

RELEASING THE ELDERLY INMATE: A SOLUTION TO PRISON OVERCROWDING

Jason S. Ornduff

Prison overcrowding is a prevalent problem in the United States, especially because many states use a sentence of life imprisonment without the possibility of parole. Overcrowded prisons affect elderly inmates in particular by exposing them to younger, more violent criminals and limiting their access to medical care. In this note, Mr. Ornduff discusses how elderly inmates both suffer from and further burden overcrowded living conditions in prisons. Mr. Ornduff also explores whether early release programs present a feasible solution to decreasing the prison population without endangering society.

I. Introduction

Overcrowding has produced a crisis of epidemic proportions in American prisons.¹ In 1990, there were 684,544 prisoners in state prisons and 58,838 prisoners in federal prisons.² Design capacity, however, was only 580,362 for all state and federal correctional facilities,³ meaning that correctional institutions as a whole are about twenty-eight percent over capacity. Per capita, more people are behind bars in this country than in any other nation.⁴ Overcrowding in prisons is

1. Stephen D. Gottfredson, *Institutional Responses to Prison Crowding*, 12 N.Y.U. REV. L. & SOC. CHANGE 259, 259 (1983-84).

2. PRISONERS IN CUSTODY OF STATE AND FEDERAL CORRECTIONAL AUTHORITIES ON DEC. 31, 1993, BUREAU OF JUSTICE STATISTICS 607, tbl. 6.35 (U.S. Dep't of Justice, 1994).

3. NUMBER OF INMATES/RESIDENTS IN AND DESIGN CAPACITY OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 1993, BUREAU OF JUSTICE STATISTICS 610, tbl. 6.39 (U.S. Dep't of Justice, 1994).

4. Pamela M. Rosenblatt, Note, *The Dilemma of Overcrowding in the Nation's Prisons: What Are the Constitutional Conditions and What Can Be Done?*, 8 N.Y.L. SCH. J. HUM. RTS. 489, 489 n.2 (1991).

now a problem recognized by most people and debated by academics, corrections officials, judges, and lawmakers.⁵

The entire penal system is under considerable stress, and government officials are looking for solutions. The cost of maintaining such a vast system is a major concern. Increased operating expenditures are needed to pay more overtime for staff and to increase staff size to meet the heightened stress and larger safety risks that come with overcrowded prisons.⁶ The cost of keeping the average prisoner behind bars has been estimated at \$20,000 a year.⁷

Among this growing prison population is an even more rapidly growing elderly population of prisoners.⁸ Ten years ago, approximately 9,000 prisoners were over the age of fifty-five, but that number is steadily growing and may rise to 100,000 by the year 2000.⁹ Nevertheless, older prisoners are still a minority in penal institutions and, as a result, are not a priority for correctional administrators.¹⁰

Although elderly prisoners, unlike younger and healthier prisoners, require special attention and care, most elderly inmates receive no special treatment or care from prison systems.¹¹ Nevertheless, some older prisoners need special facilities which are accessible to the physically handicapped, as well as expensive medications and medical treatment.¹² Further, elderly prisoners, in many prisons, occupy all

5. James Austin, *Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy*, 32 CRIME & DELINQ. 404, 411 (1986). The National Institute of Justice sponsored a 1984 survey of 1400 police chiefs, judges, prosecutors, public defenders, and correctional officials which showed that prison and jail overcrowding is the most important issue in the field of criminal justice. *Id.*

6. *Id.* at 412.

7. Molly F. James, Note, *The Sentencing of Elderly Criminals*, 29 AM. CRIM. L. REV. 1025, 1026-27 (1992).

8. Ginny Carroll, *Growing Old Behind Bars: Some Cellblocks Are More Nursing Home Than Jail*, NEWSWEEK, Nov. 20, 1989, at 70.

9. 20/20 *Golden Years Behind Bars* (ABC television broadcast, Oct. 8, 1990) [hereinafter 20/20]. The Bureau of Justice Statistics' latest figures indicate that in 1993, there were 25,004 prisoners in this country over the age of 55 and 620 prisoners over the age of 75. PRISONER POPULATION OVER AGE 55, 1993, BUREAU OF JUSTICE STATISTICS 609, tbl. 6.37 (U.S. Dep't of Justice, 1994).

10. Senior citizens (those 65 and older) comprise 12.4% of the United States population but are only the source of 1% of all crimes committed in this country. 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 143, 143-44 (Belinda McCarthy & Robert Langworthy eds., 1988); James, *supra* note 7, at 1026.

11. James, *supra* note 7, at 1027. In 47 states, elderly inmates are treated no differently from the general prison population. Ann Goetting, *The Elderly in Prison: Issues and Perspectives*, 20 J. RES. CRIME & DELINQ. 291, 301 (1983).

12. Julian H. Wright, Jr., Note, *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529, 563 (1990).

the available bed space in the prison hospital.¹³ The elderly inmate may also need specialized recreation, education, and work programs.¹⁴ Finally, older inmates may need extra protection from their younger, stronger, and more violent counterparts.¹⁵ As a result of elderly inmates' special needs, society spends about three times as much to maintain and provide for elderly and infirm inmates compared with what it spends on younger inmates.¹⁶

The problem of prison overcrowding will not disappear. Similarly, the concern for elderly inmates and the way in which they burden the already overextended prison resources will only get worse if nothing is done. The two problems are intertwined. In states, especially those states that do not allow the death penalty, the trend is to use a sentence of life-without-parole for the most violent offenders.¹⁷ Use of such long sentences ensures that many prisoners will grow old and die in prison,¹⁸ thus further crowding prisons with older prisoners. In 1982, Morris Dees, director of the Southern Poverty Law Center, prophesied that "these inmates will start adding up until we're looking at thousands of old men suffering from phlebitis, back problems, kidney failure . . . serious problems."¹⁹ If nothing is done, Dees's prediction will become a reality.

This note will review the problems stemming from the overcrowding of America's prisons. This note will first explore the problems of crowded and run-down facilities, the health and medical problems that are inherent in overcrowded conditions, the increase of violence in the prisons and its relationship to overcrowding, and the dilemmas facing prison administrators as courts are finding constitutional violations resulting from overcrowding. The note will then address how elderly inmates factor into the problems prisons are facing today, specifically addressing the problems of an elderly prison popu-

13. *Id.*

14. *Id.*

15. *Id.*

16. James, *supra* note 7, at 1027-29; Jonathan Turley, *A Solution to Prison Overcrowding*, USA TODAY, Nov. 1992, at 80; ABC World News Tonight: *Maximum Security Nursing Homes* (ABC television broadcast, Oct. 8, 1990). Estimates run from \$60,000 to \$69,000 for the yearly maintenance of the elderly inmate as opposed to about \$20,000 for the average inmate, with the higher estimate probably being more accurate as it is from a later source. For a discussion of who is considered "elderly," see *infra* notes 63-65 and accompanying text.

17. Wright, *supra* note 12, at 532.

18. *Id.* at 562-63.

19. Jim Stewart & Paul Lieberman, *What Is This New Sentence That Takes Away Parole?*, 1 STUDENT LAW., Oct. 1982, at 14, 17.

lation and how it burdens the prisons of this country. Finally, this note will look at ways in which state governments and the federal government are trying to find a solution to both problems through reducing the elderly prison population. It will further discuss which methods are most effective and should be expanded in the future.

II. Overcrowding and Its Consequences

The term "overcrowding" is somewhat redundant,²⁰ as a prison that can be described as "crowded" is already a major problem. The prison population in the country has increased 122% since the 1970s.²¹ As a result of the increase, prisons have been operating at an average capacity of 120% since 1991.²² When correctional institutions and their staffs handle many more inmates than they were designed or trained to do, problems arise. Three major problems that come from overcrowding are crammed cellblocks,²³ inadequate medical facilities,²⁴ and an inability to thwart increased violence among the prison populations.²⁵ Prison officials are also being pressured by courts and administrators to solve these problems as poor prison conditions may constitute Eighth Amendment²⁶ violations.

A. Facilities and Living Conditions

Prison crowding increases staff and inmate tensions, resulting in tougher disciplinary practices such as lock-up procedures.²⁷ Overcrowding also affects the living conditions of the inmates, as illustrated in *Monmouth County Correctional Institution Inmates v. Lanzaro*.²⁸ The court in *Lanzaro* found that inmates were sleeping on floors in all

20. Gottfredson, *supra* note 1, at 260.

21. Rosenblatt, *supra* note 4, at 490. The increase has not been in steady time increments, either. In the first six months of 1989, the increase in the general prison population was greater than had ever been experienced in an entire year. Andrew H. Malcolm, *More and More, Prison is America's Answer to Crime*, N.Y. TIMES, Nov. 26, 1989, § 4, at 1.

22. Rosenblatt, *supra* note 4, at 489.

23. See *Inmates of Allegheny County Jail v. Wecht*, 874 F.2d 147 (3d Cir. 1989).

24. See *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 595 F. Supp. 1417 (D.N.J. 1984).

25. See *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985); *McMurry v. Phelps*, 533 F. Supp. 742 (W.D. La. 1982).

26. The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

27. Austin, *supra* note 5, at 412.

28. 595 F. Supp. 1417 (D.N.J. 1984).

parts of the prison including dayrooms, dormitories, and cellblocks.²⁹ Because of a shortage of beds, prisoners had to sleep without mattresses for up to four or five months.³⁰ Moreover, an inadequate facility for visitation limited visitation periods per inmate to approximately five to ten minutes at a maximum of three times each week.³¹

In another prison, the kitchen, commissary, and food storage areas were unsanitary and infested with mice and roaches.³² Overuse of these facilities resulted in holes, cracks, crevices, and missing tiles which made the kitchen floor uncleanable.³³ Some of the ceiling was missing, and pots and pans were scattered about, covered with grime.³⁴

In Pennsylvania, another correctional facility was found to be unsafe. The court in that case found that "[t]he jail is now dangerously overcrowded. Fires and prisoner unrest are an ever-present danger at any penal setting. Here they could result in disaster. The Allegheny County Jail is a catastrophe waiting to happen."³⁵

B. Overcrowding and Health and Medical Concerns

The physical conditions in prisons have a number of effects on the inmates in terms of the physical and mental health of the prisoners. Idleness and a lack of privacy lead to severe emotional and physical consequences.³⁶ Inmates receive inadequate recreation,³⁷ and inmate work programs are severely hampered because of security problems.³⁸

Unfortunately, the same crowded conditions that create medical and mental health problems also lead to problems of inadequate medical facilities. An increase in the population of a prison or jail can

29. *Id.* at 1421.

30. *Id.* at 1422.

31. *Id.* at 1423.

32. *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985).

33. *Id.*

34. *Id.*

35. *Inmates of Allegheny County Jail v. Wecht*, 874 F.2d 147, 149 (3d Cir. 1989) (citing *Inmates of Allegheny County Jail v. Wecht*, 565 F. Supp. 1278, 1281 (W.D. Pa. 1983)).

36. *McMurry v. Phelps*, 533 F. Supp. 742, 751 (W.D. La. 1982).

37. *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 595 F. Supp. 1417, 1417 (D.N.J. 1984). The Special Master in the case concluded that one hour a day of recreation was necessary to maintain a minimal standard of decency for the prisoners. *Id.* at 1422.

38. *Austin*, *supra* note 5, at 412.

cause delays in seeing a physician and an absence of available nursing services at night and during the early morning.³⁹ Even when a prisoner can see a doctor, the examination may be inadequate.⁴⁰ Many prisons are located in rural areas and are not close to any major hospitals; thus, emergency care for an inmate must sometimes be provided by paramedical personnel or a local doctor at an inadequate medical facility.⁴¹ Also, to see a specialist who may be located far away, prisoners must be taken to the specialist rather than the other way around. This procedure creates security and monetary burdens on the prison because two correctional officers are usually required to accompany a maximum security prisoner to a location outside of the prison.⁴² In summary, an overcrowded prison faces the difficult task of maintaining health services for all of its prisoners, even though it is only equipped for a smaller number of inmates.

The inadequacy of medical care in penal institutions has been extensively litigated under the Civil Rights Act⁴³ for more than two decades. In addressing these lawsuits, the Supreme Court has held that a penal system has an obligation to provide medical care for those it is incarcerating.⁴⁴ However, even under the Supreme Court's holding, a prisoner is not guaranteed to receive the best care possible; instead, to maintain a civil rights action, the inmate must show deliberate indifference by prison administrators to serious medical needs of the prisoner.⁴⁵ Federal appellate courts, following the Court's lead, will look for a medical system within the prison that provides "minimum standards of adequacy."⁴⁶ Still, many prisons lack minimum standards of medical care, and as prisons increase in the number of inmates, the situation will only get worse. In any

39. *Lanzaro*, 595 F. Supp. at 1422.

40. *Id.*

41. Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 428 (1993).

42. *Id.*

43. 42 U.S.C. §§ 1981-2000h-6 (1988 & Supp. 1994). The relevant part of the statute reads: "Every person who . . . subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the parties injured in an action at law, suit in equity, or other proper proceeding for redress." *Id.* § 1983.

44. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

45. *Id.* at 104. The Supreme Court later explained that the "deliberate indifference" test placed the burden of proof on the inmate and is a far greater burden than showing that the prison was merely negligent in addressing the prisoner's medical needs. *Wilson v. Seiter*, 501 U.S. 294, 305 (1991).

46. *Wellman v. Faulkner*, 715 F.2d 269, 271 (7th Cir. 1983).

prison system, even in those which would meet the courts' standards, "health care is rationed or provided by less expert personnel."⁴⁷

C. Overcrowding and Violence

Another consequence of prison overcrowding appears to be an increase in violent acts committed by prisoners against other prisoners, prison faculty, and themselves. At least one study has come to the conclusion that a direct correlation exists between overcrowding and violence within the penal system.⁴⁸ In many of the prisoner cases where the courts found horrendous conditions or inadequate medical facilities, they also found that violence was commonplace among the inmates. For example, the court in *French v. Owens*,⁴⁹ noted that severe violent acts, including stabbings, bludgeonings, and homosexual rapes, were frequent occurrences in one jail.⁵⁰ Lesser forms of violence, such as threats, harassment, intimidation, and beatings were also common.⁵¹ In this case alone, the court recounted how one inmate doused another with lighter fluid in an attempt to burn the man.⁵² At the same prison, a group of inmates raped a fifteen-year-old prisoner at knife point.⁵³

Similar violence occurred in *McMurry v. Phelps*,⁵⁴ where the court noted that within a two-day period, one inmate was beaten with a broom handle, another inmate was threatened with a knife and raped, a prisoner attacked another prisoner with a plunger handle, and an inmate swallowed wood and plastic splinters as well as four razor blades in an apparent suicide attempt.⁵⁵ Although more acts of violence occur simply because of a rise in the number of inmates, re-

47. Eisenberg, *supra* note 41, at 428.

48. See Lee-Jan Jan, *Overcrowding and Inmate Behavior, Some Preliminary Findings*, 7 CRIM. JUST. & BEHAV. 293, 296 (1980). Courts also have found a connection between overcrowding and an increase in violent acts among inmates within jails and prisons. See, e.g., *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1977); *Costello v. Wainwright*, 525 F.2d 1239 (5th Cir. 1976), *rev'd*, 430 U.S. 325 (1977); *Jensen v. Gunter*, 807 F. Supp. 1463 (D. Ne. 1992); *Palmigiano v. DiPrete*, 700 F. Supp. 1180 (D.R.I. 1988), *aff'd*, 887 F.2d 258 (1st Cir. 1989); *Fisher v. Koehler*, 692 F. Supp. 1519 (S.D.N.Y. 1988); *Dohner v. McCarthy*, 635 F. Supp. 408 (C.D. Cal. 1985).

49. *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985).

50. *Id.* at 1257.

51. *Id.*

52. *Id.*

53. *Id.*

54. *McMurry v. Phelps*, 533 F. Supp. 742 (W.D. La. 1982).

55. *Id.* at 753.

searchers believe that crowding inmates together creates the stressful environment that can lead to violence.⁵⁶

D. Overcrowding: The Constitutional Dilemma

Prison officials in both the state and federal penal systems have been under considerable pressure from federal courts to correct the problems of overcrowding and its consequences. Federal courts have heard numerous cases dealing with the constitutionality of prison and jail conditions.⁵⁷ By finding constitutional violations under the Eighth Amendment, federal courts have used their powers to enforce judicial remedies upon prisons.⁵⁸ In 1974, the Supreme Court vehemently stated: "[T]hrough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."⁵⁹

Courts have held that a deliberate failure to provide enough security to prevent prisoner violence is a violation of the Eighth and Fourteenth Amendments.⁶⁰ The Supreme Court has also ruled that indifference to the medical needs of prisoners amounts to a constitutional violation.⁶¹ Finally, overcrowding in general and the problems of inadequate facilities and unsafe conditions can be enough for an Eighth Amendment violation.⁶² It appears that as prison conditions worsen from overcrowding, more prison officials will undoubtedly find themselves answering to federal courts.

56. Terence P. Thornberg & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313, 331 (1983).

57. *Id.*

58. See *El Tabech v. Gunter*, 869 F. Supp. 1446 (D. Ne. 1994); *Tillery v. Owens*, 719 F. Supp. 1256 (W.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990); *Knop v. Johnson*, 667 F. Supp. 512 (W.D. Mich. 1987); *Alberti v. Heard*, 600 F. Supp. 443 (S.D. Tex. 1984), *aff'd sub nom. Alberti v. Klevenhagen*, 790 F.2d 1220 (5th Cir. 1986); *Toussaint v. McCarthy*, 597 F. Supp. 1388 (N.D. Cal. 1984), *aff'd in part, rev'd in part*, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *Balla v. Idaho*, 595 F. Supp. 1558 (D. Idaho 1984); *Heitman v. Gabriel*, 524 F. Supp. 622 (W.D. Mo. 1981).

59. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

60. *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir.), *cert. denied*, 423 U.S. 859 (1975); *Nicholson v. Choctaw County, Alabama*, 498 F. Supp. 295 (S.D. Ala. 1980).

61. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

62. See *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 595 F. Supp. 1417 (D.N.J. 1984); see also *Inmates of Allegheny County Jail v. Wecht*, 874 F.2d 147 (3d Cir. 1989).

III. Elderly Inmates in the Penal System

It is difficult to determine how many elderly prisoners are in this country's prisons and jails, mainly because scholars and correction officials differ about who constitutes the elderly. Some authors characterize the elderly prison population as those prisoners who are sixty-five years old or older, while others begin counting older inmates at as low an age as fifty.⁶³ This leads to confusion for researchers trying to determine statistics such as how many prisoners are elderly and how much it costs a year to maintain an elderly prison population.⁶⁴ Using fifty-five as the youngest age in which to define an inmate as elderly, about three percent of the inmate population in state and federal prisons are elderly.⁶⁵

A. A Profile of the Elderly Inmate

Most older inmates are male,⁶⁶ as no more than a thousand older female inmates are housed in the nation's prisons.⁶⁷ Older inmates generally can be divided into two groups: those who have long criminal records and are familiar with the prison system and those who had little to no trouble with the law until they reached an older age.⁶⁸ The second category of elderly inmates are mostly found in jails as opposed to prisons.⁶⁹ Each group accounts for about half of the older prisoner population.⁷⁰

Older inmates, on the average, have low IQ's, a high divorce rate, a high rate of alcohol abuse, and a higher proportion of mental

63. Craig J. Forsyth & Robert Gramling, *Elderly Crime: Fact and Artifact*, in *OLDER OFFENDERS*, *supra* note 10, at 3, 5-6.

64. *Id.* at 6.

65. Linda Himelstein, *The Case For Not Letting 'Em Rot*, *BUS. WK.*, Aug. 16, 1993, at 89. Because most of the sources use 55 as the earliest age at which a person is considered "elderly," for purposes of this note, unless otherwise indicated, "elderly" means persons ages 55 and older.

66. Ann Goetting, *The Elderly in Prison: Issues and Perspectives*, 20 *J. RES. CRIME & DELINQ.* 291, 292 (1983).

67. Sol Chaneles, *Growing Old Behind Bars: The Aging of Our Convict Population Brings with It Special Needs and Problems that Few of Our Prisons Are Ready to Handle*, *PSYCHOL. TODAY*, Oct. 1987, at 47, 49.

68. Delores Golden, *Elderly Offenders in Jail*, in *ELDERLY CRIMINALS* 143, 145 (Evelyn S. Newman et al. eds., 1984).

69. *Id.* "The Bureau of Justice Statistics defines a jail as a 'local government facility authorized to detain for at least 48 hours any adult suspected or convicted of criminal offense.' Prisons are correctional facilities designed for longer incarcerations." *Id.* at 143.

70. Carroll, *supra* note 8, at 70.

problems than younger prisoners.⁷¹ Elderly inmates commonly suffer from organic brain disease and senile dementia, although they may also suffer from depression, personality disorder, functional psychosis, and paranoid schizophrenia.⁷² They appear, however, to cause less disciplinary trouble in the prison system than younger offenders.⁷³

Whether or not an elderly crime wave is sweeping the nation is the issue of some debate. While mainstream journalists have stated that elderly crime has substantially increased,⁷⁴ two scholars, Craig Forsyth and Robert Gramling, have disputed the reports, explaining that the alleged increase is simply a heightened interest in crimes committed by the elderly.⁷⁵ Forsyth and Gramling believe that the percentage of older persons who commit crimes has remained consistent and that any increase in elderly crime is probably the result of an increase in the elderly population in general.⁷⁶

B. The Problem of Elderly Prisoners

Whether the older inmate is one with a history of criminal behavior or one who is in prison or jail for the first time, both types of elderly prisoners create problems for penal officials who have to act as both jailer and care giver.⁷⁷ The needs of elderly inmates are greater than the needs of other prisoners.⁷⁸ The elderly require more medical care as they usually suffer from more chronic health problems than

71. Kenneth E. Gewerth, *Elderly Offenders: A Review of Previous Research*, in *OLDER OFFENDERS*, *supra* note 10, at 14, 29. Alcohol abuse, in particular, appears to be a predominant factor in elderly criminal behavior. One study found that 8.5% of the elderly persons studied were arrested for driving under the influence and 12.4% were arrested or ticketed for public intoxication. Peter C. Kratcoski & George A. Pownall, *Federal Bureau of Prisons Programming for Older Inmates*, *FED. PROBATION*, June 1989, at 28, 28. Alcohol is also a major factor in violent crimes committed by the elderly. Karen M. Jennison, *The Violent Older Offender: A Research Note*, *FED. PROBATION*, Sept. 1986, at 60, 60.

72. Gewerth, *supra* note 71, at 24.

73. *Id.* at 29.

74. 20/20, *supra* note 9.

75. Forsyth & Gramling, *supra* note 63, at 8, 13. The traditionalist argument is that the increase in the attention paid to crime committed by the elderly is a result of the increase in elderly crime. The constructionalist view is that crimes actually committed by the elderly have not risen, only the amount of publicity has increased. *Id.*

76. *Id.* at 13; see also William E. Adams, Jr., *The Incarceration of Older Criminals: Balancing Safety, Cost, and Humanitarian Concerns*, 19 *NOVA L. REV.* 465, 467-68 (1995) (arguing that the small number of arrests of older persons makes any increase appear substantial).

77. Gewerth, *supra* note 71, at 29.

78. Wright, *supra* note 12, at 563.

their younger counterparts.⁷⁹ Older inmates simply draw more from the resources of a prison.

For all inmates, a prison is a domiciliary institution "where the residents live together around the clock within a circumscribed space under a scheduled sequence of activities implemented by a staff and administered in a bureaucratic style."⁸⁰ Correction facilities are unique among domiciliary institutions in that they exist to control people convicted as criminals.⁸¹ Thus, correctional facility staffs are responsible for caring for residents whose purpose of residency is punishment. Prison staffs are also responsible for preventing inmates from harming society, other prisoners, and prison personnel.⁸² All of these obligations, together with the special problems of the elderly, combine to make elderly inmates a thorn in the side of prison administrators.

Gerontologists are now concerned about the treatment of older persons who have been incarcerated.⁸³ In most prison settings, elderly inmates are not treated differently.⁸⁴ Unless they are infirm, they do not live in separate facilities or receive less strenuous work assignments than younger prisoners.⁸⁵ Prisons and prison procedures were not designed to accommodate different age groups. Furthermore, change comes slowly in a bureaucracy. Because most prisoners are young, penal facilities are designed for younger criminals.⁸⁶

Correction officials disagree on whether older prisoners should be segregated in a special facility or distributed throughout the prison system.⁸⁷ Separating elderly inmates may produce the following advantages: an enhancement of self-respect for the older prisoners, a stimulation of social interaction among fellow elderly inmates to avoid feelings of loneliness, and the atmosphere to create programs oriented for this age group.⁸⁸ By segregating the elderly, a prison can better protect them from younger, more violent prisoners. Arguments

79. *Id.*

80. Elmer H. Johnson, *Care for Elderly Inmates: Conflicting Concerns and Purposes in Prisons*, in *OLDER OFFENDERS*, *supra* note 10, at 157, 158. Other kinds of domiciliary institutions are military bases, mental hospitals, monasteries, boarding schools, nursing homes, and some residential complexes for the elderly. *Id.*

81. *Id.*

82. *Id.* at 161.

83. *Id.* at 157.

84. James, *supra* note 7, at 1027.

85. *Id.*

86. Golden, *supra* note 68, at 146.

87. Johnson, *supra* note 80, at 163.

88. *Id.* at 162-63.

against separation of older inmates include the following: older inmates may not be able to get appropriate work assignments, the elderly inmates may be denied access to many programs, and segregation may be against the preferences of prisoners who do not identify with their age group.⁸⁹ Some prison officials also maintain that spreading older prisoners throughout the prisons creates a calming effect and counters the more aggressive nature of the younger inmates.⁹⁰ However, when these officials refer to older prisoners, they are referring to prisoners between the ages of thirty-five and fifty years.⁹¹ Inmates sixty-five and older may be too weak and passive to command the respect necessary to influence the behavior of younger prisoners.⁹² How to house elderly inmates is still a major issue for prisons.

Also in controversy is the manner by which the elderly cope with confinement.⁹³ All prisoners experience some level of mental breakdown upon imprisonment as they lose their accustomed comforts.⁹⁴ This is especially true for those elderly inmates who have been incarcerated for the first time at an old age. Prisoners must adjust to their new environment and compensate for what they have lost through confinement.⁹⁵ Most older inmates read books and newspapers, watch television, exercise, or work at a prison job.⁹⁶ On the other hand, few older inmates participate in programs and activities offered by the institution which involve interaction with other prisoners, including social and recreational activities, and more importantly, formal programs such as counseling, educational programs, and vocational training.⁹⁷ In fact, prison staffs can discourage elderly inmates from participating in programs, especially programs leading to parole, because they view such programs as designed for younger inmates.⁹⁸ As a result, the elderly tend to become idle, which can affect the older inmate's health.

89. *Id.* at 163.

90. *Id.*

91. *Id.*

92. *Id.*

93. Gewerth, *supra* note 71, at 29.

94. Michael J. Sabath & Ernest L. Cowles, *Factors Affecting the Adjustment of Elderly Inmates in Prison*, in *OLDER OFFENDERS*, *supra* note 10, at 178, 178.

95. *Id.*

96. *Id.* at 184.

97. *Id.*

98. Goetting, *supra* note 66, at 300.

When it comes to older prisoners, the greatest challenge facing officials is providing for their health care needs. As of 1990, the average prisoner could be maintained at a cost of \$18,600 a year, while an older or terminally ill prisoner costs about \$67,000.⁹⁹ Health care costs accounted for much of the additional money spent on older inmates. Health needs for the elderly inmates vary. They may need simple items like eyeglasses, hearing aids, and dentures.¹⁰⁰ Older inmates also may need more expensive items such as prosthetic devices.¹⁰¹ Penal institutions also must accommodate older prisoners who require special diets and replace prison uniform buttons and string shoelaces with velcro for those who suffer from arthritis in their fingers.¹⁰²

Sometimes the medical needs of elderly inmates are more demanding. Prison wards are often forced to keep inmates suffering from Alzheimer's disease and other organic brain disorders.¹⁰³ Prison hospitals thus become nursing homes. The medical deterioration of some of these elderly inmates in terms of sight, hearing, reflexes, and mind means that specially trained staff are needed for older inmates.¹⁰⁴

The most adverse effect of the medical needs of elderly inmates is the collateral cost associated with obtaining the medical treatment. Although governments may have to pay for elder inmates' medical needs regardless of whether they are incarcerated, transactional costs of providing health care in the prison system compound state and federal expenditures. For example, in 1992, William Hawkins, a then sixty-two-year-old convicted murderer in the Louisiana penal system, was driven to Baton Rouge three times a week for treatment with a dialysis machine.¹⁰⁵ Hawkins logged more than 23,000 hours on dialysis at a cost to Louisiana taxpayers of around \$39,000 annually in

99. Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse Than the Disease?*, 3 WIDENER J. PUB. L. 799, 807 n.25 (1994). Jurisdictions vary as to how much they spend on the health care of inmates. See COSTS OF HEALTH CARE IN STATE AND FEDERAL DEPARTMENTS OF CORRECTION, 1993, BUREAU OF JUSTICE STATISTICS, 15, tbl. 1.11 (U.S. Dep't of Justice, 1994). Massachusetts spends the most at \$3260 per inmate per year in health care costs alone. *Id.* Louisiana spends the least, allotting \$634 in health care costs for each inmate. *Id.* The federal government spends about \$3000. *Id.*

100. Carroll, *supra* note 8, at 70.

101. *Id.*

102. *Id.*

103. Chaneles, *supra* note 67, at 51.

104. Goetting, *supra* note 66, at 302-03.

105. Turley, *supra* note 16, at 80.

medical care alone.¹⁰⁶ Although the government may have had to help pay for this treatment anyway, it also picked up the tab for travelling from the prison to the hospital accompanied by guards. At McCain prison in North Carolina, a sixty-nine-year-old convicted murderer, Howard King, had his leg amputated because of gangrene.¹⁰⁷ The cost to North Carolina taxpayers was \$21,000 for the surgery.¹⁰⁸

In fact, health care for the elderly is so expensive that being sentenced to prison may be a small price to pay for the elderly individual. Some elderly prisoners may commit crimes in order to be put in prison and benefit from state-paid prison health care.¹⁰⁹ Libby Marsh, a social worker at McCain, recalled an elderly inmate who, while in prison, had a cataract removed from his eye.¹¹⁰ The next year, the same elderly man threw a brick through the window of a department store so that he could come back to prison to get a cataract in the other eye removed.¹¹¹

C. Future Problems with Elderly Prisoners

In 1988, Professor Jonathan Turley, an advocate for the release of elderly prisoners, estimated that the number of elderly inmates in America's prisons was doubling every four or five years.¹¹² As the prison population grows, so too does the number of elderly behind bars.¹¹³ A news broadcast summarized the situation this way: "[t]he graying of America's prisons threatens to overwhelm a penal system already bursting at the seams from overcrowding and straining the taxpayer's purse."¹¹⁴

The federal system does have a hospital that cares for older federal prisoners, but it is not a long-term nursing home.¹¹⁵ Most states, on the other hand, have not started dealing with the problem.¹¹⁶ Prisoners eighty-five and older, who represent the fastest growing portion of the population, require more health services, such as twenty-four-

106. *Id.*

107. 20/20, *supra* note 9.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. ABC World News Tonight, *supra* note 16.

113. *Id.*

114. *Id.*

115. Chaneles, *supra* note 67, at 51.

116. 20/20, *supra* note 9.

hour-a-day health care.¹¹⁷ Dr. Bert Rosefield, Superintendent of the prison hospital at McCain, believes that in the future, "[e]very state is going to have to end up with one or two facilities that are essentially nursing homes."¹¹⁸ Currently, only a handful of institutions, like McCain, have special programs or facilities for the elderly inmates.¹¹⁹ Only about a dozen states separate older inmates from the rest of the prison population.¹²⁰

Prisons currently work under the assumption that incoming prisoners will be young and will still be young when released;¹²¹ however, as states impose more mandatory sentences, including life without parole, the percentage of old people within prison walls will increase.¹²² These prisoners need special care, especially medical care, facilities that protect them from younger inmates, and programs designed specifically for the elderly. Elderly prisoners have different needs than the rest of the prison population and, as a result, need to be treated differently. This in turn means greater burdens on already strained prison health facilities. It also means that more of a prison's budget and attention will be used for a small percentage of the prison population. States will be forced to make policy decisions on what to do with elderly inmates within their penal systems.

IV. Attempts to Decrease the Elderly Inmate Population

In facing prison overcrowding, officials have found four ways to deal with the issue: reduce the number of persons sent to prison or jail, accelerate the release of prisoners already incarcerated, build more prisons to handle the large number of criminals, or do nothing at all.¹²³ Some jurisdictions are attempting to find ways both to solve prison overcrowding and to curb the rising number of elderly behind bars. For these correction systems, accelerating the release of the elderly inmate is a potential solution to both problems. Prison administrators who must deal with overcrowding and the special problems of elderly inmates have four options: maintain the status quo, reduce

117. Chaneles, *supra* note 67, at 51.

118. 20/20, *supra* note 9.

119. *Id.*

120. *Id.*

121. Lincoln J. Fry, *The Concerns of Older Inmates in a Minimum Prison Setting*, in *OLDER OFFENDERS*, *supra* note 10, at 164, 164.

122. ABC World News Tonight, *supra* note 16.

123. Gottfredson, *supra* note 1, at 267.

medical care alone.¹⁰⁶ Although the government may have had to help pay for this treatment anyway, it also picked up the tab for travelling from the prison to the hospital accompanied by guards. At McCain prison in North Carolina, a sixty-nine-year-old convicted murderer, Howard King, had his leg amputated because of gangrene.¹⁰⁷ The cost to North Carolina taxpayers was \$21,000 for the surgery.¹⁰⁸

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117. Chaneles, *supra* note 67, at 51.

118. 20/20, *supra* note 9.

119. *Id.*

120. *Id.*

121. Lincoln J. Fry, *The Concerns of Older Inmates in a Minimum Prison Setting*, in *OLDER OFFENDERS*, *supra* note 10, at 164, 164.

122. ABC World News Tonight, *supra* note 16.

123. Gottfredson, *supra* note 1, at 267.

sentences based on age so that older prisoners will spend less time in a correctional facility, use medical parole as a means to lessen the burden of paying for the medical treatment of older and infirm inmates, and/or engage in early release programs that seek to release those elderly inmates who no longer pose a threat to society.

A. The Argument Against Seeking the Release of Elderly Inmates

Most corrections administrators do not believe that their job is to rehabilitate criminals.¹²⁴ In fact, the concept of rehabilitation as the purpose of incarceration has been rejected by almost everyone working within the criminal justice system.¹²⁵ Rehabilitation has been described as when society "punish[es]" the convicted criminal by giving him appropriate treatment, in order to rehabilitate him and return him to society so reformed that he will not desire or need to commit further crimes."¹²⁶

Rehabilitation, as a goal of incarceration, has given way to retribution, which is the oldest and most popular theory of punishment.¹²⁷ "Retributivists" believe the purpose of punishment is societal revenge and that criminals should suffer for the harm created by their crimes.¹²⁸ Proponents of retribution also believe that in order to maintain respect for the law, retributive punishment is needed.¹²⁹

Retributivists who want to see criminals suffer in proportion to their crimes¹³⁰ believe that minimizing the period of incarceration for elderly inmates does not further this goal.¹³¹ For the retributivist, age should not be a factor in punishment because the harm done to society is the same, whether committed by a young person or an older person. Therefore, the punishment should be the same. A problem with this conclusion is that because elderly criminals will lose a greater percentage of their lives than the younger criminals, the elderly criminals suffer more even though the sentences imposed are the same.¹³²

124. Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012 (1991).

125. *Id.*

126. WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5 (2d ed. 1986).

127. *Id.*

128. *Id.*

129. *Id.*

130. James, *supra* note 7, at 1038.

131. *Id.*

132. *Id.*

B. Leniency in Sentencing Due to the Old Age of the Convicted Criminal

States are using age as a factor in sentencing as one way of dealing with the problems of overcrowding and elderly inmates. Some state statutes provide that the defendants' age when they commit crimes can be a mitigating factor for judges to consider when sentencing, although the statutes deal with other factors besides age and usually only apply in cases where the defendant is eligible for the death penalty or at least life without parole.¹³³ An utilitarian point of view towards sentencing might support using age as a factor in giving a lesser sentence, since less punishment might be enough to deter the elderly criminal, and the physical and mental capacity to engage in criminal activity lessens as the offender gets older.¹³⁴

Not every proponent of using different sentences for the elderly believes that the older criminal should receive a reduced sentence. Some commentators see elderly offenders as more culpable because of the adage that with age comes experience and wisdom.¹³⁵ This would tend to be the view of a retributivist.¹³⁶ Others hold a more extreme view in the opposite direction, saying that at a certain age, an elderly person lacks the mens rea to commit an offense, and at certain ages, there should be a "rebuttable presumption of irresponsibility."¹³⁷

The concept of using age as a factor in sentencing is not new. During the Ch'ing Dynasty in China,¹³⁸ if a very old or a very young person committed an otherwise capital offense, that person would be able to obtain release through monetary redemption.¹³⁹ The fine involved was usually nominal, and in some cases, was waived altogether.¹⁴⁰ In states that do allow courts to use age as a mitigating

133. *Id.* at 1032; e.g., ALA. CODE § 13a-5-51(7) (Michie 1994); ARIZ. REV. STAT. ANN. § 13-702(D)(1) (West Supp. 1994); CAL. PENAL CODE § 190.3(i) (West 1988); COLO. REV. STAT. ANN. § 16-11-103(4)(a) (West Supp. 1994); FLA. STAT. ANN. § 921.141(6)(g) (West 1985); MO. ANN. STAT. § 565.032(3)(7) (West Supp. 1995); N.J. STAT. ANN. § 2C:11-3(5)(c) (West 1982 & West Supp. 1995); OR. REV. STAT. § 163.150(c) (1993); 42 PA. CONS. STAT. ANN. § 9711(c)(4) (1982). The age of the defendant is just one of the factors. Other mitigating factors include prior or no past criminal history, duress on the defendant when the crime was committed, the defendant's role in the crime, and the defendant's emotional disturbances. *Id.*

134. *Id.* at 103; see also Fred Cohen, *Old Age as a Criminal Defense*, 21 CRIM. L. BULL. 5, 11 (1985).

135. Cohen, *supra* note 134, at 11.

136. James, *supra* note 7, at 1039.

137. Cohen, *supra* note 134, at 11.

138. The Ch'ing Dynasty lasted in China from 1644-1911. Derk Bodde, *Age, Youth, and Infirmary in the Law of Ch'ing China*, 121 U. PA. L. REV. 437, 438 (1973).

139. *Id.* at 439.

140. *Id.* This system applied to all crimes except treason and rebellion. *Id.*

factor in sentencing, the power to make this determination is left to the discretion of the sentencing judge.¹⁴¹ Although old age and poor health can be used as a basis for a lesser sentence, state supreme courts appear reluctant to overrule trial courts that choose to ignore the age or poor health of the convicted criminal by imposing standard sentences for the crime committed.¹⁴² For example, in *Alsbaugh v. State*, the Supreme Court of Florida upheld a five-year sentence for a seventy-five-year-old man convicted of running an illegal lottery.¹⁴³ The court reasoned that if the sentence appeared to endanger the life of the defendant, then that was a matter for the parole board.¹⁴⁴ In another case, the Supreme Court of Idaho allowed a six-year sentence for voluntary manslaughter to stand, even though the defendant was sixty and suffered from declining physical health.¹⁴⁵ The trial judge refused to note the defendant's age, and the court affirmed his sentence, stating that a court may impose a longer sentence if, among other reasons, "a lesser sentence will depreciate the seriousness of the defendant's crime" or imprisonment "will provide an appropriate deterrent for other persons in the community."¹⁴⁶

The problem in the states is that each trial judge has discretion in sentencing, and thus factoring age into sentencing is ineffective overall as a way to solve overcrowding and lessen the burden of elderly inmates within state correctional facilities. Judges could impose shorter sentences for elderly offenders, but many do not, and a concentrated effort by all judges in a state is necessary to deal effectively with an influx of elderly criminals into the state's prison system. Individual efforts are not enough. Also, sentencing reform by itself does not alleviate overcrowding and the increasing elderly prison population. Using age as a sentencing factor only affects those criminals who are old at the time they are sentenced and fails to address the elderly inmates who were young when sentenced to prison.¹⁴⁷

141. See *supra* note 133.

142. See *Alsbaugh v. State*, 133 So. 2d 587 (Fla. 1961); *State v. Baker*, 644 P.2d 365 (Idaho 1982).

143. *Alsbaugh*, 133 So. 2d at 588.

144. *Id.* at 589.

145. *Baker*, 644 P.2d at 369.

146. *Id.*

147. Only about half of elderly inmates were old when they were sentenced. The other half have become old while incarcerated. See *supra* text accompanying notes 68-70.

Federal courts, like some state courts, appear willing to impose lesser sentences on older and terminally ill defendants.¹⁴⁸ In the federal courts, however, judges have stricter federal sentencing guidelines¹⁴⁹ to follow, and a refusal to lower the sentence because of age or illness cannot be appealed by the defendant.¹⁵⁰ The government, however, may appeal if the trial judge does consider age in lowering the sentence.¹⁵¹ Judges who do deviate from the federal sentencing guidelines must give a specific reason for the deviation, and the sentence imposed needs to be reasonable given the circumstances stated by the judge.¹⁵² Age, by itself, is not normally a factor in determining whether to deviate from the guidelines.¹⁵³ Instead, federal law only allows courts to consider age in sentencing when "the offender is elderly *and* infirm and where a form of punishment . . . might be equally efficient as and less costly than incarceration."¹⁵⁴

If an older person is sentenced in the federal courts, and the prisoner's medical condition begins to worsen, the inmate still has a chance at a reduced sentence under Rule 35(b) of the Federal Rules of Criminal Procedure.¹⁵⁵ Rule 35(b) operates as a final check before the sentencing judge considers the case closed.¹⁵⁶ Imposition of the rule does not mean that a defendant will get a review, and if the judge denies the motion, the court does not even need to state the reasons for the denial.¹⁵⁷ However, older inmates with deteriorating physical conditions can only use Rule 35(b) if they were convicted of crimes committed before November 1, 1987.¹⁵⁸ Rule 35(b) was revised in 1988 to allow for a reduction of sentence for defendants who provide substantial assistance to the federal government in other investigations and prosecutions.¹⁵⁹ Therefore, future elderly defendants will not be able to get their sentences reduced if their health begins to worsen

148. Russell, *supra* note 99, at 814.

149. See United States Sentencing Guidelines, 18 U.S.C. §§ 3551-59 (1988 & Supp. 1994).

150. United States v. Ghannam, 899 F.2d 327, 328 (4th Cir. 1990).

151. *Id.* at 329; e.g., 18 U.S.C. § 3742(b).

152. United States v. Carey, 895 F.2d 318, 322 (7th Cir. 1990); e.g., 18 U.S.C. § 3742(e).

153. Carey, 895 F.2d at 324.

154. *Id.*

155. Russell, *supra* note 99, at 814.

156. United States v. DeCologero, 821 F.2d 39, 41 (1st Cir. 1987).

157. *Id.*

158. Russell, *supra* note 99, at 816 n.64.

159. *Id.* at 814; FED. R. CRIM. P. 35(b).

after incarceration unless they significantly help the government in other prosecutorial matters.

C. Medical Parole of the Elderly Inmate

Parole is another option for the elderly inmate. Some courts believe that the parole board should decide whether a convicted person will spend less time than is usual for the offense. These courts sentence elderly defendants according to that belief¹⁶⁰ and are reluctant to substitute their judgments for the decisions of state and federal corrections administrators.¹⁶¹ When courts take this view, the elderly inmate appears to have no choice but to hope that old age and poor health will result in a favorable decision by parole boards.

Of all people in society, prison inmates have the least amount of control over the type of treatment they will receive for terminal illnesses. Also, when inmates are dying, they have no control over their setting or companions at the time of death.¹⁶² The guiding force for prison medical care is meeting constitutional standards and budget constraints.¹⁶³ A prison is limited in comforts and personnel who can deal with terminally ill individuals¹⁶⁴ and often keeps away family and loved ones from the sick inmate. Despite the dying inmate's misery, no constitutional right to parole or a motion for parole exists, regardless of the circumstances.¹⁶⁵

For humanitarian and practical reasons, a number of states have created statutory provisions for parole based exclusively on the fact that an inmate is terminally ill or requires medical care that cannot be adequately provided in a prison setting.¹⁶⁶ A terminally ill prisoner generally is no longer a danger to society, so medical parole programs are not politically contentious.¹⁶⁷ Unlike normal parole situations, the public generally does not fear paroling prisoners who will die shortly.¹⁶⁸ Meanwhile, prison officials are freeing prison space and medical resources.

160. James, *supra* note 7, at 1033.

161. Bachman v. Jeffes, 488 F. Supp. 107, 109 (M.D. Pa. 1980).

162. Russell, *supra* note 99, at 804 n.16.

163. *Id.*

164. *Id.*

165. Turner v. United States Parole Comm'n, 810 F.2d 612, 616 (7th Cir. 1987).

166. See *infra* notes 171-72 and accompanying text.

167. Russell, *supra* note 99, at 805.

168. *Id.*

Just recently, Professor Marjorie Russell¹⁶⁹ surveyed all fifty states and the District of Columbia to find out what provisions existed in those jurisdictions for compassionate release and medical parole programs.¹⁷⁰ She found that only three jurisdictions, the District of Columbia, Kansas, and Maine, had no programs for the parole or release of terminally ill prisoners.¹⁷¹ In the other states, the parole board must find that the prisoner is too ill to pose any threat to society.¹⁷² Parole may be revoked if the parolee's medical condition changes to the point where the prisoner may become dangerous again or simply is no longer classified as terminally ill.¹⁷³ The states also require a pre-determined location for the care of the inmate outside of the institution.¹⁷⁴

However, states disagree on where the prisoner may go after being released on medical parole. Delaware is a state that takes a strict approach to the question of where a parolee will go, conditioning parole for medical reasons "only when arrangements have been made for the treatment of the person in some institution."¹⁷⁵ Connecticut will allow the paroled prisoner to be placed in any housing, including the family home, that is "suitable to his medical condition."¹⁷⁶ Montana takes a moderate approach, requiring that the prisoner agree to a location designated by the parole board.¹⁷⁷ Both Montana and Connecticut give the parole board the power to decide where the prisoner will go upon release,¹⁷⁸ and Delaware implies this power by reserving the right to "impose any conditions of parole."¹⁷⁹ Seven states require periodic reporting by the prisoner.¹⁸⁰ The remaining jurisdictions can impose periodic examinations and frequent check-ins by the parolee on a case-by-case basis.¹⁸¹ Seven states have provisions that call for

169. Professor Russell is an associate professor of law at Thomas M. Cooley Law School.

170. See Russell, *supra* note 99, at 818-31.

171. Russell, *supra* note 99, at 818-19.

172. *Id.* at 826-27.

173. *Id.*

174. *Id.* at 830.

175. DEL. CODE ANN. tit. 11, § 4346(e) (Michie 1987).

176. CONN. GEN. STAT. ANN. § 54-131d(a) (West 1994).

177. MONT. CODE ANN. § 46-23-210(3) (1993).

178. CONN. GEN. STAT. ANN. § 54-131d(a); MONT CODE ANN. § 46-23-210(3).

179. DEL. CODE ANN. tit. 11, § 4346(e).

180. Russell, *supra* note 99, at 831. These states are Georgia, Ohio, Oklahoma, New York, Oregon, Texas, and Wyoming. *Id.*

181. *Id.*

the revocation of parole should the parolee's medical condition improve.¹⁸²

At the federal level, the Bureau of Prisons may also parole prisoners for medical reasons.¹⁸³ Before November 1, 1987, the federal government could parole a prisoner if it determined that adequate care in a prison setting was determined to be impossible.¹⁸⁴ The law allowing federal prison officials to release a prisoner on medical parole was later repealed, although the law still applies to federal prisoners who committed crimes before November 1, 1987.¹⁸⁵ If the Bureau of Prisons refuses to act, that inaction is not subject to judicial review.¹⁸⁶

Medical parole and release can help prison systems avoid the high cost of maintaining inmates who need expensive medical care while battling with illnesses that will probably take their lives. Prison doctors and medical staff can have more time and resources to handle the more routine medical needs of the inmates. Conversely, medical parole is only an option for inmates who will not live long, so the benefits from medical parole are short-lived for the prison system. Because most elderly inmates would not be able to take advantage of medical parole until the very end of their lives, they effectively would stay in prison for a longer time and require more medical care than the rest of the prison population.

D. Early Release Programs for the Elderly Inmate

A new option for dealing with overcrowding and elderly inmates consists of early release programs that specifically target elderly prisoners who no longer pose a threat to society. The most prominent figure in the movement to seek early release of older prisoners is Professor Jonathan Turley,¹⁸⁷ founder and director of the Project for Older Prisoners (POPS). POPS first started in Louisiana at Tulane Law School and has grown to include chapters at law schools in Louisiana,

182. *Id.*

183. *Id.* at 816.

184. 18 U.S.C. § 4205(g) (1988).

185. Russell, *supra* note 99, at 816 n.64.

186. *Fernandez v. United States*, 941 F.2d 1488, 1493 (11th Cir. 1991); *Turner v. United States Parole Comm'n*, 810 F.2d 612, 618 (7th Cir. 1987).

187. Professor Turley is an associate professor of law at George Washington University National Law Center.

North Carolina, Michigan, Florida, Illinois, and the District of Columbia.¹⁸⁸

Professor Turley started POPS while working on a lawsuit on an unrelated matter brought by Quenton Brown, an elderly prisoner at Louisiana's Angola State Prison.¹⁸⁹ Brown's story is typical of many elderly inmates, and he is typical of the type of prisoner POPS seeks to release. In 1973, Brown, a fifty-year-old drifter with a low IQ, stole \$117 and a cherry pie from a convenience store in Morgan City, Louisiana.¹⁹⁰ For this crime, Brown was sentenced to thirty years in a maximum security prison.¹⁹¹ By the time he became the first client of POPS in 1989, the sixty-seven-year-old model prisoner was suffering from bleeding ulcers and emphysema.¹⁹²

Brown represents the type of prisoner that POPS is trying to release from prison, where older prisoners divert resources from the prison that could be put towards better uses. POPS is extremely discriminating in the cases it will accept and only helps ten percent of prisoners interviewed by members of the program.¹⁹³ Candidates must be at least fifty-five, have already served the average time for their offense, and have been evaluated as unlikely to commit further crimes in the future.¹⁹⁴ A more interesting requirement, and one that keeps many elderly inmates out of the POPS program, is that the victim, or the victim's family, must agree to early release.¹⁹⁵ As a result of the rigid standards that POPS maintains for anyone seeking release through the program, no prisoner released by POPS has ever returned to prison for committing another crime.¹⁹⁶

POPS does not simply work to secure the release of elderly inmates who no longer pose a threat to society. Simply releasing elderly prisoners without giving them the provisions necessary to become

188. Telephone Interview with Jonathan Turley, Associate Professor of Law, George Washington University National Law Center and Director of the Program for Older Prisoners (Nov. 15, 1994).

189. *Id.*

190. Himelstein, *supra* note 65, at 89.

191. *Id.*

192. *Id.*

193. Himelstein, *supra* note 65, at 89; Turley, *supra* note 16, at 81. Law students are responsible for interviewing potential candidates and compiling pardon and parole cases for those prisoners chosen for the program. Turley, *supra* note 16, at 81.

194. Himelstein, *supra* note 65, at 89.

195. *Id.*

196. Interview with Jonathan Turley, *supra* note 188.

functioning members of society would be irresponsible.¹⁹⁷ Rather, the program works to help its clients receive Social Security payments or find a job or housing.¹⁹⁸ Quenton Brown, for example, is now a gardener in Florida.¹⁹⁹ Some elderly prisoners have been incarcerated for so long that they may have a difficult time readjusting to life outside of prison.²⁰⁰ By assisting these prisoners once they are out of prison, POPS helps its elderly clients stay out of trouble—another reason for POPS's perfect record of zero recidivism.²⁰¹

POPS is still a fledgling program and is not active in most states.²⁰² To date, POPS has secured the release of sixty elderly inmates, which is only a small fraction of the elderly prisoner population.²⁰³ Because early release is so new, it is still viewed as an extremely controversial approach to reducing prison overcrowding and the problem of caring for older inmates within the penal institutions of this country.²⁰⁴ Releasing any criminals back into society can be politically dangerous,²⁰⁵ and if early release programs grow, the public may become even more frustrated with governments it perceives to be soft on crime.²⁰⁶ Though POPS has never released a prisoner who committed another crime after release, POPS's perfect record eventually may be broken, as more prisoners are put back into society, and the probability that one of the released prisoners will commit another crime rises. After all, incapacitation is the most effective way of preventing a criminal from engaging in future criminal behavior.²⁰⁷ However, Turley's research does indicate that elderly prisoners are the least likely to, and the least capable of, committing crimes.²⁰⁸

Conversely, the benefits of early release are numerous and realizable.²⁰⁹ Early release serves to reduce the prison population or at

197. Wright, *supra* note 12, at 563.

198. Turley, *supra* note 16, at 81.

199. Himelstein, *supra* note 65, at 89.

200. ABC World News Tonight, *supra* note 16.

201. See *supra* text accompanying note 194.

202. See *supra* text accompanying note 186.

203. Interview with Jonathan Turley, *supra* note 188; see also *supra* note 9.

204. Austin, *supra* note 5, at 405.

205. ABC World News Tonight, *supra* note 16; see Himelstein, *supra* note 65, at 89. "Lawmakers are afraid of appearing soft on crime and are loath to risk releasing a prisoner who may go on to commit another offense." *Id.*

206. See Austin, *supra* note 5, at 405.

207. *Id.* at 415.

208. ABC World News Tonight, *supra* note 16; see also Carroll, *supra* note 8, at 70.

209. Austin, *supra* note 5, at 415.

least slow down its growth, which in turn helps reduce the overall costs of maintaining correctional facilities.²¹⁰ Prison costs are the second fastest growing expenses for states.²¹¹ From 1986 to 1992, the costs of corrections went from \$9.8 billion to \$20.6 billion, due in part to meeting the health needs of the older prisoners.²¹²

Besides lowering costs, early release programs can alleviate overcrowding. Almost every state has been before federal courts on constitutional challenges to prison conditions, and many of these states are under court order to decrease prison populations and create better prison conditions.²¹³ If prisoners must be released, perhaps it is best to release the older prisoners who are less likely to cause further trouble.²¹⁴ As Professor Turley argues, "[b]y identifying low-risk candidates for parole and confirming the necessary benefits needed to re-adjust to society, states can open up thousands of cells while actually lowering the risk currently imposed on society by unguided court-ordered releases."²¹⁵

V. Of the Methods for Reducing Overcrowding and the Elderly Inmate Population, Early Release Is the Best Alternative

Early release programs for the elderly appear to offer the best solution to overcrowding and a rapidly growing elderly prison population. The statistics cannot be ignored, and prisons must address the problems of prison overcrowding and an increasing older prisoner population. Morris Dees, director of the Southern Poverty Law Center, believes that "someday people will [have to] come to their senses and realize it's the young men who commit crimes. When you get toothless and bedridden, you're not a danger to anyone."²¹⁶

Implementing early release programs is better than using age as a factor in sentencing for two reasons. First, early release of elderly inmates is an approach that can apply to both prisoners who enter

210. *Id.* at 483.

211. Himelstein, *supra* note 65, at 89. Health care is the fastest rising cost for states. *Id.*

212. *Id.*

213. *See supra* note 58.

214. The highest percentage of crime is committed by persons ages 15 to 24. Forsyth & Gramling, *supra* note 63, at 9.

215. Turley, *supra* note 16, at 81.

216. Stewart & Lieberman, *supra* note 19, at 17.

prison at an older age and those who have spent a lifetime incarcerated. Using age as a mitigating factor in sentencing would still leave in prison those elderly inmates who were young when sentenced for their crimes, but who are no longer a threat to society. Early release programs are also a more accurate means of determining when an older prisoner is no longer motivated towards further criminal activity. A judge sentencing a criminal has no way of knowing what the defendant will be like when the prison term is completed. Programs like POPS, however, put inmates through an interview process designed to insure that the inmate is ready for release back into society.²¹⁷

Early release of elderly inmates is also a better method for reducing overcrowding and elderly prison populations than medical parole. Medical parole systems are only available to prisoners, elderly or not, who are terminally ill and not expected to live more than a year.²¹⁸ Although terminally ill prisoners do create a burden for corrections facilities, many elderly prisoners also have expensive medical needs that while serious, are not immediately life threatening.

For example, one of the POPS clients is seventy-four years old, half-blind, and a double amputee.²¹⁹ Another fifty-five-year-old inmate who is serving time for writing fraudulent checks is living on one kidney and suffers from diabetes, high blood pressure, gout, and circulatory problems.²²⁰ This inmate takes thirty-one pills daily and will need dialysis soon.²²¹ Society is responsible for the care and well-being of those it incarcerates,²²² but the price of that responsibility is high. Such prisoners are expensive to keep in prison and are no longer likely to commit crimes due to their physical conditions; however, neither inmate would be eligible for medical parole because neither inmate is terminally ill.

Forty-two states and the District of Columbia are currently under court order to relieve prison overcrowding.²²³ For many states, the only current solution is paroling or releasing younger criminals who tend to be more dangerous. This, however, is not the solution.

217. See *supra* text accompanying note 193.

218. See generally Russell, *supra* note 99.

219. Himelstein, *supra* note 65, at 89.

220. Turley, *supra* note 16, at 80.

221. *Id.*

222. Dan Rubenstein, *The Elderly in Prison: A Review of the Literature*, in *ELDERLY CRIMINALS*, *supra* note 68, at 153, 153-54.

223. Turley, *supra* note 16, at 81.

An example is Arthur Lewis, a young offender who was released from a New Orleans jail due to overcrowding.²²⁴ A few months later, Lewis murdered a tourist in front of the victim's wife and friends.²²⁵

Age is the only reliable factor used in predicting recidivism.²²⁶ Twenty-two percent of all criminals between the ages of eighteen and twenty-two will return to prison one year after release whereas for those offenders over forty-five, the recidivism rate is two percent.²²⁷ If prisons are forced to release criminals, it makes sense to release those inmates who will least likely commit other crimes.

VI. Conclusion

Prison overcrowding is a major problem in America. As this country struggles to find answers to overcrowding, it must also come to grips with a portion of the prison population that is aging and placing more demands on the resources of the nation's corrections systems. Elderly inmates need more specialized medical care than their younger counterparts.²²⁸ Some of this care costs tens of thousands of dollars with no relief in sight for the prisons.²²⁹ Although many people may debate the role of prisons in our society, few believe that they are designed to be nursing homes. Correctional staffs are not trained or equipped to handle the growing elderly prison population. Even if they were, strong bars are not needed to hold the weak bodies of the older inmates. The prison space could be put to better use protecting society from younger and more violent offenders.²³⁰ With more elderly going to prison and with more younger prisoners getting longer sentences, it is only a matter of time before something drastic will have to be done.

Currently, however, precious little is being done about the problem. In order to curb the rising tide of elderly prisoners, the options that are available must be expanded if they are to be of any effect. Of these options, early release programs for the elderly, especially the

224. *Id.*

225. *Id.*

226. Russell, *supra* note 99, at 805 n.20.

227. *Id.*

228. See *supra* text accompanying notes 99-104.

229. See *supra* text accompanying notes 105-08.

230. See *supra* text accompanying notes 220-23. Prisoners will be released anyway, because courts will order indiscriminate releases to alleviate unconstitutional overcrowding. Therefore, it makes sense to release elderly inmates rather than permit the more violent younger criminals to go free.

Program for Older Prisoners, is the least flawed and must receive more support from the public and legislators. Sentencing guidelines that account for age work only for criminals who are convicted at an older age, which is only about half of the elderly prison population;²³¹ the guidelines do not affect those elderly already incarcerated. Medical parole does address the problem of the elderly inmate who is a long-term burden on the prison, but it allows only the release of those prisoners who will die soon. Elderly inmates with chronic medical problems that are not immediately life threatening remain a burden to prison staffs. Only early release programs can potentially encompass all elderly inmates who tax the prison system, while at the same time minimize the public from any harm resulting in early release of convicted criminals. If no measures are taken, many of our prisons could become "maximum security nursing homes."²³²

231. See *supra* note 8.

232. ABC *World News Tonight*, *supra* note 16. The title of the story was "Maximum Security Nursing Homes."