inmates, leaving their needs unmet.³³⁴

State prisons need to adopt certain policy changes for elder inmates. Basic changes to housing policies and simple accommodations by staff will help elder prisoners safely serve the remainder of their sentences.³³⁵ Many changes cost nothing to implement. For example, prisons should ensure elder inmates are placed in lower bunks and are permitted to use short cut paths when walking around prison campuses.³³⁶ Other relatively inexpensive changes include: creating age-appropriate programming, providing extra blankets, and scheduling extra staff to assist with wheelchairs and changing beds.³³⁷ By catering to these specific needs and challenges, officials lessen the risk of causing human rights violations and create a safer environment for elder inmates.³³⁸

Prisons should also consider organizing specialized, age-appropriate group housing using California’s Silver Fox and SLU programs as a guide. Such an arrangement would help streamline prison staffing and resource allocation. Prison staff with geriatric training can specifically work in these units, to ensure the needs of aging inmates are better recognized and met. Furthermore, research has shown elder inmates prefer to live in age-specific housing with other elder inmates, providing relief from the stress of prison life and protection from victimization by other, younger inmates.³³⁹ With many prisons strapped for resources and unable to provide age-appropriate

330. OLD BEHIND BARS, *supra* note 3, at 67.

331. *Id.*

332. Williams et al., *supra* 18, at 1290.

333. OLD BEHIND BARS, *supra* note 3, at 67.

334. *See generally id.*, at 67–68.

335. *Id.* at 7, 10.

336. *Id.* at 10.

337. *Id.*

338. *Id.* at 7, 10.

339. ADAY, *supra* note 120, at 208.

programming, this low-cost solution encourages socialization and better behavior among elder inmates.³⁴⁰

C. Implementing Legislative Changes that Reduce Overzealous Sentencing

Finally, state legislatures should repeal or lessen restrictive sentencing laws. It is not enough to just propose budgetary increases or try to plan for the future needs of elder prisoners.³⁴¹ State governments must take a systemic approach and reevaluate the legislation and policies that created this crisis in the first place.³⁴² State legislatures are best suited to the task;³⁴³ they are responsible for authoring sentencing guidelines that directly impact prison populations and policies.³⁴⁴ California's Prop 36 is an example worth emulating for struggling states. Prop 36 requires an individual's third offense to be of a violent or serious nature in order to be slammed with a sentence of twenty-five-years-to-life.³⁴⁵ Individuals who are found guilty of repeat, non-serious, nonviolent crime should receive a greater sentence, albeit not a disproportionately harsh sentence.³⁴⁶ Of course, individuals convicted of rape, murder, or child molestation would not benefit from such changes in any fashion.³⁴⁷ This will reduce prison populations and slow the surge of elder inmates, saving states money in the form of reduced medical and assistance costs and helping to break the cycle of repeat incarcerations.

Additionally, legislative changes should benefit those unfairly sentenced under previously established, excessive sentencing laws. Again, states should adopt changes similar to those embodied in Prop 36. Prop 36 allows inmates convicted of nonviolent, non-serious crimes under the old Three Strikes law to apply for resentencing.³⁴⁸ After applying, a judge can determine whether an inmate remains a threat to society and approve or reject an inmate's application accord-

340. *Id.* at 208–09.

341. *See Abner, supra* note 2.

342. *Id.* (suggesting that “states may reconsider sentencing policies that keep offenders in prison for longer terms in an effort to curb prison growth.”).

343. *TIME SERVED, supra* note 49, at 23.

344. *Id.*

345. *About Proposition 36, supra* note 278.

346. *Id.*

347. *Id.*

348. *Id.*

ingly:³⁴⁹ Those with successful resentencing hearings will be released with time served, with punishment reflecting the seriousness of the last crime they committed.³⁵⁰ This provides a release valve for currently overcrowded prisons by way of releasing those inmates who were overzealously sentenced for lesser crimes. Such a change, as well as requiring an individual's third offense to be of a serious nature before sentencing to life in prison, could save a state millions of dollars each year.³⁵¹

V. Conclusion

Incarceration is a vital tool in our criminal justice system, but it is not the only tool. With budget shortfalls and limited resources, state legislatures must make difficult choices as to how to use incarceration effectively. If examining the current state-based efforts reveals anything, it is that deep, structural changes are necessary to find a financially sustainable, ethical solution to punish and successfully rehabilitate elder inmates back into society. Prolonged imprisonment of elder inmates fails to serve the conventional goals of the criminal justice system.³⁵² Prisons themselves remain an overly expensive, ineffective means of caring for America's elderly inmate population. Although the current state of the elder prisoner population is serious and troubling, the crisis also provides an opportunity: An opportunity to improve sentencing law guidelines, provide adequate, respectful care to an aging population, and hopefully, help transition non-violent, eligible inmates successfully back into society.

349. *Id.*

350. *FAQs, supra* note 58.

351. *See e.g. About Proposition 36, supra* note 275.

352. *ACLU, supra* note 12, at 45.

