

## JAILED WHILE FRAIL: EXAMINING RATIONALES FOR INCARCERATING AGING AND INFIRM CRIMINALS

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*As the aging population in the United States increases, the number of elderly criminals also rises. The four theories of criminal punishment play an important role in sentencing decisions for elderly offenders. Given the physiological changes that accompany aging, current prisons are not fully equipped to handle the health and care concerns of elderly inmates. There is an emerging need to analyze whether longer sentences truly serve to deter and rehabilitate elderly offenders. This Note examines the various judicial considerations that inform sentencing decisions under the Federal Sentencing Guidelines and case law, the increased costs associated with caring for elderly offenders, and the role of the four theories of punishment. This Note recommends that an offender's age and mental and physical condition be afforded more consideration in sentencing decisions, similar to how juvenile delinquency cases are handled. This Note further recommends the implementation of alternative treatment programs for elderly offenders, targeting individualized treatment for offender rehabilitation.*

### I. Introduction

Until recently, scholars and the public have paid little attention to elderly criminals. Scholarly focus was largely geared towards the victimization of older people.<sup>1</sup> As the prevalence of elderly criminals broke into public and scholarly discourse, the care of and increasing number

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1. William E. Adams, Jr., *The Incarceration of Older Criminals: Balancing Safety, Cost, and Humanitarian Concerns*, 19 NOVA L. REV. 465, 465 (1995) [hereinafter Adams].

of elderly inmates has been at the forefront of these discussions. However, there is an emerging need to analyze the intersection between the length of sentences imposed on elderly offenders and whether longer sentences truly serve to deter and rehabilitate elderly criminals.

This Note proposes that instead of imposing long prison sentences on elderly criminals, rehabilitative treatment programs should be available. Further, the mental and physical condition of elderly offenders should be taken into consideration on an individualized basis. Part II of this Note provides background information about elderly criminals, including types of crimes, the difference between recidivists and first-time offenders, and the mental and physical considerations specific to the elderly population. Part III analyzes the four theories of criminal punishment and whether they are met by imposing long sentences on elderly offenders. Part IV recommends implementing alternative treatment programs for elderly offenders instead of incarceration.

## II. Background

Elderly criminals account for about 1% of the prison population,<sup>2</sup> but “the population of elderly criminals is likely to grow even more in the future because the elderly population in general is increasing.”<sup>3</sup> Sentencing elderly offenders can be particularly difficult because of the increased cost arising from the specific needs and health concerns uniquely faced by the elderly population.<sup>4</sup> Corrections departments across the United States have reported that “health care for older prisoners costs between four and eight times what it does for younger prisoners[.]”<sup>5</sup> This cost includes money spent on drugs, specialist visits, and off-site prisoner health care.<sup>6</sup> Further, elderly inmates face greater

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2. THE AGING INMATE COMMITTEE OF THE MSBA CORRECTIONAL REFORM COUNCIL, *Aging Inmates: Correctional Issues and Initiatives*, 44 MD. B.J. 22, 22 (2011).

3. Molly Fairchild James, *The Sentencing of Elderly Criminals*, 29 AM. CRIM. L. REV. 1025, 1026 (1992), reprinted in AGING AND THE LAW 603 (Lawrence A. Frolik ed., 1999) [hereinafter James].

4. Ronald H. Aday & Jennifer J. Krabill, *Aging Offenders in the Criminal Justice System*, 7 MARQ. ELDER'S ADVISOR 237, 241 (2006).

5. Michael Ollove, *Elderly Inmates Burden State Prisons*, THE PEW CHARITABLE TRS. (Mar. 17, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/17/elderly-inmates-burden-state-prisons> [hereinafter Ollove] (“In 2013, nearly half the \$58 million that Virginia spent on off-site prisoner health care went to the care of older prisoners . . .”).

6. *Id.*

health care needs because there is a “high prevalence of communicable and chronic diseases (including hepatitis, HIV, tuberculosis, arthritis, hypertension, ulcer disease, prostate problems, respiratory illnesses, cardiovascular disease, strokes, Alzheimer’s, and cancer)”<sup>7</sup> in prisons.

Another significant source of difficulty regarding the sentencing of elderly offenders has been the widespread shift in sentencing philosophy, which resulted from the enactment of the Federal Sentencing Guidelines (“Guidelines”) in 1984.<sup>8</sup> The Guidelines have almost completely removed discretion from judges in making sentencing decisions and have replaced it with binding sentencing margins.<sup>9</sup> The typical result is that offenders are serving lengthier prison sentences and growing old in prison.<sup>10</sup>

The Guidelines have indicated that rehabilitation is one of its objectives in sentencing offenders, yet the Guidelines deliberately switched from the prior indeterminate sentencing system, which gave judges broad discretionary powers and oversight at the sentencing stage,<sup>11</sup> to a system focused on uniformity in punishment,<sup>12</sup> instead of an “individualized and highly discretionary determination of what is necessary and what works for each offender.”<sup>13</sup> The Guidelines departed from a rehabilitative model and instead determine punishment based on three considerations: “in descending order of influence: (a) offense seriousness (an approximation of blameworthiness [degree of harm inflicted and the defendant’s state of mind] . . .), (b) criminal history, and (c) personal circumstances (primarily relevant to choice of sentence within the guideline range and to departures).”<sup>14</sup>

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7. *The High Costs of Low Risk: The Crisis of America’s Aging Prison Population*, OSBORNE ASS’N (July 2014), <http://www.osborneny.org/resources/resources-on-aging-in-prison/osborne-aging-in-prison-white-paper/> [hereinafter OSBORNE] (“The elderly in prison also demonstrate a greater risk of injury, victimization, ailing health, and death than their younger counterparts.”).

8. Dawn Miller, *Sentencing Elderly Criminal Offenders*, 7 NAELA J. 221, 225 (2011) [hereinafter Miller].

9. *Id.*

10. Ollove, *supra* note 5.

11. John D. Burrow & Barbara A. Koons-Witt, *Elderly Status, Extraordinary Physical Impairments and Intercircuit Variation Under the Federal Sentencing Guidelines*, 11 ELDER L.J. 273, 280 (2003).

12. *Id.* at 282.

13. Miller, *supra* note 8, at 226.

14. WAYNE LAFAVE, *MODERN CRIMINAL LAW* 29 (5th ed. 2011) [hereinafter LAFAVE] (quoting Frank O. Bowman III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U.L.J. 299, 315–16 (2000)).

Elderly offenders can, however, receive differential treatment in some circumstances. This differential treatment “hinges on the degree to which the motives and rationales behind criminal sentencing generally apply to this subset of offenders.”<sup>15</sup> The underlying theories for punishment in criminal sentencing are deterrence, rehabilitation, incapacitation, and retribution.<sup>16</sup> All four theories are not always relevant to every offense, but any can inform “the sentencing decision to the degree to which [a theory is] a concern, based on consideration of factors such as offense level, criminal history, and personal characteristics, including possibly age.”<sup>17</sup> The Guidelines incorporate all four theories in its mission statement.<sup>18</sup>

The deterrence theory of punishment is composed of two types: general and specific deterrence.<sup>19</sup> General deterrence encompasses the idea that by punishing one offender for his or her acts, other similar actors will be discouraged “from doing the same because they will, theoretically, fear the same result.”<sup>20</sup> Specific deterrence aims to punish the individual offender for his or her actions so that he or she will “refrain from doing it again to avoid suffering the unpleasant consequences he now associates with that action.”<sup>21</sup>

The rehabilitation theory also has the goal of preventing future crime commission by the individual offender by removing the individual from society and “through deliberate processes and programs aimed at preventing crime commission once the individual returns to society.”<sup>22</sup> Currently, the theory of rehabilitation is not served by the present sentencing practices for elderly offenders because there are little to no widespread deliberate programs aimed at preventing crimes committed by elderly offenders.<sup>23</sup>

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15. *Id.*

16. Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic's View*, 102 DICK. L. REV. 355, 361 (1998) [hereinafter Nygaard].

17. Miller, *supra* note 8, at 226 (citing Peter M. Leavitt, *Proposal for Senior Offender Law*, 19 PACE L. REV. 293, 297 (1999)).

18. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 1A2 (2008)).

19. Nygaard, *supra* note 16, at 361.

20. *Id.*

21. *Id.*

22. Miller, *supra* note 8, at 226.

23. Lyle B. Brown, *The Joint Effort to Supervise and Treat Elderly Offenders: A New Solution to a Current Corrections Problem*, 59 OHIO ST. L. J. 259, 259–60 (1998) [hereinafter Brown].

The incapacitation theory focuses on the imprisonment of offenders to “prevent them from committing other crimes,”<sup>24</sup> and to protect society.<sup>25</sup> This theory of punishment has been criticized because incapacitation “rationalizes the continued incarceration of criminals based on sheer speculation that those who have previously committed crimes will continue to do so.”<sup>26</sup> Thus, this theory can result in superfluous incarceration of offenders “who may already be corrected, those who need no correction at all, or those who can be corrected less expensively without incarceration.”<sup>27</sup> This issue is often the case with elderly offenders.<sup>28</sup>

The retribution theory focuses on revenge.<sup>29</sup> Retribution embodies the idea that individuals who violate the law deserve to suffer and be punished for their wrongful actions.<sup>30</sup> Retribution is about “just deserts” and communicates “the idea that punishment is directed at imposing merited harm upon the criminal for his wrong, and not the achievement of social benefits.”<sup>31</sup> In addition, retribution focuses on proportionality because a criminal sentence “must be directly related to the personal culpability of the criminal offender.”<sup>32</sup> The theories of incapacitation and retribution will be discussed in more detail in Part III.

In analyzing the theories of punishment in criminal sentencing of elderly offenders, there is a necessary distinction between elderly offenders who age as their criminal histories grow (and are likely to have high recidivism rates), and elders who first offend at an older age.<sup>33</sup> Age and criminal history strongly influence recidivism, with rearrest rates being higher among federal offenders younger than twenty-one years

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24. Nygaard, *supra* note 16, at 362.

25. Michele Cotton, *Back With a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000) [hereinafter Cotton].

26. Nygaard, *supra* note 16, at 362.

27. *Id.*

28. *Id.*

29. *Id.* at 363.

30. *Id.* (“Under this theory, the offender’s violation of the law legitimates our vengeful punishment and absolves us of any injustice or transgression we may commit upon her because the offender deserves some suffering for violating the social order.”).

31. Cotton, *supra* note 25, at 1315–16.

32. *Tison v. Arizona*, 481 U.S. 137, 149 (1987).

33. Miller, *supra* note 8, at 224; see also Victoria K. Kidman, *The Elderly Offender: A New Wrinkle in the Criminal Justice System*, 14 J. CONTEMP. L. 131, 141 (1988) [hereinafter Kidman] (stating that “[t]here are first-time offenders and those offenders who have aged in the institution”).

of age (67.6%) and significantly decline with federal offenders sixty years and older (16.4%).<sup>34</sup> In addition, the Federal Bureau of Prisons calculated that 58% of aging inmates in 2013 were sentenced at age fifty and older, and 41% of those inmates were first-time offenders.<sup>35</sup> There are special considerations for elderly first-time offenders because of the relevant psychological and physiological changes that occur in the aging process.<sup>36</sup> Some factors that explain the occurrence of first-time elderly offenders include marital and family issues, alcohol and drug abuse, physiological changes, and cognitive deficiencies—including dementia and “chronic brain syndrome,” which is linked to elderly violent crime commission.<sup>37</sup>

In examining reasons why elders commit crimes, some factors are distinctly associated with common physical and mental responses to the aging process.<sup>38</sup> These factors include changes accompanying “chronic brain syndrome,” feelings of “depression, worthlessness, and boredom,” and economic hardships that “are often the result of increasing medical costs and the desire to maintain social status.”<sup>39</sup> Given that these factors specifically affect the elderly, they should be taken into account at sentencing because effectuating the theories of punishment cannot be achieved without accommodating the particular needs of the elderly offender.

In addition, there are special considerations for all elderly inmates, regardless of whether they are first-time offenders or recidivists, because of the decrease in mental and physical abilities associated with aging.<sup>40</sup> Prisons are not well-equipped to handle the extra needs of elderly inmates, making the housing of elderly inmates more costly and overly burdensome for the prison system,<sup>41</sup> whereas an alternative

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34. THE EFFECTS OF RECIDIVISM AMONG FEDERAL OFFENDERS, U.S. Sentencing Commission 22 (2016), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207\\_Recidivism-Age.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf).

35. *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, OFFICE OF THE INSPECTOR GENERAL, DEPT. OF JUSTICE n.14 (2015), <https://oig.justice.gov/reports/2015/e1505.pdf>.

36. Miller, *supra* note 8, at 225.

37. *Id.*

38. Nadine Curran, *Blue Hairs in the Bighouse: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225, 241 (2000) [hereinafter Curran].

39. *Id.*

40. Evan A. Jenness, *The ‘Silver Tsunami’ and Sentencing – Age and Health as Mitigating Factors*, CHAMPION, 30–31 (2013).

41. Curran, *supra* note 38, at 233–34.

treatment program to incarceration is inexpensive and more likely to be effective in rehabilitating elderly offenders.<sup>42</sup> Given these special considerations for elderly offenders, the question arises do long sentences imposed on elderly offenders truly serve the deterrence and rehabilitation goals of punishment in criminal sentencing?

### III. Analysis

#### A. Deterrence

The theory of deterrence is thought to have a different application to elderly offenders because “[w]ith maturity the elderly acquire greater stakes in [the] social order and the threat to this order may act as a deterrent to committing crime.”<sup>43</sup> However, the purpose of deterrence, as applied to elderly recidivists, is undermined by the person’s age upon release if he or she is “too old to be a recidivist anyway.”<sup>44</sup> Although elderly inmates have considerably low recidivism rates,<sup>45</sup> it is partly due to inmates being too old to reoffend upon release.<sup>46</sup>

Given that recidivism tends to decline with age,<sup>47</sup> the theory of deterrence makes more sense as applied to elderly first-time offenders. If elderly people are said to have more at stake at an older age, it is a logical conclusion that they are less likely to commit a crime for fear of

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42. *Id.* at 261–63 (“North Carolina’s McCain Correctional Hospital is a model facility that caters to inmates with special medical needs, such as older offenders. The facility was an old tuberculosis hospital which was converted to house 350-beds for inmates requiring special medical treatment. This facility administers healthcare and protects inmates from victimization, thus reducing the cost of incarceration [i.e., fewer required security personnel].”).

43. Kidman, *supra* note 33, at 143 (“Consequently, the older the individual, the more they may be deterred from committing crime for fear of losing their status and place obtained in society.”).

44. Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. CAL. L. REV. 785, 791–92 (2014) [hereinafter Weisberg] (“If the incarceration lasts long enough, much or all of the recidivism reducing effect of a person’s sentence will lie in the purely incapacitative consequence of delaying the person’s release into society until he is too old to be a recidivist anyway.”).

45. Patricia S. Corwin, *Senioritis: Why Elderly Federal Inmates Are Literally Dying to Get Out of Prison*, 17 J. CONTEMP. HEALTH L. & POL’Y 687, 687–88 (2001) (“Ninety-nine percent are never convicted of another crime upon release.”).

46. Weisberg, *supra* note 44, at 792.

47. Elizabeth Taylor, Note, *Elderly Sex Offenders: What Should Be Done?*, 18 ELDER L. J. 419, 428 (2010) [hereinafter Taylor].

losing their social status.<sup>48</sup> However, by the same token, the physiological changes that occur with aging can make elderly people lose their inhibitions or their sense of right and wrong, which can lead to crime commission.<sup>49</sup> Or, because elderly people may have suffered certain losses (e.g., family or marital changes, economic hardships), they may turn to crime despite decades of being successfully deterred.<sup>50</sup> Sometimes elderly first-time offenders commit nonviolent offenses, like shoplifting, as a result of economic hardships – which can be associated with the desire to maintain social status.<sup>51</sup>

The theory of general deterrence is also problematic because the reasons older people offend vary from offender to offender. In particular, general deterrence is undermined by the distinction between first-time offenders and recidivists. For example, if an elderly person commits larceny for the first time at an older age because of dementia or “chronic brain syndrome,” the fact that incarceration exists as a consequence to deter the general public is irrelevant and inapplicable to a repeat offender.<sup>52</sup>

Penalties will also have a more serious effect on some persons than on others. For example, fines or economic sanctions, which may seem more appropriate for non-violent offenses, may have a harsher effect on an elderly person who shoplifted because of economic need. The fine may worsen the economic condition of the offender, thus contravening any deterrent effect. Further imprisoning people past a stage where they are dangerous, particularly if more dangerous criminals are released, puts society at greater risk of harm.<sup>53</sup>

In addition, mandatory minimum sentencing does not facilitate a successful application of the deterrence theory. If a nonviolent offender and a violent offender are potentially subject to the same prison time,

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48. Curran, *supra* note 38, at 241.

49. *Id.*

50. *Id.*

51. *Id.* (“Feelings of violence or the propensity to commit non-violent crimes may be the result of economic hardships. These economic hardships are often the result of increasing medical costs and the desire to maintain social status.”).

52. Adams, *supra* note 1, at 476 (stating that the theories of deterrence and rehabilitation “may necessitate different results depending upon the type of crime committed and the characteristics of the older offender. Some older prisoners are clearly more dangerous than others. In order to deter or prevent future crime, some would argue that the violent prisoners should stay incarcerated”).

53. *Id.* at 476–77.



then the reasons for deterring different types of offenses have no practical significance.<sup>54</sup>

By locking individuals into lengthy mandatory sentences with limited avenues for early release, we all but ensure that they will grow old in prison. As a result, we are forced to spend billions on incarcerating the aging, elderly, incapacitated, immobile, and infirm in spite of their mounting physical, mental, and social needs and minimal risk to public safety.<sup>55</sup>

The current system “continues to funnel large numbers of people into a traumatic prison environment against the evidence that alternative sanctions are more successful in reducing crime and recidivism.”<sup>56</sup> Some scholars support a conditional release program for aging prisoners because “[g]iven the criminological consensus that fifty is the age at which prisoners ought to be considered elderly and given the evidence that recidivism in all crime categories plummets by the time prisoners turn fifty, eligibility for age-based parole should begin at age fifty.”<sup>57</sup>

Another issue accompanying the successful deterrence of offenders is the specific considerations for offenders who have committed violent crimes. Some states, in attempting to reduce prison populations, have released nonviolent inmates or sent offenders to community programs before going to prison.<sup>58</sup> But the issue of what to do with violent offenders remains,<sup>59</sup> particularly as many violent offenders are denied

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54. OSBORNE, *supra* note 7, at 5.

55. *Id.* (“[T]he effects of stringent mandatory minimum and three strikes laws on the front end of the criminal justice continuum are further compounded by limited parole opportunities, underuse of compassionate early release, and truth-in-sentencing laws. This overall increase in sentencing length combined with decreasing rates of release on discretionary parole has created a bottleneck in the criminal justice system, leading to a far greater number of people serving longer, less flexible prison sentences, with little national consensus on how best to address overcrowded facilities and accumulating costs.”).

56. *Id.*

57. *At America’s Expense: The Mass Incarceration of the Elderly*, AM. CIVIL LIBERTIES UNION 48 (June 2012), [https://www.aclu.org/files/assets/elderlyprison-report\\_20120613\\_1.pdf](https://www.aclu.org/files/assets/elderlyprison-report_20120613_1.pdf) [hereinafter *At America’s Expense*].

58. See Ollove, *supra* note 5.

59. *Id.* (“Many states have taken steps to reduce their prison populations by releasing nonviolent inmates or by diverting some offenders to community programs before sending them to prison. But corrections officials say those reforms alone will do little to decrease the population of older prisoners who are serving mandatory sentences or have committed violent crimes.”).

geriatric release.<sup>60</sup> Further, in states that offer conditional release programs, recidivism poses a significant concern. Although elderly offenders have lower rates of crime, “the risk of new crimes being committed by them cannot be discounted entirely.”<sup>61</sup>

A long prison sentence for a violent elderly offender becomes increasingly separate from the goal of specific deterrence when the offender’s age and infirmity diminish the offender’s capacity to be held accountable for the crime.<sup>62</sup> While a prison sentence may have been proportionate to the crime at the time it was imposed, the effects of the aging process and an offender’s mental capacity should be considered—even for violent offenders—in “the calculus against continued incarceration and in favor of some form of conditional release.”<sup>63</sup> What are the purposes of continued incarceration of elderly offenders such as an eighty-seven-year-old man who has been in prison for twenty-seven years and is in a special unit because of his severe cognitive impairments?<sup>64</sup> Or, for the sixty-eight-year-old man who has been in prison for ten years, is blind, has diabetes and leukemia, and is completely paralyzed except for one arm?<sup>65</sup> Or, for the sixty-five-year-old man who has been incarcerated for twenty-five years and is dying of stage four metastasized esophageal cancer?<sup>66</sup>

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60. *Id.* (“Last year, 505 eligible prisoners were considered for geriatric release . . . [o]nly 3 percent were granted release . . . many of those who were denied had committed violent crimes.”).

61. Caroline M. Upton, Note, *A Cell for a Home: Addressing the Crisis of Booming Elder Inmate Populations in State Prisons*, 22 *ELDER L.J.* 289, 307 (2014) [hereinafter Upton] (“Furthermore, parole boards are highly discretionary bodies. They do not have to release an individual no matter how much evidence of their reformation is presented during parole hearings. 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.”).

62. HUMAN RIGHTS WATCH, *Old Behind Bars: The Aging Prison Population in the United States* 87 (2012), [https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf) [hereinafter *Old Behind Bars*] (“Accountability for crime is an indispensable component of a just criminal justice system. Extremely serious crimes warrant long prison sentences. Nevertheless, as prisoners grow old and infirm, the justification for continued imprisonment may diminish. Even if ongoing punishment is warranted, the question remains whether the form that punishment takes should change to reflect age and infirmity. For example, conditional release to home confinement under parole officer supervision could be substituted for continued incarceration.”).

63. *Id.* at 87–88.

64. *Id.* at 88.

65. *Id.*

66. *Id.*

When elderly inmates are battling chronic illnesses, have diminished mental capacity, and limited physical functioning, it becomes increasingly difficult to justify continued incarceration.<sup>67</sup> Even if the elderly prisoner was convicted of a violent offense, it is difficult to see how sitting in prison is an effective form of punishment compared to treatment in a conditional release program or an alternative treatment program. With regard to specific deterrence, “[c]ontinued incarceration has scant deterrent impact on the older offender who, by virtue of age and infirmity, already poses a negligible threat of reoffending.”<sup>68</sup>

With respect to the general deterrence theory, “requiring people to remain in prison until the end of their sentence regardless of age and infirmity has no demonstrable general deterrent effect.”<sup>69</sup> Critics of general deterrence often argue that people who are going to commit crimes will not think about the consequences immediately before committing the criminal offense.<sup>70</sup> Further, critics state that “[i]t is by no means clear that increasing the length of sentences increases the deterrent effect.”<sup>71</sup> However, “even if the increased severity of the punishment in some situations has increased deterrence value, it does not seem particularly likely that such an effect would come from requiring older offenders to remain in prison into their dotage.”<sup>72</sup>

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67. *Id.* (“It is hard to see how their continued incarceration meaningfully serves any of the purposes for which their sentences were originally imposed. The main purposes of punishment are retribution, deterrence, incapacitation, and rehabilitation. Retribution has been furthered by their time behind bars and could be further served if they were released from prison by restrictions on their liberty in the community and parole supervision. Incapacitation and deterrence are not necessary, given that these prisoners are not likely to endanger public safety if no longer behind bars but again, if there were a possibility of wrongful conduct, it could be prevented by the conditions of their release. Finally, further imprisonment is unlikely to advance rehabilitation. In these circumstances, continued incarceration would seem to be a disproportionately severe punishment.”).

68. *Id.* at 92.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

## B. Rehabilitation

With the rapidly growing elderly inmate population, the United States correctional system is currently unprepared to handle the needs of the increasing number of elderly inmates.<sup>73</sup> Elderly inmates are “routinely the most difficult to care for and the most expensive to house . . . [because] [m]any prison officials and facilities are unaccustomed to managing these populations, and prison staff often lack the specialized training required to properly care for aging prisoners.”<sup>74</sup>

Given that elderly inmates have significantly more needs than the general inmate population, imposing longer sentences is not rehabilitative for elderly offenders when their time in prison is comprised of suffering from chronic illnesses, the inability to walk, or the inability to go to the bathroom without help.<sup>75</sup> If the prison system is effectively functioning as a long-term care facility,<sup>76</sup> the goal of reforming or rehabilitating elderly inmates is quickly foregone when prisons are burdened with managing and housing dying offenders.

The rehabilitative theory underlying justifications for criminal punishment is centered on the idea that specific and deliberate processes targeted at an individual will reform the individual who can, upon release, return to society “with skills that reduce the likelihood of

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73. Upton, *supra* note 61, at 290 (“The elder prisoner population is currently growing at a rate faster than the elder general population, and elder prisoners are the fastest growing sector within state prisons.”).

74. *Id.* at 291-92 (“In general, not much is known about administering geriatric healthcare in the prison system.”); see also *At America’s Expense*, *supra* note 57, at 45 (“States can implement mechanisms to determine which aging prisoners pose little safety risk and can be released. Releasing many of these individuals will ease the burden on taxpayers and reunite prisoners with their families to care for them”); see generally 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) (stating that the elderly inmate population surge “is among the principal contributing factors to escalating correctional healthcare costs, because older prisoners cost approximately three times the cost of younger prisoners.” In addition, geriatric care outside of prison relies on family or friends to care for the elderly whereas in prison, “other prisoners or correctional officers (prison guards) may provide informal care.”).

75. *Old Behind Bars*, *supra* note 62, at 4 (“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.”).

76. Upton, *supra* note 61, at 301.

further criminal activity.”<sup>77</sup> The theory is effective if the individual has the opportunity to be reintegrated into society after the rehabilitative processes are complete.<sup>78</sup> Thus, programs “must be designed to provide immediate rehabilitation to enable the older offender to continue to live the remainder of his years as a law abiding citizen.”<sup>79</sup> However, a long sentence has a considerably different impact on elderly offenders compared to younger offenders.<sup>80</sup> For example, a fifteen-year sentence for a sixty-five-year-old offender is essentially a life sentence while the same sentence for a twenty-year-old offender is not; the younger offender will still have around a thirty-year life expectancy upon release from imprisonment.

Because elderly inmates pose higher costs and demands on prisons, correctional facilities and their staffs are unable to meet the general health needs, much less the rehabilitative needs, of the growing elderly inmate population.<sup>81</sup> Further, the physical and mental states of elderly offenders may be weakened while incarcerated. For example, if the offender develops dementia<sup>82</sup> or is so physically incapable of reintegrat-

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77. Adams, *supra* note 1, at 476.

78. *Id.*

79. Kidman, *supra* note 33, at 143 (“Rehabilitation of the elderly offender must have highly specific, attainable, and measurable objectives. The rehabilitation of a 65-year-old first-time shoplifter need not be aimed at preparing this individual for a long productive life in an industrial society.”).

80. Miller, *supra* note 8, at 237 (“[A]ny sentence that includes imprisonment will constitute essentially a life sentence on account of the offender’s old age, thus, rendering the sentence ‘grossly disproportionate.’ Even if the offender does not die in prison, unless life expectancy was taken into account during the sentencing process, the offender will have spent a greater proportion of his or her remaining life in prison.”).

81. Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 ELDER L. J. 173, 188 (1996) [hereinafter Ornduff] (“Most corrections administrators do not believe that their job is to rehabilitate criminals. In fact, the concept of rehabilitation as the purpose of incarceration has been rejected by almost everyone working within the criminal justice system. 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.”).

82. Yelena Yukhvid, *Should Elderly Criminals Be Punished for Being Prisoners of the Mind? An Analysis of Criminals with Alzheimer’s Disease*, 50 GONZ. L. REV. 43, 50–54 (2014–2015) [hereinafter Yukhvid] (“Older inmates are rarely given special treatment solely because of their advanced age. They are generally kept in the mainstream population and given the same work assignments as younger individuals. While prison is difficult for most individuals, it is particularly trying ‘for someone who is losing their strength and mental faculties.”).

ing into society upon release at an advanced age, rehabilitative processes are less successful.<sup>83</sup> Significantly, rehabilitation efforts still need to be incorporated with the sentence length and circumstances of individual elderly offenders.

Adults can grow and change markedly while incarcerated, especially if rehabilitative programs and opportunities for acquiring new skills and self-knowledge are provided. But it is unlikely that additional rehabilitation is achieved by continuing a prisoner's incarceration into advanced old age. For an 80-year-old who has been in prison for 25 years and has already participated in whatever educational and skills-building courses were available, more time in prison will not contribute measurably to his reformation. Indeed, what is the rehabilitative potential for a person who has dementia who no longer knows why she is in prison, or even that she is in prison? While there may be exceptions in individual cases, as a general matter it is hard to understand how the goal of rehabilitation is furthered by the continued incarceration of geriatric or dying prisoners.<sup>84</sup>

The distinction between first-time offenders and recidivists further complicates the successful application of the rehabilitation theory. A recidivist, who has aged as his or her criminal history grew, is not necessarily receptive to rehabilitation, especially if prior attempts at rehabilitation have failed.<sup>85</sup> In addition, a first-time elderly offender may have committed the offense because of "chronic brain syndrome,"<sup>86</sup> which is difficult to rehabilitate if the offender was without the mental faculties to intentionally or knowingly commit a crime in the first place.

In some circumstances, the age of the defendant can be a mitigating factor in a court's sentencing decisions for noncapital offenses. However, courts vary in how much weight they attribute to the defendant's age. The 1998 Guidelines' policy statement specifies that: "Age . . . is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range [but] may be a reason to [depart

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83. Adams, *supra* note 1, at 476 ("Some offenders who have committed very violent crimes may no longer be physically able to commit a violent crime because of failing health.").

84. *Old Behind Bars*, *supra* note 62, at 93-94.

85. Curran, *supra* note 38, at 239 ("With fewer inmates being released because of mandatory sentencing laws and 'three strikes' legislation, the elderly prison population will inevitably increase. These laws ensure that [m]ore inmates will remain in prison for longer periods of time. And more inmates will grow old in prison.").

86. James, *supra* note 3, at 1026 ("Those who see the inside of a prison for the first time after their fifty-fifth birthdays are more likely than the recidivists to have been sentenced for spontaneous, interpersonal violence. This violence may in part be caused by a loss of inhibitions resulting from 'chronic brain syndrome,' boredom or alcohol.").

downward] when the defendant is *elderly and infirm*.”<sup>87</sup> This statement was relevant in *United States v. Simmons*, where the Court of Appeals for the Fifth Circuit reviewed the district court’s sentencing decision of a forty-eight-year-old defendant.<sup>88</sup> The district judge’s explanation for his sentencing decision was as follows:

The court simply feels that a term of imprisonment of 20 years for a man who is 48 years old is a sufficient sentence in this case and serves all of the reasons for incarcerating a person for a long period of time. The court does not feel that a sentence in excess of 20 years would be beneficial either to the victim, to the public or to the defendant himself. The court believes that a sentence within the guideline range without the departure would, in essence, put this man probably very close if not at the end of his life. And I think that 20 years of imprisonment is enough.<sup>89</sup>

The court of appeals disagreed with this reasoning, discussing the district court’s departure from the Guidelines’ policy statement.<sup>90</sup> The court elaborated that pre-*Booker*,<sup>91</sup> the court had rejected this same age-based rationale.<sup>92</sup> In *United States v. Booker*,<sup>93</sup> the trial judge found additional facts and increased the defendant’s sentence pursuant to the sentencing guideline after the jury verdict’s initial sentencing range.<sup>94</sup> The Supreme Court held that judicial fact-finding was unconstitutional<sup>95</sup> and in subsequent cases judges, though they have more discretion, have proceeded cautiously and with adherence to the Guidelines.<sup>96</sup> The *Simmons* court, post-*Booker*, did not rule on “a district court’s focus on age in imposing a non-Guidelines (‘reasonable’) sentence” in light of

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87. *United States v. Simmons*, 470 F.3d 1115, 1130 (5th Cir. 2006) (quoting U.S.S.G. § 5H1.1 (1998) (emphasis added)).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1127–28 (“Although, pursuant to *Booker* the district court did *not* impose a mandatory Guidelines sentence, it was still required, post-*Booker* to properly determine the Guidelines range as part of the process for determining *Simmons*’ sentence.”) (citing *United States v. Booker*, 543 U.S. 220 (2005)).

92. *Id.* at 1130 (“*See, e.g., United States v. Fierro*, 38 F.3d 761, 775 (5th Cir. 1994) (vacating sentence, which had a downward departure, the district court’s having reasoned ‘a 20-year sentence was long enough’ for a defendant who ‘would be 64 or 65 when he got out of prison’; our court held, *inter alia*, ‘a defendant’s age is an improper basis for departure unless the defendant is ‘elderly and infirm’ at the time of sentencing.’”).

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

94. *Id.* at 228.

95. *Id.* at 226–27.

96. LAFAVE, *supra* note 14, at 29–30.

the Guidelines' policy statement, but the court cited other circuits that have "held such consideration [of age] not inappropriate."<sup>97</sup>

The court of appeals' discussion in *Simmons* illustrates the difficulty courts face in deciding whether, and to what extent, age of the defendant is considered in sentencing decisions for noncapital offenses. The general approach is that factors like age and physical conditions of defendants "are generally irrelevant except in an extraordinary case."<sup>98</sup> Given that trial judges are working within the boundaries of the Guidelines, courts are reluctant to consider age more than what the Guidelines proscribe.<sup>99</sup>

In particular, in *United States v. Carey*, the trial court sentenced a sixty-two-year-old defendant to one month in prison and two years of supervised release for defrauding a bank.<sup>100</sup> The Guidelines' range for this offense was twelve to eighteen months, and the trial court's downward departure in sentence length was partially based on the defendant's age and physical condition.<sup>101</sup> The defendant had tumors removed from his brain twice and had undergone other operations.<sup>102</sup> The Seventh Circuit, however, found that "the fact that [the defendant] was sixty-two and had had several serious operations as a result of brain tumors, *without more*, was not significant enough to allow for a downward departure from the Guidelines."<sup>103</sup> The court of appeals did not affirm the lower court's decision because the downward departure in sentence length did not "include the necessary particularized findings that the defendant was 'elderly and infirm.'"<sup>104</sup>

In light of precedent cases, it is doubtful that "a finding of 'health problems' would be enough to classify a defendant as 'infirmit.'"<sup>105</sup> The case law is unclear as to what conditions would lead to classifying an elderly offender as infirm.<sup>106</sup> However, precedent cases dealing with

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97. *United States v. Simmons*, 470 F.3d 1115, 1130 (2006).

98. *James*, *supra* note 3, at 1029 (citing *United States v. Carey*, 895 F.2d 318, 322 (7th Cir. 1990)).

99. *Id.*

100. *Id.* at 1028–29.

101. *Id.*

102. *Id.*

103. *Id.* at 1029 (emphasis added).

104. *Id.*

105. *Id.* at 1030.

106. *Id.* ("The Guidelines have a separate policy statement on physical condition which says 'physical condition is not ordinarily relevant in determining whether a sentence should be outside the Guidelines . . . . However, an extraordinary physical



physical condition set out initial parameters for what courts may consider to be infirmity: a defendant who is at least sixty years old and suffering from a debilitating disease at the time of sentencing.<sup>107</sup>

In contrast to the general irrelevancy of a defendant's age in sentencing noncapital offenses, "[c]riminals who are actually elderly at the time they commit a capital offense are guaranteed by the Eighth and Fourteenth Amendments to have their age considered as part of the individualized sentencing."<sup>108</sup> Given the varying state laws and the limitations imposed by the Guidelines, it is unclear what impact elderly status alone has on sentencing decisions.<sup>109</sup> Importantly, the age of the defendant may be relevant "if it helps to show frailty of mind."<sup>110</sup> However, aggravating factors that counteract the defendant's age hold equal weight in death penalty cases and noncapital offenses.<sup>111</sup>

In *State v. Porter*, the defendant's age of sixty-one was not submitted to the jury as a mitigating factor because he was not frail. He had a "youthful interest" in the victim, his girlfriend whom he killed after she told him she did not want to see him anymore. Also,

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impairment may be a reason to impose a sentence other than imprisonment.' According to *United States v. DePew*, extraordinary physical impairments do not include AIDS, cancer or various other terminal life threatening conditions. However, the district court in *United States v. Ghannam* imposed a sentence of forty-eight months on a defendant 'suffering from the debilitating effects of cancer,' when the Guidelines' range was seventy-eight to ninety-seven months.").

107. *Id.* at 1036-37 ("The way the courts have dealt with physical condition provides a hint to what they may consider to be infirmity. Drawing from the above cases, a defendant may be infirm only if he or she is at the present time 'suffering' from an adverse medical condition, as opposed to merely having a serious and perhaps fatal diagnosis or a sympathetic recent medical history. For a defendant to be elderly and infirm, he or she would probably have to be at least sixty and currently experiencing the effects of a debilitating disease.").

108. *Id.* at 1036 ("The sentencing process must permit consideration of the character and record of the individual offender and circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the death penalty.' As in noncapital cases, individualized sentencing does not automatically mean that the aged would receive a lesser sentence. While a sentencer must 'not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstance of the offense that the defendant proffers as a basis for a sentence less than death,' the mitigating circumstance must be relevant. Considering the law in the states along with the Federal Guidelines, it is not at all clear that elderly status alone is relevant. However, age may be relevant if it helps to show frailty of mind.").

109. *Id.*

110. *Id.* (citing *State v. Nash*, 143 Ariz. 392, 694 P.2d 222, cert. denied, 471 U.S. 1143 (1985) (defendant convicted of first degree murder, armed robbery, aggravated assault, and theft)).

111. *Id.* (citing *Bevins v. Commonwealth*, 712 S.W.2d 932, 936 (Ky. 1986); *State v. Coppens*, No. 90-0151-Cr., 1990 Wisc. App. LEXIS 641, at \*3 (Wisc. July 3, 1990)).

his "physical prowess" was demonstrated by escape attempts. In *State v. Nash*, the defendant's advanced age of sixty-seven was not a factor which could mitigate the defendant's death sentence because he had led a life of crime.<sup>112</sup>

Courts face competing considerations in approaching sentencing decisions. On the one hand is the desire to uphold an aspect of the retributivist theory of criminal punishment: that criminals should suffer punishment in proportion to their crimes.<sup>113</sup> Yet, under the utilitarian theory, punishment is useful to the extent it successfully reforms offenders and deters other similar actors.<sup>114</sup>

Unfortunately, this disjointed application of the defendant's age in sentencing decisions (the irrelevancy of age as compared to the consideration of infirmity and frailty) fails to account for the resulting strain on prison systems caring for ailing elderly inmates.<sup>115</sup> If the purpose of weighing various factors in a sentencing decision is to calculate a proportional punishment to a defendant's crime, sentencing an elderly defendant with cancer who requires multiple operations to a long prison sentence fails to account for the lost possibility of rehabilitation when the prison effectively functions as a nursing home.

The prison system in the United States is ill-equipped to manage the extensive health and housing needs of elderly inmates.<sup>116</sup> State prisons bear the cost burden, spending money on health care and hiring additional staff to care for elderly offenders.<sup>117</sup> Since prison staffs lack the specialized training to handle age-related issues and chronic illnesses, "prisons often transport sick elder inmates to outside hospital facilities . . . [and] [o]utside treatment not only incurs extra cost for the

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112. *Id.* at 1037.

113. *Id.* at 1038 ("According to the retributive theory, the punishment of law-breakers is an end in itself. This theory focuses on moral guilt and just desserts [sic]. A criminal deserves to be punished, and should suffer in proportion to the depravity of his or her act.").

114. *Id.* ("Under the utilitarian theory, punishment is a necessary evil which is socially useful to reform offenders, protect society and deter the convicted individual and others in society from committing illegal acts. The proper amount of punishment is that which will do the most good or the least harm to all who are affected by it.").

115. Upton, *supra* note 61, at 301.

116. *Id.* ("States bear the full burden in paying for the mental and medical health needs of prisoners.").

117. *Id.* ("More money is now spent on healthcare and increasing staff to care for elder inmates.").

hospitalization itself, but the prison must also pay for the transportation, security, and escorting guards for these prisoners.<sup>118</sup> Because of the strain on prison resources, states bear the full burden in paying for health care needs for elderly inmates.<sup>119</sup> It does not make sense fiscally or morally to “incarcerate men and women who pose no threat to public safety and have long since paid for their crime.”<sup>120</sup>

Elderly prisoners remain the most expensive prisoner population to house, “costing states \$16 billion every year to incarcerate prisoners who are age fifty and older.”<sup>121</sup> In addition, elderly offenders often lose eligibility, as a result of incarceration, for federal programs like Medicare and Social Security that help pay for the increased costs of health and living expenses that accompany aging.<sup>122</sup> The existing criminal justice system effectively removes the possibility of rehabilitation through a prison sentence when the time in prison is spent traveling to and from hospitals, incapacitated in a cell, or requiring the assistance of prison guards for bathroom trips and more.<sup>123</sup>

Although there is a low crime rate for elders sixty-five and older,<sup>124</sup> age still plays a role in sentencing decisions and whether age

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118. *Id.* (“Correctional officers are posted twenty-four hours a day when elder inmates are treated in hospitals outside of the prison campus. Consequently, the prison system is acting like a ‘nationwide long-term care facility – something it was never designed to be.’ This is a costly, ineffective means of dealing with a booming elder prisoner population.”).

119. *Id.*

120. Sari Horwitz, *The Painful Price of Aging in Prison*, WASH. POST (May 2, 2015), [http://www.washingtonpost.com/sf/national/2015/05/02/the-painful-price-of-aging-in-prison/?utm\\_term=.f8e51b79c4c8](http://www.washingtonpost.com/sf/national/2015/05/02/the-painful-price-of-aging-in-prison/?utm_term=.f8e51b79c4c8).

121. Upton, *supra* note 61, at 301–02 (citing *At America’s Expense: The Mass Incarceration of the Elderly*, AM. CIV. LIBERTIES UNION 45 (2012), [https://www.aclu.org/files/assets/elderlyprisonreport\\_20120613\\_1.pdf](https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf)).

122. *Id.* at 302 (“Also, as a result of their incarceration, elder inmates often, sometimes, etc. lose eligibility for important federal programs. 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. Without these benefits, the entire cost of caring for aging inmates is passed on to strained state correctional facilities.”).

123. *Id.* (“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. Such disproportionate spending is becoming increasingly unsustainable.”).

124. Taylor, *supra* note 47, at 422. *But see, e.g.*, 2016 CRIME IN THE UNITED STATES: EXPANDED HOMICIDE DATA TABLE 2, FBI (2016), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/expanded-homicide-data-table-2.xls>; *see also*, Edith Elisabeth Flynn, *Elders as Perpetrators*, in *ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM: MYTHS, PERCEPTIONS, AND REALITY IN THE 21ST CENTURY*

has indeed affected the defendant's infirmity or mental frailty.<sup>125</sup> The severity of the defendant's crime is an important consideration in sentencing decisions because the attendant circumstances of the individual elderly defendant influence a court's decision.<sup>126</sup> If an elderly offender is less affected by aging (e.g., retains his or her mental faculties) and commits a violent or heinous crime, a court is less likely to consider the defendant's age as a mitigating factor in its sentencing decision.

There has been no uniform application of the factor of age in sentencing decisions for elderly offenders, most likely because aging affects each individual differently. In *State v. Porter*,<sup>127</sup> a sixty-one-year-old defendant was convicted of first degree murder of his then twenty-two-year-old girlfriend.<sup>128</sup> The Supreme Court of North Carolina reviewed the defendant's assertion that the trial judge erred in failing to submit the defendant's age of sixty-one as a mitigating circumstance.<sup>129</sup> The court disagreed, stating that "[e]ven had he requested that the trial judge submit this circumstance, which defendant did not, the evidence did not support offering it for the jury's consideration."<sup>130</sup> The court also noted that the defendant's mental capacity and general demeanor, "when balanced against defendant's youthful interest in the victim, his vigorous responses to the prosecutor's cross-examination, and his physical prowess in his attempts to escape, the evidence did not require submission [of the defendant's age]."<sup>131</sup>

The way courts utilize the defendant's age has a nebulous application in sentencing decisions because a defendant's age can either work for or against the defendant, or be completely irrelevant. As seen in *Porter*, the Supreme Court of North Carolina recognized that it had not previously considered the issue of advanced age as a mitigating

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43, 54 (Max B. Rothman et al. eds., 2000) [hereinafter *Elders as Perpetrators*] ("Although basic demographics and stiffer sentencing policies probably are paramount factors, the steady growth in the older prisoner population may be explained, at least in small part, by this rise in violent crime among the older population. In fact, older inmates (age 50 and over) have increased as a percentage of the prison population from 4.9% in 1990 to 6.8% in 1997, thereby registering a 38% growth.")

125. Miller, *supra* note 8, at 227.

126. *Elders as Perpetrators*, *supra* note 124.

127. *State v. Porter*, 326 N.C. 489, 511 (1990).

128. *Id.* at 494 ("[D]efendant shot and killed his girlfriend . . . . A jury convicted defendant of first-degree murder and recommended the death sentence.")

129. *Id.*

130. *Id.*

131. *Id.*

factor, but had considered age in the context of young defendants.<sup>132</sup> In contrast, the defendant's age becomes important if the defendant committed a white-collar crime later in life as a result of "chronic brain syndrome" or from loss of financial stability. The ability of the defendant to understand the purpose of punishment is important because "[i]f the aged cannot be morally guilty, it makes sense to retributivists to refrain from punishing them. If the aged are deemed to be without the mental capacity to commit crime, deterrence, important to utilitarians, would not be successful."<sup>133</sup>

The special needs of elderly offenders would be better handled by social workers or special counselors instead of prison staff, especially when analyzing the underlying issues affecting elderly crime commission.<sup>134</sup> This individualized approach makes sense if, for example, the underlying reason an older person committed a crime was because he or she suffered trauma from the loss of a spouse and was subsequently affected by "chronic brain syndrome." Prison is not the appropriate "case worker" to handle those underlying issues.

There is also research on the prevalence of alcohol use that is involved when elders commit nonviolent and violent crimes,<sup>135</sup> which further suggests that social workers are better equipped to handle these issues instead of prison guards. The increasing likelihood that alcohol is involved when elders commit violent crimes reflects a pattern that "[a] high incidence of alcoholism and unstable social relationships are descriptive of elderly inmate populations in general."<sup>136</sup> The impact of

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132. *Id.* ("We note parenthetically that we have not considered this issue [submitting the defendant's age as a mitigating factor to the jury] in the context of advanced age. However, the cases considering the matter in the context of extreme youth are equally applicable.").

133. James, *supra* note 3, at 1041-42 ("From a utilitarian perspective, reduced sentences for the elderly make sense if deterrence and rehabilitation are ineffective for that population. Because punishment is not seen as an end in itself, severe punishment should not be implemented if it serves no societal purpose. If an elderly individual is not presently a threat to society, or soon will cease to be a threat because of advancing age, it would be better to release these relatively harmless individuals into society than to keep them in prison and have taxpayers incur \$60,000 a year in their support.").

134. Ruth Shonle Cavan, *Is Special Treatment Needed For Elderly Offenders?*, 2 CRIM. JUST. POL'Y REV. 213, 216 (1987) [hereinafter Cavan].

135. Karen M. Jennison, *The Violent Older Offender: A Research Note*, 50 FED. PROB. 60, 60 (1986) [hereinafter Jennison].

136. *Id.* ("Previous studies thus indicate that violent crimes among the elderly are, for the most part, associated with a history of excessive drinking and with the use of alcohol immediately prior to the crime for which they are arrested.").

the aging process cannot be discounted or marked completely irrelevant in sentencing decisions because incarceration would not be rehabilitative for an elderly offender who committed crimes based on being adversely affected by aging, which could also be aggravated by alcohol use.

The goal of rehabilitation would be better served by addressing specific issues that influence crime commission, recidivism, and the impact of aging on elderly offenders. If the purpose of addressing an individual's offense is to rehabilitate the individual, rehabilitative treatment should be made available instead of incarcerating someone in the name of "rehabilitation."<sup>137</sup> In the particular case of elderly alcohol use, research conclusions suggest "the need for maintenance of widespread alcohol screening of older offenders at the judicial level, [and] providing more information in the criminal justice system and correctional institutions about elderly offenders who are problem drinkers."<sup>138</sup> Alcohol use and abuse is just one example of the disparate impact of aging and the special considerations that should factor into sentencing decisions or alternative treatment for elderly criminals.

However, punishment and enforcement of the law cannot be completely cast aside when considering elderly offenders because people should be held accountable for their actions. In *United States v. Bergman*, the sixty-four-year-old defendant was convicted of his first-time offense, nursing home fraud, and was sentenced to four months in prison.<sup>139</sup> The defendant was an ordained rabbi who owned multiple nursing homes and pled guilty to two counts of an eleven-count indictment.<sup>140</sup> Bergman's lawyers submitted proposals for alternatives to imprisonment and argued that incarcerating the defendant would not serve the four theories of criminal punishment.<sup>141</sup> The court rejected the proposals, but did note it agreed that "no one should ever be sent to prison for rehabilitation . . . . If someone must be imprisoned — for other,

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137. LAFAVE, *supra* note 14, at 13 ("It is a familiar kind of well-intended mockery for our judges to imagine vaguely, or to say, that psychotherapy or some other form of treatment is the proper course for a defendant, to impose a supposedly rehabilitative sentence, and to ignore that there is no pertinent treatment available where the defendant is sent or anywhere else in the state's penal facilities.") (quoting JUDGE MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 111 (1973)).

138. Jennison, *supra* note 135, at 64.

139. *United States v. Bergman*, 416 F. Supp. 496, 497 (S.D.N.Y. 1976).

140. *Id.*

141. *Id.* at 498-500.

valid reasons – we should seek to make rehabilitative resources available to him or her. But the goal of rehabilitation cannot fairly serve in itself as grounds for the sentence to confinement.”<sup>142</sup>

The *Bergman* court also acknowledged that courts seek to “individualize” sentences on a case-by-case basis for defendants.<sup>143</sup> The court recognized that given the defendant’s age, imperfect health, and first offense, the danger of recidivism was not a concern and the court stated that “it verges on cruelty to think of confinement for a term of years.”<sup>144</sup> In rejecting the defense’s proposals for alternative sanctions to incarceration, the court held that the theory of general deterrence demanded a prison sentence in Bergman’s case.<sup>145</sup> Although the court took the defendant’s age, health, and first-time nonviolent offense into account, the court also considered the purpose of deterring the public from committing similar crimes.

[Courts believe] that crimes like those in this case deliberate, purposeful, continuing, non-impulsive, and committed for profit are among those most likely to be generally deterrable by sanctions most shunned by those exposed to temptation . . . . Some attention must be paid to the demand for equal justice; it will not do to leave the penalty of imprisonment a dead letter as against “privileged” violators while it is employed regularly, and with vigor, against others.<sup>146</sup>

The *Bergman* court’s consideration of various factors in calculating an appropriate sentence exemplifies the complexity and difficulty in applying the theories of punishment to elderly offenders. The *Bergman* court’s recognition of the need to tailor sentences to defendants is important because not all elderly offenders are the same. The variation in reasons why elderly offenders are in the criminal justice system mirrors the variation in which theory of punishment motivates the sentencing of elderly offenders,<sup>147</sup> which is why rehabilitation and deterrence cannot be uniformly applied to sentencing all elderly offenders.

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142. *Id.* at 499.

143. *Id.* at 501. The Sentencing Guidelines were not in effect at the time of defendant Bergman’s case.

144. *United States v. Bergman*, 416 F. Supp. 496, 502 (S.D.N.Y. 1976).

145. *Id.* at 499.

146. *Id.* at 500.

147. LAFAVE, *supra* note 14, at 1 (“The choice of one theory over the others can have a profound effect upon one’s view of what the sentence should be in a particular case, and also as to exactly how the sentencing step in the criminal justice process should be structured.”).

### C. Retribution and Incapacitation

The argument that the theories of deterrence and rehabilitation are not met by imposing long sentences on elderly offenders cannot be discussed without addressing the roles of retribution and incapacitation. Is there room to consider age and associated mental and physical ailments, or even compassion, for offenders who commit particularly heinous crimes? Put simply, what do we do with the Charles Mansons of the world?

At its core, retribution is about the wrongfulness of the crime an offender committed.<sup>148</sup> In considering both the harm to the victim(s) and the moral wrong of the offense, retributivists are not concerned with the likelihood of reoffending, but rather are focused on the wrongfulness of the offender's crime and society's desire to punish the offender through continued incarceration.<sup>149</sup>

Many of the offenders in prison who are in their seventies or older committed serious offenses that resulted in long sentences.<sup>150</sup> While an elderly offender's physical and mental condition is an important factor, many proponents of retribution focus on the crime committed in the past rather than the offender's current condition.<sup>151</sup> A person like Charles Manson—a cult leader who orchestrated brutal murders and was convicted of nine,<sup>152</sup> was denied parole twelve times,<sup>153</sup> and incarcerated at the age of thirty-seven in the California State Prison, where

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148. Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 69 (1999) [hereinafter Moore] (“[T]he retributivist justifies punishment by the desert of the offender. Such desert is constituted by the wrong that was done by the offender and the culpability with which he did that wrong.”).

149. See Marie Gottschalk, *Life Sentences and the Challenges to Mass Incarceration*, J. INST. JUST. INT’L STUD. 7, 12 (2011); Moore, *supra* note 148, at 69.

150. *Old Behind Bars*, *supra* note 62, at 6, 28 (“Some older men and women in prison today entered when they were young or middle-aged; others committed crimes when they were already along in years. Those who have lengthy sentences, as many do, are not likely to leave prison before they are aged and infirm.” And “[p]rison sentences tend to be longest for persons convicted of violent offenses, and many older prisoners were convicted of such crimes.”).

151. *Id.* at 91 (“In the case of serious violent crimes committed by older persons, it might be troubling from a retributive, as well as fairness, perspective if offenders were to escape punishment simply by virtue of age and associated frailty.”).

152. *People v. Manson*, 61 Cal. App. 3d 102, 123 (1976).

153. Michael Martinez, *Charles Manson denied parole, with next parole hearing set for 2027*, CNN (Apr. 12, 2012, 5:41 AM), <https://www.cnn.com/2012/04/11/justice/california-charles-manson/index.html> [hereinafter *Charles Manson denied parole*].



he remained until his death at age eighty-three<sup>154</sup> — is not a sympathetic elderly offender.

Another example, Susan Atkins, a former follower of Charles Manson and convicted murderer, claimed to have been reformed during her forty years in prison.<sup>155</sup> Atkins petitioned for and was denied parole twelve times,<sup>156</sup> and also sought compassionate release because she was dying of brain cancer.<sup>157</sup> Yet public response to Atkins's plea disregarded her good behavior in prison and focused on the atrociousness of her 1969 offense, with one of the victim's family members stating at a parole hearing: "I feel genuine compassion for Ms. Atkins as she deals with this disease, but in no way should an illness dealt by fate mitigate punishment for crimes of this magnitude."<sup>158</sup> This statement reflects the widely held view that there should be no mercy for violent offenders.<sup>159</sup>

There is an additional group of elderly offenders: those who are arrested later in life for crimes committed when they were younger. How much consideration should society give to an offender's age and condition when they are just now paying the price for what they did? These elderly offenders are different from the elderly criminals who have already served thirty years because they have eluded criminal punishment for many years. Take for example, Whitey Bulger, a Ten

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154. Margalit Fox, *Charles Manson Dies at 83; Wild-Eyed Leader of a Murderous Crew*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/obituaries/charles-manson-dead.html>.

155. Marie Gottschalk, *Sentenced to Life: Penal Reform and the Most Severe Sanctions*, 9 ANN. REV. L. & SOC. SCI. 353, 369 (2013) [hereinafter Gottschalk] ("In 2008, Governor Schwarzenegger and prosecutors in California vehemently opposed the compassionate release of Susan Atkins, a former follower of Charles Manson who was convicted of the infamous 1969 Tate-LaBianca murders. Atkins, who was paralyzed and dying of brain cancer, had become a model prisoner in her 40 years behind bars. Explaining why he refused to commute Atkins's sentence when she was gravely ill, Schwarzenegger said, '[T]hose kinds of crimes are just so unbelievable that I'm not for compassionate release.' For Schwarzenegger and many other politicians, the retributive end point for certain crimes is infinity.").

156. Sarah Netter & Lindsay Goldwert, *Dying Manson Murderer Denied Release*, ABC NEWS (Sept. 2, 2009), <https://abcnews.go.com/US/charles-manson-follower-susan-atkins-parole-die-home/story?id=8462901>.

157. *Id.*

158. *Ex-Manson follower Susan Atkins dies*, CNN (Sept. 25, 2009, 11:17 AM), <http://www.cnn.com/2009/CRIME/09/25/california.manson.atkins/index.html>.

159. Gottschalk, *supra* note 155, at 369 ("Governors and other public officials remain deeply opposed to releasing serious and longtime offenders, no matter how many decades they have served behind bars, no matter the pile of evidence showing that they have turned their lives around, and no matter the compelling research findings about deterrence and aging out of crime.").

Most Wanted Fugitive for sixteen years, who was finally apprehended in 2011 and prosecuted for his pre-existing indictment of nineteen counts of murder, conspiracy, extortion, narcotics distribution, and money laundering.<sup>160</sup> Bulger was arrested at age eighty-one and was serving two life sentences at the age of eighty-nine, until he was killed the day after his prison transfer.<sup>161</sup> Or, Donnie Rudd, who was found guilty at the age of seventy-six for the 1973 murder of his then nineteen-year-old wife,<sup>162</sup> and also prosecuted for the murder of his second wife.<sup>163</sup>

The debate surrounding why society punishes criminals is still relevant to which theory (or combination of theories) applies to offenders who have “gotten away” with their prior crimes. When the nature of the crime is so horrible, these offenders will receive less mercy because they have lived for many years that their victims did not, and escaped punishment. The theory of retribution supports imposing long sentences on this group of elderly offenders because although they may spend the last few years of their lives in prison, they spent a majority of their lives getting away with their crimes.

Another example is Bill Cosby, who was convicted of aggravated sexual assault at the age of eighty-one.<sup>164</sup> Cosby’s attorney used Cosby’s advanced age and blindness as reasons for a sentence of house arrest.<sup>165</sup> Cosby’s future threat to society is relatively low, but his crimes were severe. Society has a strong interest in Cosby paying for his offenses because he spent so long escaping criminal liability, and an interest in

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160. *United States v. Bulger*, 816 F.3d 137, 141 (1st Cir. 2016).

161. See *Whitey Bulger: The Capture of a Legend*, N.Y. TIMES, [https://archive.nytimes.com/www.nytimes.com/interactive/us/bulger-time-line.html#/time256\\_7812](https://archive.nytimes.com/www.nytimes.com/interactive/us/bulger-time-line.html#/time256_7812) (last visited Nov. 14, 2018); see also Ray Sanchez, *Boston gangster James ‘Whitey’ Bulger killed in West Virginia prison a day after transfer*, CNN (Oct. 30, 2018), <https://edition.cnn.com/2018/10/30/us/james-whitey-bulger-killed/index.html>.

162. *Donnie Rudd found guilty of 1973 murder of wife*, ABC NEWS (July 2, 2018), <https://abc7chicago.com/donnie-rudd-found-guilty-of-1973-murder-of-wife/3692452/>.

163. George Houde, *Donnie Rudd sentenced to 75-150 years in prison for 1973 murder of new wife; judge calls him ‘diabolical’*, CHI. TRIB. (Sept. 13, 2018, 7:05 PM), <http://www.chicagotribune.com/news/local/breaking/ct-met-donnie-rudd-wife-murder-sentence-20180913-story.html>.

164. Eric Levenson & Aaron Cooper, *Bill Cosby sentenced to 3 to 10 years in prison for sexual assault*, CNN (Sept. 26, 2018, 10:03 AM), <https://www.cnn.com/2018/09/25/us/bill-cosby-sentence-assault/index.html>.

165. *Id.*

treating Cosby the same as any other offender, despite his fame and wealth.

Given that the theory of retribution involves society expressing moral condemnation of the offender's crime with the goal of proportionality between crime and punishment, retributivists argue that further incarceration is the appropriate punishment for heinous crimes including life sentences or life without parole.<sup>166</sup> Thus, if there is general agreement that violent offenders should "rot" in prison for the rest of their lives, the question then becomes who bears the cost when these offenders require extra services due to their age? If these offenders are staying in prison, then the burden of maintaining care and health services falls on taxpayers.<sup>167</sup> When offenders like Charles Manson fall ill and require additional care services, is the public willing to bear those extra costs of the offenders the public previously declared too horrible to receive consideration of their age and condition when sentenced?

The theory of incapacitation focuses on the idea that "incarceration protects public safety . . . by preventing [the offender] from committing crimes in the community."<sup>168</sup> The concern with elderly offenders is that those with terminal illnesses or those who are wheelchair-bound do not pose a threat of reoffending. The possible risk of recidivism posed by individual offenders is not strictly determined by age because "other factors must be considered as well, including their physical and mental condition and recent conduct behind bars."<sup>169</sup> Accordingly, the theory of incapacitation can still be the motivating factor behind punishing and the continued incarceration of some elderly criminals.

For example, the California parole panel denied Charles Manson parole after he stated, "I am special. I am not like the average inmate. I have put five people in the grave. I've been in prison most of my life. I'm a very dangerous man[.]" in an interview with a psychologist in 2011.<sup>170</sup> Clearly, age alone does not entirely eradicate the danger an elderly offender poses to society. The mental and physical condition of

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166. See generally Upton, *supra* note 61.

167. CHRISTIAN HENRICHSON & RUTH DELANEY, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* 2 (Jules Verdone ed., 2012), <https://www.vera.org/publications/price-of-prisons-what-incarceration-costs-taxpayers>.

168. *Old Behind Bars*, *supra* note 62, at 92.

169. *Id.* at 82.

170. *Charles Manson denied parole*, *supra* note 153.

the offender should be taken into account because aging affects everyone differently. Similar to the judge's decision in *State v. Porter*, age will be given even less consideration if the offender is not frail of mind or body.<sup>171</sup>

#### D. Comparison to Juveniles

The legislative and judicial branches already give special considerations to age in the context of juvenile delinquents.<sup>172</sup> Since age is afforded special considerations in the juvenile context, this raises the questions: should all offenders over a specific age, regardless of their crimes, be removed from the criminal justice system? Should they be given special status as elderly offenders, which would entitle them to special treatment?<sup>173</sup>

In the United States, there is a specialized system for juvenile delinquents.<sup>174</sup> Some scholars suggest that similar special courts should exist to handle the cases of elderly criminals.<sup>175</sup> These courts "could . . . determin[e] an appropriate remedy for elderly persons experiencing problems in complying with societal rules and norms."<sup>176</sup> Juvenile offenders are given special considerations in general, and in sentencing, due to the characteristics of mental and emotional development at their age.<sup>177</sup> Similarly, there are distinctive characteristics associated with aging.

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171. See *State v. Porter*, 326 N.C. 489, 511 (1990).

172. Cavan, *supra* note 134.

173. *Id.* ("Such a policy would involve the creation of special elder offender institutions, geriatric courts, probation officers with gerontological training, and so forth, just as the status of juvenile delinquent has necessitated the establishment of special courts, correctional institutions, diversion to community programs and specially educated counselors and judges.").

174. *ACLU Fact Sheet on the Juvenile Justice System*, AM. CIVIL LIBERTIES UNION, available at <https://www.aclu.org/other/aclu-fact-sheet-juvenile-justice-system> (last visited Nov. 14, 2018).

175. Adams, *supra* note 1, at 482–83.

176. *Id.*

177. *Youth in the Justice System: An Overview*, JUV. L. CTR., (Mar. 21, 2018), <http://jlc.org/youth-justice-system-overview> ("Developmental psychology . . . is supported by neuroscience, which has shown that key areas of the adolescent brain continue to develop until the mid-twenties. This research has forced constitutional changes in how youth are sentenced when prosecuted in the criminal justice system. . . .").

The Juvenile Delinquency Act (“the Act”)<sup>178</sup> was designed to remove young offenders under the age of eighteen from the criminal justice system in order to rehabilitate them and avoid the stigma of a criminal conviction.<sup>179</sup> Significantly, the Act limits detention periods for juvenile offenders, which are often substantially less than the sentence the juvenile offender would face as an adult.<sup>180</sup> If a juvenile offender is to be treated as an adult, the Attorney General may “transfer” a juvenile to adult status.<sup>181</sup> A court will consider six factors in determining whether a transfer is in the interest of justice:<sup>182</sup>

(1) [T]he juvenile’s age and social background; (2) the nature of the alleged offense; (3) the extent and nature of the juvenile’s prior delinquency record; (4) the present intellectual development and psychological maturity of the juvenile; (5) past treatment efforts and the juvenile’s response to them; and (6) the availability of programs designed to treat the juvenile’s behavioral problems.<sup>183</sup>

Courts give substantial weight to the age of a juvenile offender, going as far as dismissing an indictment against a twenty-one-year-old defendant because he was not originally prosecuted under the procedures of the Juvenile Delinquency Act.<sup>184</sup> In *United States v. Rivera*,<sup>185</sup> the defendant was originally prosecuted for murder and treated as an adult; however, the defendant was actually seventeen at the time of the murder, but the prosecutor miscalculated his age and tried him as a twenty-year-old.<sup>186</sup> The United States District Court for the Southern District of New York ordered the State to proceed in its charges against the defendant following the procedures of the Juvenile Delinquency Act.<sup>187</sup> The lengths that courts are willing to go to ensure juvenile defendants are protected is indicative of the importance of age and the effect it has on courts’ decision-making.<sup>188</sup>

Because special considerations are afforded to juvenile offenders, it makes sense to apply the same rationale and framework to elderly offenders given the mental and physical abilities of the elderly. Elderly

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178. 18 U.S.C. §§ 5031–42 (2012).

179. *United States v. Rivera*, 912 F. Supp. 70, 73 (S.D.N.Y. 1995).

180. *Id.* (citing 18 U.S.C. § 5037(c)).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 72.

186. *Id.* at 71–72.

187. *Id.* at 75–77.

188. *See generally id.*

offenders have a considerably more difficult time in prison due to chronic diseases, deteriorating physical condition, and mental illnesses.<sup>189</sup> Some states now provide geriatric accommodations, ranging from free-standing prisons, dedicated nursing homes, or selected clustering.<sup>190</sup> For example, the Oregon Department of Corrections' geriatric unit incorporates specialized facilities and resources to meet the needs of their elderly inmates.<sup>191</sup>

Elderly inmates can be considered to no longer pose a threat or risk of criminal activity because they may be rendered mentally or physically incapable of posing a continued threat.<sup>192</sup> Recent studies discuss the prevalence of an increasing number of inmates who "continue to *age in place*, [and that] the onset of dementia is becoming a more common occurrence."<sup>193</sup> This finding reflects the notion that an elderly offender can no longer pose a safety risk to society because he or she now has physical, mental, and health complications, and could not reoffend even if he or she tried.<sup>194</sup>

The comparison to juveniles differs in this regard. Unlike juveniles, elderly offenders are physically and mentally weakened and do not pose the same threat as a juvenile delinquent, who would have a higher potential to reoffend as he or she matures. Courts are generally concerned about protecting juvenile offenders due to the belief that these offenders have not fully mentally developed to understand the

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189. Ronald H. Aday & Jennifer J. Krabill, *Older and Geriatric Offenders: Critical Issues for the 21st Century*, in SPECIAL NEEDS OFFENDERS IN CORRECTIONAL INSTITUTIONS 206 (Lior Gideon ed., 2013), [https://in.sagepub.com/sites/default/files/upm-binaries/49941\\_ch\\_7.pdf](https://in.sagepub.com/sites/default/files/upm-binaries/49941_ch_7.pdf) [hereinafter *Older and Geriatric Offenders*].

190. *Id.* at 215.

191. *Id.* at 216 ("In the Oregon Department of Correction's geriatric unit, inmates are provided hospital-style beds equipped with extra padding, toilets, sinks, and showers that are handicapped accessible and inmates use a therapeutic gym equipped with a pool table configured at a lower height to accommodate wheelchairs. Closed-captioned television and specially equipped phones are available for the hearing impaired.") (citing B. JAYNE ANNO ET AL., CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES, NAT'L INST. CORRECTIONS (2004)).

192. Weisberg, *supra* note 44, at 792.

193. *Older and Geriatric Offenders*, *supra* note 189, at 12 ("It has been noted that Alzheimer's effects 15 to 25% of individuals who are 65 years and older. Wilson and Barboza (2010) estimate that currently over 3,500 inmates currently possess symptoms of dementia. However, due to the frequency of comorbidity found among aging inmates and the regimented lifestyle of prison, this figure is expected to be much higher since few health care systems screen for cognitive impairments.")

194. Weisberg, *supra* note 44, at 792.

consequences of their actions.<sup>195</sup> The same should be true for elderly offenders because they can be subject to infirmity and mental frailty as a result of aging, and “[a]ging persons – even those convicted of serious crimes – have a right to lives free of mistreatment and poor care wherever and however long they live.”<sup>196</sup>

#### IV. Recommendation

Longer sentences for elderly offenders do not serve the deterrence and rehabilitative purposes that criminal sentencing normally serves. Therefore, special considerations should be evaluated and an individualized approach should be taken when sentencing elderly offenders. Because there are certain aspects affecting the elderly as a result of aging, age and the impact of aging should be given more significant consideration in sentencing elderly offenders.

One possible solution is to implement alternative rehabilitation programs for elderly offenders. These alternative programs would be similar to existing collaborative alternative treatment programs for juvenile delinquents and substance abusers (e.g., juvenile and drug court programs).<sup>197</sup> The legal community has already recognized a significant need to address the special issues of defendants with substance abuse problems because traditional criminal punishment failed to address the underlying issues and failed to reduce crimes. Similarly, elderly offenders have special needs that are routinely unmet by traditional incarceration and other criminal justice processes.<sup>198</sup>

Drug court programs utilize the criminal justice system to treat the substance abuse and drug addiction problems of defendants through “judicially monitored treatment rather than mere incarceration

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195. *Old Behind Bars*, *supra* note 62, at 45.

196. *Id.* at 95.

197. Kevin S. Burke, *Just What Made Drug Courts Successful?*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 39, 40 (2010) [hereinafter Burke] (stating that the theory behind drug courts is that “drug courts use the criminal justice system to treat drug addiction through judicially monitored treatment rather than mere incarceration or probation. Judges supervise the defendants in a more intense fashion than traditional courts and develop interpersonal relationships with defendants that would rarely occur in a more traditional court. The National Drug Court Institute describes drug courts as follows: ‘Drug courts represent the coordinated efforts of the judiciary, prosecution, defense bar, probation, law enforcement, mental health, social service, and treatment communities to actively and forcefully intervene and break the cycle of substance abuse, addiction, and crime.’”).

198. Weisberg, *supra* note 44, at 793–94.

or probation.<sup>199</sup> It is a collaborative effort that is generally between the judge, prosecutor, public defender, probation officers, substance abuse counselors, and mental health treatment providers.<sup>200</sup> The collaborative treatment team then works with the defendant to provide intensive supervision and treatment to address the defendant's addiction and offenses.<sup>201</sup>

An alternative treatment program for elderly offenders could function similarly to the structure and framework that has been established by drug court programs. Broward County, Florida has already implemented a special diversionary program designed for elderly shoplifters.<sup>202</sup> This program has been successful at significantly decreasing incidence of repeat offenses and many elderly offenders have successfully complete the program.<sup>203</sup> Proponents of alternative treatment programs for elderly criminals suggest that responding to the problem of elderly offenders "must initially fall on the local communities such as Broward and eventually upon each state's criminal justice system."<sup>204</sup>

Further, some of the underlying reasons why elderly people commit crimes in the first place can be more specifically addressed. For instance, a high incidence of elderly crime commission involves intoxication or alcoholism.<sup>205</sup> Alcohol treatment or alcohol rehabilitation programs have been suggested when addressing the needs of elderly offenders.<sup>206</sup> This approach could include programs instituted during

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199. Burke, *supra* note 197, at 40.

200. *Id.*

201. *Id.*

202. Kidman, *supra* note 33, at 148 ("The Broward Senior Intervention and Education program (BSIE) was founded in 1979 for elderly offenders arrested for misdemeanor shoplifting. The program has two major objectives: first, to prevent the recurrence of shoplifting by the elderly; and second, to provide the courts with humanitarian and socially constructive sanctions for elderly shoplifters.").

203. *Id.* at 148-49 ("The BSIE is essentially a three-dimensional rehabilitation program aimed at reducing recidivism among elderly shoplifters. The first dimension of the program emphasizes individual counseling to reduce the trauma of committing the crime and the accompanying pretrial anxieties. This dimension of the program also addresses the underlying motives for shoplifting. The second phase of the program requires participation in senior center social, cultural, and educational activities. The third dimension involves an externship with a community service organization such as hospitals or the Salvation Army.").

204. *Id.* at 149.

205. *Id.*

206. *Id.* ("The identification of the elderly problem drinker would be the first challenge to such a program within the criminal justice system. Discovery could begin through a screening conducted by counselors following arrest of the elderly



or after the course of elderly offenders serving their sentences. Or, it could take the form of education programs and providing treatment before elderly people ever commit a crime.<sup>207</sup>

An alternative treatment program would also be necessary when elderly offenders are suffering from alcoholism or other substance abuse issues and where traditional incarceration efforts, particularly longer sentences, will not rehabilitate the underlying and offense-causing issue of addiction.<sup>208</sup> This approach posits that longer sentences would not eliminate elderly recidivism by an elderly offender who has not received specific substance abuse treatment while in prison. A recent study discussed the importance of distinguishing first-time offenders and recidivists when incorporating older offenders into rehabilitative programs:<sup>209</sup>

The diversity of the growing number of older offenders should also be recognized and incorporated into rehabilitative programs. For example, the elderly first offender should be integrated into prison life differently than the repeat offender. The first offender is likely to be more anxious, fearful, depressed, and suicidal than the chronic offender. Aging inmates coming into an institutional setting late in life with the realization that prison may be their final home may experience tremendous shock to their system.<sup>210</sup>

The extraordinary needs of elderly inmates are consistently unmet and underserved in prisons, and prison staffs are not trained to handle the specific health concerns of elderly inmates.<sup>211</sup> Especially

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offender. A second challenge would be to treat the offender while within the correctional system and to rehabilitate the offender after release. A possible coordination between correctional programs and social service programs would create the potential for a total rehabilitation program.”).

207. *Id.* at 149-50 (“Programs outside the criminal justice system could also be instituted prior to arrest to educate and prevent the elderly from committing alcohol-related crimes. For example, educational materials concerning the effects of alcohol on the elderly body could be given out by health care providers and social workers. The information could also be distributed to the elderly upon renewal of their driver’s license.”).

208. *Id.*

209. Ronald H. Aday, *Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates*, 58 FED. PROB. 47, 53 (1994).

210. *Id.*

211. Ornduff, *supra* note 81, at 182-84 (“Elderly prisoners create problems for penal officials who have to act as both jailer and care giver. The needs of elderly inmates are greater than the needs of other prisoners. The elderly require more medical care as they usually suffer from more chronic health problems than their younger counterparts. Older inmates simply draw more from the resources of a prison.”).

since “prisons and prison procedures were not designed to accommodate different age groups,”<sup>212</sup> elderly inmates are at a disadvantage if the goals of deterrence and rehabilitation are supposed to be effectuated by incarceration and longer sentences. Removing elderly offenders from prison is a step in a better direction if the goal is to rehabilitate and deter offenders from reoffending.<sup>213</sup>

In addition to modeling alternative rehabilitative programs for elderly offenders from drug court programs, juvenile delinquency institutions can be used for constructing similar “geriatric court” programs.<sup>214</sup> Judges give special considerations to the developmental stages juvenile offenders may be at. In a similar manner, judges can consider the physiological changes that accompany aging. For example, if an elderly offender suffers from Alzheimer’s disease, traditional criminal justice processes will not be equipped, apt, or able to meet the offender’s considerable needs.<sup>215</sup> The case law is unclear in this regard, with some courts holding that “a diagnosis of [Alzheimer’s] alone is not conclusive evidence that an individual lacks capacity.”<sup>216</sup> Other courts consider incompetence and incapacity as factors during sentencing, and “[s]ome judges even believe that criminal punishments should not be given to individuals for ‘being in a condition that he [or she] is powerless to change.’”<sup>217</sup> Other judges believe that “[i]t is unacceptable to jail someone with Alzheimer’s.”<sup>218</sup>

Given the increasing problems associated with imposing long sentences on elderly offenders, it is illogical to keep elderly offenders incarcerated when they no longer pose a threat, are infirm, and are aging in place. Juvenile courts are aimed at separating children from the adult prison population to protect children, address the needs of their

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212. *Id.* at 183.

213. *Id.* at 183–84 (An additional issue connected to incarcerating elderly offenders is the threat posed by housing elderly offenders with younger, more violent prisoners. In attempts to address this issue, some prisons have segregated elderly inmates from younger prisoners. Despite arguments against segregating elderly inmates, prisoners over the age of sixty-five “may be too weak and passive to command the respect necessary to influence the behavior of younger prisoners.”).

214. Cavan, *supra* note 134, at 215–17.

215. Yukhvid, *supra* note 82, at 50–53.

216. *Id.* at 49 (quoting that “[u]nder a majority of capacity definitions [capacity being defined as ‘maintain[ing]] the requisite level and classification of abilities relevant to a specific action or decision,’ a diagnosis of [Alzheimer’s] alone is not conclusive evidence that an individual lacks capacity.”).

217. *Id.*

218. *Id.*

developing brains, and address underlying causes of crime commission.<sup>219</sup> In a similar vein, elderly offenders are more at risk, physically and mentally, in prison.<sup>220</sup>

Longer sentences further exacerbate the problem of community reintegration when decades spent in prison isolate elderly offenders from the outside world, family, and potential resources upon their eventual release.<sup>221</sup>

Successful community reintegration for the older offender can be excruciatingly challenging when there is a compounding of factors, like one grenade after another tossed their way—serious health and/or mental health issues to contend with, lack of any family or peer support, no financial resources, inability to access social welfare benefits, no available transportation, and no place to live.<sup>222</sup>

Ohio established the Hocking Correctional Facility, which specifically addressed the prison and community reintegration needs of elderly inmates.<sup>223</sup> The facility provides multiple services including a “pre-release program that provides offenders with information on Social Security or welfare benefits, job-seeking skills, housing-placement services, employment training, property maintenance, self-care and [geriatric]-informed . . . classes, and general education courses.”<sup>224</sup>

In addition, at the Hocking Correctional Facility staff members “are trained to deal effectively with geriatric populations, including chronic illnesses and death and dying issues.”<sup>225</sup> The facility’s focus in community reintegration is on “ensuring that older offenders have the necessary resources for living, including an approved placement in a nursing home if necessitated by declining health.”<sup>226</sup>

Other states, such as Florida, Pennsylvania, Alabama, Georgia, Virginia, and Louisiana, have offered more progressive programs for elderly offenders.<sup>227</sup> A praised example of a successful program for elderly offenders is the Northern Nevada Correctional Center.<sup>228</sup> The pro-

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219. See Cavan, *supra* note 134, at 216.

220. Brown, *supra* note 23, at 271–75.

221. Frank J. Porporino, *Managing the Elderly in Corrections*, 157 INT’L TRAINING COURSE VISITING EXPERTS’ PAPERS 34, 46 (2014).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Older and Geriatric Offenders*, *supra* note 189, at 216.

228. *Id.* at 217.

gram, the Structured Senior Living Program (“SSLP”), includes requiring “each inmate to participate in educational activities which directly confronts their reason for incarceration.”<sup>229</sup> The SSLP uses “no state tax dollars and relies on a cadre of inmate and community volunteers.”<sup>230</sup>

Successful programs like SSLP implement a variety of activities and programs aimed at a realistic and successful rehabilitation of elderly offenders. Programs like SSLP are more apt at meeting the needs of their participants because the programs are created with the sole purpose of addressing elderly offenders’ needs. These programs also include life skills trainings, art programs, pet therapy, physical fitness activities, and writing groups.<sup>231</sup>

Other scholarly discussions on elderly offenders often suggest compassionate release programs.<sup>232</sup> Compassionate release decisions are often extremely fact-specific, with some states refusing to consider elderly inmates who were convicted of violent crimes like murder.<sup>233</sup> Since there is limited application of compassionate release programs as it pertains to violent offenders, not considering the offender’s mental or physical capacity, alternative treatment programs should still be integrated.

There is the additional concern for rehabilitative treatment of infirm elderly offenders, including treatment of prisoners with Alzheimer’s. Some scholars have recommended the creation of specialized

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229. *Id.*

230. *Id.*

231. *Id.* (“[T]he Community Involvement Program helps participants increase interpersonal and social skills that are important whether they remain in prison or reintegrate into the free world. Such activities and skills include: meal planning on a budget, nutrition, microwave cooking, decision making, time management, goal setting, victimization (elder abuse, identity theft, and telephone and Internet scams), financial planning, and acquiring or reacquiring necessary identification documents.”).

232. Yukhvid, *supra* note 82, at 64 (“Compassionate release programs refer to procedures for granting parole to inmates for health reasons. Essentially, prisons release these inmates to die outside of prison before their sentence is completed. There are two rationales for the program: ethical justifications for releasing prisoners with life threatening illnesses and the financial benefits from such releases. Prisons save money from such programs because they do not have to expend large amounts of money on end-of-life care, which is often the ‘most expensive [time] in terms of health care.’ As mentioned previously, many jurisdictions also impose the requirement that the prisoner cannot be adequately cared for in the prison setting. Additionally, ‘[m]ost states that permit the early release of older prisoners have set the age of eligibility at 60 or 65.”).

233. *Id.*

Alzheimer's and dementia units in prisons and jails, similar to the approach a New York state prison recently implemented.<sup>234</sup> Units like this would include specialized and trained staffs who care for prisoners with Alzheimer's and experiment with hospice-like functions for units "to which terminally ill prisoners can be transferred at the end of life."<sup>235</sup>

In addition to the ethical advantages to providing separate and targeted care and management for terminally ill prisoners, there are also cost benefits. There could be reduced security costs in providing prisoners with Alzheimer's a stable environment separate from the younger prisoner population because there are less instances of violence and aggression.<sup>236</sup> Further cost advantages include an improved focus on the general prison population with less time and resources spent on caring for dying elderly offenders.<sup>237</sup>

There is also the argument that retribution cannot be the only consideration underlying punishment for wrongdoing because it would then eliminate humanitarian and ethical concerns.<sup>238</sup> Some scholars argue that "prison is not the only form of punishment that serves retributive purposes."<sup>239</sup> Human Rights Watch suggests that punishment can still be maintained through conditional release programs because an offender would still be "subject to specific restrictions that limit his freedom and to supervision by a parole officer,"<sup>240</sup> with the idea being that

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234. *Id.* at 70-71.

235. *Id.*

236. *Id.* at 71 ("Establishing separate units for housing those with Alzheimer's 'will [also] reduce security costs.' Prisoners with Alzheimer's are less likely to be aggressive if they find themselves in a more stable environment. Keeping these prisoners separate from the mainstream population will additionally reduce the risk of violence between the younger prisoners and the older ones with Alzheimer's. Alzheimer's prisoners in these units could also receive simplified work assignments consistent with their condition.").

237. *Id.* at 71-72 ("Having separate facilities for these kinds of inmates would further eliminate transactional costs such as transportation, since many prisons currently have to transport such inmates to different sites and hospitals in order for them to obtain appropriate medical care.").

238. *Old Behind Bars*, *supra* note 62, at 91 ("But once retributive values have been acknowledged, for example because a prison sentence has been imposed and part of it served, there seems to be little basis for insisting that retribution should dictate continued incarceration regardless of other considerations.").

239. *Id.*

240. *Id.*

parole is still a form of punishment or oversight by the government and is cheaper than incarceration.<sup>241</sup>

Further, there are current programs and proposals regarding eligibility for age-based parole or conditional release.<sup>242</sup> Eligibility would be based on multiple factors including years served at an enumerated percentage of the sentence, the nature of the underlying offense, behavior in prison, and mental and physical condition.<sup>243</sup> For example, the Pathway to Community Program within the Illinois Department of Corrections applies to offenders “at least 50 years old and within 25 years of consecutive time served in a state prison facility.”<sup>244</sup>

Such an approach is done on a case-by-case basis because aging affects every individual differently, and programs acknowledge “it is imperative that the intensity of any release conditions or treatment should be tailored to the prisoner’s risk level.”<sup>245</sup> Employing individual risk assessments for elderly offenders and utilizing that information to provide tailored treatment for offenders would also accomplish the retribution theory’s goal of proportionality.

## V. Conclusion

The imposition of lengthy sentences on elderly offenders does not serve the deterrence and rehabilitation theories that underlie the purposes of punishment in the criminal justice system. Elderly offenders account for a considerable percentage of prison populations across the United States and are aging in place.<sup>246</sup> There are specific concerns that uniquely apply to elderly offenders with regard to the way the mind and body are impacted by aging.<sup>247</sup> Prisons are oftentimes overcrowded

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241. *At America’s Expense*, *supra* note 57, at 47 (“A handful of states, including Virginia and Maryland, have laws that grant prisoners above a certain age (usually 50 or 60) who have typically already served a minimum number of years in prison (usually 5 to 15) the ability to go before a parole board to request parole.”).

242. *Id.* at 48.

243. *Id.* at 49.

244. ILL. SENTENCING POLICY ADVISORY COUNCIL, PATHWAY TO COMMUNITY ELDERLY SENTENCE MODIFICATION PROGRAM (2018), [http://www.icja.state.il.us/spac/pdf/HB4173\\_Turner\\_Elderly\\_Release\\_FINAL.pdf](http://www.icja.state.il.us/spac/pdf/HB4173_Turner_Elderly_Release_FINAL.pdf).

245. *Id.* (“For example, low-risk prisoners should be subject to low-level intensity release conditions and services (like minimal supervision while on parole) and high-risk prisoners should be subject to high-level intensity release conditions and services (like intensive parole supervision or placement in a halfway home).”).

246. *Older and Geriatric Offenders*, *supra* note 189, at 206.

247. *Id.*

and lack the specific and sufficient resources to care for aging prisoners.<sup>248</sup>

The ability to deter or rehabilitate an offender dwindles in conjunction with the elderly offender's diminishment in mental capacity. If the purpose of punishment is to hold criminals accountable for their offenses, there is an implicit requirement that the offender be able to continue to comprehend his or her punishment as paying his or her debt to society.<sup>249</sup> The case law is imprecise as to whether old age is considered at all, and if age is considered, to what extent it impacts a trial judge's sentencing decision.

Improving treatment of elderly offenders requires serious reform not only in sentencing policies and decisions, but also in the care and treatment which specifically considers the various needs of elderly offenders. Courts already assign considerable weight to the age and mental capacity of juvenile offenders. It is not absurd to consider the condition and characteristics of elderly offenders as well. If the purpose of criminal punishment truly is to deter and rehabilitate offenders, then insisting that elderly offenders die in prison, without consideration of individualized treatment, does not serve that goal. There is little deterrent value in keeping elderly criminals in prison, in failing health, until they die. Similarly, there is little chance of rehabilitation for an elderly offender who suffers from Alzheimer's, for example, and no longer has the capacity to understand why they are in prison. A "one-size-fits-all" standard for punishing elderly offenders is not realistic or applicable because there are different reasons for why elderly individuals are in prison. A case-by-case analysis and consideration of various individual-specific factors is necessary to effectuate the goal of holding offenders accountable for their actions while also maintaining humanitarian goals in sentencing elderly offenders.

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248. Yukhvid, *supra* note 82, at 73.

249. See generally *Old Behind Bars*, *supra* note 62.

