THE CONTINUING PROBLEM OF AMERICA'S AGING PRISON POPULATION AND THE SEARCH FOR A COST-EFFECTIVE AND SOCIALLY ACCEPTABLE MEANS OF ADDRESSING IT

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The age of America's prison population continues to rise. Mr. Curtin examines the nature of this trend and addresses how to efficiently and adequately address the problem. The root causes of the problem are examined by looking at the types of offenses elderly prisoners commit, their physical and mental conditions, and their adjustment to prison life. Mr. Curtin then highlights the challenges of accommodating elderly prison inmates in the prison health care system, as well as the proposals to separate the elderly inmate population and implement early-release programs. Next, Mr. Curtin analyzes how telemedicine and congregate housing can reduce costs, save resources, provide health care access, and create a healthier prison environment. Mr. Curtin also shows how the efficiency of early-release programs is not as certain. Finally, Mr. Curtin encourages more public debate on the problems associated with aging prison populations and improved funding.

I. Introduction

In a recent *Wall Street Journal* article, Gary Fields shared the story of an aging inmate at Louisiana's Angola

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Prison.[1] Fifty-three years old at the time of the story, Richard Leggett was convicted of killing a man and a woman during a store robbery in 1971.[2] By 2005, Leggett, then a diabetic with a bad heart valve, served his time as, among other things, the prison's chief coffin-maker.[3] In this capacity he was increasingly busy. An increasing number of his fellow inmates needed to be buried on prison grounds because their long incarcerations had led to a disintegration of ties to the outside world.[4] Leggett himself was only able to locate one relative: his son who was serving time in a Texas prison.[5]

Leggett's story is in many ways emblematic of the crisis facing the American correctional system today. It describes a prisoner, not traditionally considered elderly, whose environment and chronic health conditions have aged him beyond his years, living in a setting designed to house and regiment the lives of young, active men. Regardless of the mission of correctional institutes, the graying of America's prisons creates serious questions about how they can efficiently and cost-effectively accomplish their goals.

The causes of the increasing elderly inmate population are discussed in Part II. The remainder of this Part takes a closer look at the characteristics of elderly inmates and at three issues which have a particular impact on this unique group: the nature of the prison health care system; whether elderly inmates should be housed separately from younger inmates; and, whether early-release programs are a viable option. Part III analyzes three potential strategies to confront and effectively address the unique circumstances of elderly inmates. Finally, Part IV advocates a proactive approach to treating elderly prisoners with the dignity they deserve.

II. Background

The United States has the highest reported incarceration rate in the world with more than 2.1 million inmates,[6] about 10% of whom

1. Gary Fields, *Life and Death: As Inmates Age, a Prison Carpenter Builds More Coffins*, WALL ST. J., May 18, 2005, at A1.
2. *Id*.
3. *Id*.
4. *Id*.
5. *Id*.
6. International Centre for Prison Studies, Prison Brief for United States of America, http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/north_america_records.php?code=190 (last visited Sept. 29, 2007).

are over fifty-five years-of-age.[7] Fifty-five is a critical age; at first glance it seems too young to be characterized as "elderly," but prisoners are an unusual group.[8] Unsurprisingly, prison inmates often have a history of drug and alcohol abuse.[9] If an inmate comes from an impoverished background, he may have had only limited access to health care prior to incarceration.[10] Along with the rigors of prison life, these factors give many inmates a physiological age ten to fifteen years older than their contemporaries.[11] Most of the literature that considers the health-damaging effects of prison life in combination with the lifestyle and poor health care of many inmates prior to incarceration suggests that age fifty-five or even fifty be considered elderly for prisoners.[12]

Over the past twenty years, the population of elderly prisoners has increased by leaps and bounds.[13] This ever-growing segment of the prisoner population creates a disproportionate drain on the resources of the penal system due to the curious fact prisoners are the only people in the United States who have a constitutional right to health care.[14] As the prison population ages, the number of chronic health conditions suffered by the average inmate rises with a concomitant rise in the cost of their medical care.[15] In Wisconsin, health care costs for adult prisoners leapt from $28.5 million in 1998 to $87.6 million in 2005, during which time the prison population increased by only 25%.[16] In California, the amount of money spent on inmate

7. George J. Bryjak, Op-Ed., *The Coming Prison Crisis*, SAN DIEGO UNION-TRIBUNE, Aug. 19, 2004, at B-9:7.

8. *See* Lincoln J. Fry, *The Concerns of Older Inmates in a Minimum Prison Setting, in* OLDER OFFENDERS: PERSPECTIVES IN CRIMINOLOGY AND CRIMINAL JUSTICE 164, 165 (Belinda McCarthy & Robert Langworthy eds., 1988).

9. Mike Mitka, *Aging Prisoners Stressing Health Care System*, 292 JAMA 423, 423 (2004).

10. *Id.*

11. *Id*.

12. Fry, *supra* note 8, at 165.

13. Bryjak, *supra* note 7 ("A study of [sixteen] [s]outhern states found that the number of inmates age [fifty-five] and older increased 480 percent between 1987 and 1997 while the total inmate population in the U[nited] S[tates] rose by only 147 percent during that same period.").

14. Mitka, *supra* note 9, at 423.

15. RONALD H. ADAY, AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS 87 (2003).

16. Bob Purvis, *Cheaper Prison Options Sought; As Number of Older Prisoners Rises, So Do Costs for Care*, MILWAUKEE J. SENTINEL, Aug. 7, 2006, at A1.

medical care nearly doubled over seven years to $676 million.[17] While many prison systems do not track medical costs by age group, the strong presumption is that this disproportionate increase is due to the rising percentage of elderly prisoners.[18]

The success of prison health care programs in reducing prison mortality has led to longer inmate life spans and ever-higher health care costs.[19] In fact, the Department of Justice recently released a study showing the mortality rate among state prison inmates has dropped below that of the general population owing to the accessibility of prison health care.[20] Eighty-nine percent of all state prisoner deaths were caused by medical conditions (with heart disease and cancer far outpacing less age-associated conditions such as AIDS), as opposed to 8% due to homicide or suicide.[21] This suggests prisoners are living longer in general. As prison health care programs improve, they seem to be becoming financial victims of their own success.

Prison health care is itself designed for young, healthy inmates and traditionally modeled after the military sick-call system, which does not lend itself to dealing with chronic illnesses.[22] One state found that inmates over the age of fifty-five suffered from an average of three chronic health problems.[23] The cause of this growing crisis is a combination of longer sentences and fewer chances of parole under state truth-in-sentencing laws.[24] States have struggled to find new

17. Jenifer Warren, *The Graying of the Prisons; Incarceration: Longer Terms and Fewer Paroles Give the State a Growing Number of Old Inmates*, L.A. TIMES, June 9, 2002, at A1.

18. CHARLOTTE A. PRICE, N.C. DEP'T OF CORR., AGING INMATE POPULATION STUDY 11 (2006), *available at* http://www.doc.state.nc.us/dop/Aging%20Study%20Report.pdf.

19. ADAY, *supra* note 15, at 89.

20. CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, MEDICAL CAUSES OF DEATH IN STATE PRISONS, 2001–2004, at 3 (2007) *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mcds04.pdf.

21. *Id*. at 1.

22. Michael Taylor, *California Grapples with Aging Prison Population*, S.F. CHRON., Aug. 2, 1993, at A1.

23. Bryjak, *supra* note 7 ("[E]lderly female inmates are at even greater risk than their male counterparts for developing serious health problems. Older women need regular breast and cervical cancer screening as well as treatment when complications arise.").

24. *See* Diane Jennings & Bruce Tomaso, *Society to Face Rising Costs of Aging Prison Population; Experts Wonder Whether Texas System Can Keep Up as Inmate Numbers Swell Under Long-Term Sentencing*, DALLAS MORNING NEWS, Aug. 19, 1998, at 1A.

ways to deal with the problem while it is still manageable.[25] In response, many authors have suggested early release for low-risk convicts.[26] They point out that as the age of inmates increases the recidivism rate drops.[27] However, many authors also argue that early release only shifts the cost of caring for an uninsured, unemployable, elderly ex-prisoner from the prison system to other government programs.[28] Furthermore, older convicts are not only serving time for crimes committed in their youth; almost half of older prisoners serving long sentences were convicted of crimes committed within a few years of their imprisonment.[29] Additionally, early-release programs are a double-edged sword for reform-minded politicians.[30] Their opponents waste no time in branding them soft on crime, and proponents risk enraging victims' rights groups.[31] Reforms to parole laws have also been suggested.[32]

Another possible solution is to send low-risk prisoners into nursing homes.[33] This strategy can lead to unintentional behavioral problems.[34] Also, statutes may require nursing homes to make the criminal records of their residents public.[35] Public backlash against such

25. GREG JONES ET AL., MD. ST. COMM'N ON CRIM. SENTENCING POL'Y, AGING OFFENDERS & THE CRIMINAL JUSTICE SYSTEM 1 (2001), http://www.msccsp.org/publications/aging.html.

26. *E.g.*, Jason S. Ornduff, Note, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 ELDER L.J. 173, 199–200 (1996).

27. ADAY, *supra* note 15, at 212.

28. Bryjak, *supra* note 7.

29. Warren, *supra* note 17.

30. Gary Heinlein, *Governor's Prison Plan Not Locked In*, DETROIT NEWS, Feb. 22, 2007, at 5B (Michigan Senate Majority Leader Mike Bishop remarks, "[c]losing prisons, reducing our state police force and putting the public's safety in jeopardy is not the way to solve our budget shortfalls.").

31. Warren, *supra* note 17 ("'The people who commit these heinous crimes have to be held accountable,' said Harriet Salarno, chairwoman of Crime Victims United of California. Salarno said she might not fight low-security confinement for old, sick convicts whose offenses were minor, but she objects to changes for those with violent pasts, however distant.").

32. Jennings & Tomaso, *supra* note 24.

33. Purvis, *supra* note 16 (quoting Jim Greer, Director, Wis. Dep't of Corr., Bureau of Health Services).

34. Joanna Weiss, *Oldest Prison Inmates to be Moved; Warden Urges Parole for Some*, TIMES-PICAYUNE, Oct. 8, 1998, at A2. The author relates the story of a prisoner who had broken his neck and was paralyzed from the neck down. *Id.* The inmate was sent to a nursing home, where his family trashed his nursing home room and gave him illegal drugs. *Id.*

35. *See*, *e.g.*, 210 ILL. COMP. STAT. 45/2-216 (2006) (stating every licensed facility shall provide to every resident and prospective resident written notice advising them of their right to ask whether any residents of the facility are identified offenders).

programs is always a possibility. The comments of Wisconsin State Representative Scott Suder are illustrative: "I don't think age should be a factor . . . for letting people loose early or giving them things like house arrest . . . . Putting these criminals in residential nursing homes with an already vulnerable population . . . I think is just utterly dangerous."[36] Placing prisoners in nursing homes might also run afoul of federal laws against the restriction of residents' movements and activities.[37] In the short term, there are several minor changes that prisons could make to improve conditions for the elderly.[38] In the long term, whatever else they may do, prison systems will have to invest in an even greater number of specialized facilities for aging inmates.

A. The Nature and Cause of the Rising Elderly Prisoner Population

A confluence of trends has brought America's prisons to an important crossroads. Seventy-six million aging Baby Boomers are entering the American elderly population.[39] As this group enters its declining years, its needs will create unprecedented challenges for policymakers.[40] This tremendous demographic shift is also profoundly affecting America's criminal justice system.[41] Each year, people aged fifty and over account for almost half a million arrests.[42] In

36. Purvis, *supra* note 16.

37. *See* 42 C.F.R. § 483.13(a) (2007) ("The resident has the right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms."); Warren Wolfe, *Aging Behind Bars; The Number of Older and Ailing Inmates Has Doubled in the Past Decade and That Increase Is Expected to Continue*, STAR TRIB. (Minneapolis), July 20, 2004, at 1A.

38. *Prison Health: As Inmate Population Ages, Prison System Must Adapt to Meet Healthcare Needs, Say Researchers*, MED. & L. WKLY., Apr. 14, 2006, at 311 [hereinafter *Prison Health*].

39. ADAY, *supra* note 15, at 2.

40. B. JAYE ANNO ET AL., CRIMINAL JUSTICE INST., INC., CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 5 (2004), *available at* http://www.nicic.org/Downloads/PDF/2004/018735.pdf.

41. ADAY, *supra* note 15, at 2.

42. *Id*. at 2–3. This problem is not limited to the United States. *See Japanese Prisons Graying Fast as Elderly Crime Surges Amid Economic Slump*, MAINICHI DAILY NEWS, Feb. 6, 2006, http://mdn.mainichi-msn.co.jp/features/archive/news/2006/02/20060206p2g00m0fe013000c.html. "Senior prisoners in 2004 numbered 7,381, up nearly 60 percent from 2000 and accounting for more than 11 percent of all inmates in Japan, the Justice Ministry says." *Id.* The number of inmates over sixty years old in Japan's sixty-seven prisons has in fact tripled in the past decade and is expected to rise further. *Id. See also* HER MAJESTY'S INSPECTORATE OF

addition to older offenders, a disproportionately large portion of the elderly population present in most large state prisons is because of felony sentencing laws (both three-strikes laws and truth-in-sentencing), which send repeat offenders to prison for twenty-five years to life.[43] Traditionally, parole helped relieve the pressure of overcrowding and gave inmates an incentive for good behavior.[44] However, parole has been eliminated in the federal system for offenses occurring after 1987 and is also unavailable in many states.[45] The popularity of the life-without-parole sentence as a humane alternative to the death penalty has also contributed to this trend.[46]

As a result of these trends, the number of elderly prisoners has doubled over the last decade.[47] According to the National Center of Institutions and Alternatives, prisons spend $69,000 a year to incarcerate an elderly inmate as opposed to a national average of $22,000 for all inmates.[48] Finding a way to legally and humanely deal with a growing, expensive, and unsympathetic population puts the correctional system in a double-bind that Todd Clear, a criminologist at Florida State University, refers to as "the 500-pound gorilla of corrections policy."[49]

PRISONS, 'NO PROBLEMS—OLD AND QUIET': OLDER PRISONERS IN ENGLAND AND WALES 61 (2004), *available at* http://inspectorates.homeoffice.gov.uk/hmiprisons/thematic-reports1/hmp-thematic-older-04.pdf?view=Binary. "The sentenced population of prisoners aged [sixty] and over in the male estate has more than trebled over [ten] years from 442 in 1992 to 1359 in 2002 . . . making those aged [sixty] and over the fastest growing population." *Id.* The population of female prisoners aged 50 and over increased by two and a half times in the same period, from 60 to 156. *Id*. *See also* Anna Grant, *Elderly Inmates: Issues for Australia*, TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE, May 1999, at 2, *available at* http://www.aic.gov.au/publications/tandi/ti115.pdf ("In 1987, inmates over [fifty] years of age comprised 4.1% of the total Australian prison population of 12,113 persons. By 1997, this [had] risen to 7.4% of 19,082 persons.").

43. ANNO ET AL., *supra* note 40, at 7.

44. *Id.*

45. *Id*.

46. Sasha Abramsky, *Lifers*, LEGAL AFFAIRS, Mar.–Apr. 2004, *available* at http://www.legalaffairs.org/issues/March-April-2004/feature_abramsky_marpar04.msp.

47. Patrick McMahon, *Aging Inmates Present Prison Crisis*, USA TODAY, Aug. 11, 2003, at 3A.

48. *Id*. As Professor Aday notes, if a sixty-year-old inmate lives to be eighty in prison, the cost of his incarceration would project to $1.4 million. ADAY, *supra* note 15, at 89–90.

49. Jennings & Tomaso, *supra* note 24.

1. OLDER OFFENDERS: THE NATURE OF OFFENSES COMMITTED BY INMATES WHO ENTER PRISON AT AN ADVANCED AGE

In Pennsylvania, which in January 2001 ranked sixth nationally among state prison systems for percentage of older prisoners relative to the total population, the Department of Corrections conducted a profile on inmates aged fifty and older.[50] It found these older inmates were more likely to be jailed for violent offenses, including sexual offenses.[51] The same top nine offenses were committed by both old and young inmates.[52] The offenses are rape, first-degree murder, drug offenses, robbery, third-degree murder, aggravated assault, burglary, second-degree murder, and theft.[53] Rape and first-degree murder together made up 36.6% of the elderly prisoners' offenses as opposed to only 13.1% for the younger group.[54] The study showed that older inmates were 22% less likely than younger inmates to have a prior record.[55] But where older inmates had a previous offense, it was more likely to be serious.[56] In North Carolina in 2005, 56% of inmates aged fifty and older were imprisoned for sexual crimes or other violent crimes.[57] The age of new inmates in North Carolina's Division of Prisons has also increased since 1994–95 while the number of younger inmates admitted has decreased.[58]

50. PA. DEP'T OF CORR., ELDERLY INMATE PROFILE 1 (2003), *available at* http://www.cor.state.pa.us/stats/lib/stats/elderlyinmateprofile.pdf.
51. *Id.* at 4.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 2.
56. *Id.* at 2, 4.
57. PRICE, *supra* note 18, at 15.
58. *Id.* at 5; *see also* Sol Chaneles, *Growing Old Behind Bars: The Aging of Our Convict Population Brings with It Special Needs and Problems That Few of Our Prisons Are Ready to Handle*, PSYCHOL. TODAY, Oct. 1987, at 47, 47–48. "From 1976 to 1985, the arrest rate for rape committed by men over [sixty-five] increased 155 percent. For men [sixty] to [sixty-four], the increase was 112 percent." *Id.* The rate of arrests also increased for larceny-theft in the same period. *Id.* The author believes the real increase in elder crime may have been even higher, as police and prosecutors are more likely to overlook offenses by the elderly, not arresting offenders or dismissing charges quickly. *Id.*

2. ELDERLY INMATES HAVE MORE PHYSICAL INFIRMITIES AND HAVE MORE SERIOUS MEDICAL CONDITIONS GENERALLY THAN THE NONINSTITUTIONALIZED ELDERLY POPULATION

Older prisoners experience more mental and physical challenges than their younger counterparts.[59] This comes as no surprise as aging in the general population is also accompanied by an increasing number of impairments and chronic conditions.[60] Aging prisoners, like their noninstitutionalized contemporaries, may suffer from hearing loss, vision problems, arthritis, hypertension, and dementia.[61] According to the *Journal of the American Medical Association*, inmates older than fifty-five have an average of three chronic conditions and as many as 20% have a mental illness.[62] This leads to an increased need for medical services and aids, such as walkers, wheelchairs, hearing aids, and breathing aids.[63] Additionally, elderly inmates frequently need expensive dental and periodontal work.[64] As people in the outside world age they often need assistance with certain activities in their daily lives, including eating, going to the toilet, and dressing.[65] These needs exist for elderly prisoners as well.[66] An early study comparing noninstitutionalized older men with a proxy group representing prisoners found the prison group was more prone to adverse health conditions and was likely to spend a longer time in bed recovering from injury or illness.[67]

59. Cynthia Massie Mara, *Chronic Illness, Disability and Long-Term Care in the Prison Setting, in* VULNERABLE POPULATIONS IN THE LONG TERM CARE CONTINUUM 39, 43–44 (Paul R. Katz et al. eds., 2004) ("Although 23.8% of inmates under age [twenty-five] reported having at least one (chronic) condition, 47.6% of prisoners over [forty-four] years of age said they had a similar level of impairment.").

60. ADAY, *supra* note 15, at 87.

61. *Id*.

62. Mitka, *supra* note 9, at 424.

63. ADAY, *supra* note 15, at 87.

64. *Id*.

65. Massie Mara, *supra* note 59, at 39–40.

66. *Id*. at 48 (a study of long-term care in the Pennsylvania prison system found that 31.6% of inmates between seventy and seventy-four needed assistance with their daily living activities).

67. *Id.* at 44. Owing to the scarcity of studies on inmate health, the study compared two groups of nonincarcerated men. *Id.* The first group, which was to represent the "free" population, was comprised of educated, married, nonurban males with an annual income of over $15,000. *Id.* The second group, which acted as a stand-in for the prison population, was comprised of single urban dwellers without a high school education, making less than $15,000 per year. *Id.*

3. ELDERLY INMATES' ADJUSTMENT TO IMPRISONMENT

i. *Common Problems for All Elderly Inmates* How the prison environment affects elderly inmates is subject to a wide variety of opinions.[68] Studies have found that some elderly inmates have benefited from regular meals, increased access to medical care, and abstention from drug and alcohol use.[69] Other studies have found imprisonment led to rapid physical and mental deterioration.[70] Observers should remember elderly inmates constitute a group with a wide range of physical and mental abilities.[71]

Acclimatizing to the prison setting is a challenge to all inmates as they adjust to the loss of their familiar way of life and become isolated from their support groups.[72] Avoiding confrontations with both fellow inmates and guards is a constant source of stress.[73] Elderly inmates complain about the noise and lack of discipline among younger inmates.[74] A 1984 review describes prison's influence on elderly inmates as making them more introverted and neurotic than younger inmates.[75] It is interesting that while elderly prisoners exhibit fewer psychotic responses and less psychic pain, they are more anxious, depressed, and worried than the general prison population.[76] These less obvious mental problems can be as dangerous to an elderly prisoner as more visible ones, and present an extra challenge to a prison system designed to respond to overt problems.[77]

Many elderly prisoners feel especially vulnerable to the intimidating and predatory behavior of younger inmates.[78] Elmore Elliot, a sixty-four-year-old prisoner in a New Hampshire facility, pled guilty to manslaughter in the early 1990s.[79] After four hospital visits, two

68. Fry, *supra* note 8, at 165.
69. *Id*.
70. *Id*.
71. *Id.* at 166.
72. Michael J. Sabath & Ernest L. Cowles, *Factors Affecting the Adjustment of Elderly Inmates to Prison, in* OLDER OFFENDERS: PERSPECTIVES IN CRIMINOLOGY AND CRIMINAL JUSTICE, *supra* note 8, at 178, 178.
73. ANNO ET AL., *supra* note 40, at 8–9.
74. Taylor, *supra* note 22.
75. Fry, *supra* note 8, at 166.
76. *Id*.
77. GRANT, *supra* note 42, at 4.
78. *Id*.
79. *The Price of Punishment: Growing Old in Jail—Follow-up Conversation with Sixty-four Year Old Inmate* (WBUR radio broadcast 2000), at 00:52, *available at* http://www.wbur.org/special/prison/elderly.shtml [hereinafter *Inmate Conversation*].

bypass surgeries, and the installation of a pacemaker, he spoke to an interviewer about his day-to-day experience,[80] "It's like living in a minefield, when you're my age, in a place like this," Elliot said, "[y]ou don't know what you're going to step on next, whether it's going to blow up in your face."[81] Like many other inmates in his situation, Elliot worries about sharing space with young inmates, and the "things [that] go on, there are fights, it's tough."[82] Captain Steve Beltrami, head of security for the New Hampshire Prison for Men, reported that "[i]n prison society . . . you have predators and prey . . . as they get older[, inmates] wane [more] from predatory status to prey."[83] He tells of seeing younger inmates snatching canes or walkers away from older prisoners for weapon use.[84] When Beltrami began his career as a corrections officer a little over a decade ago, canes or walkers were considered weapons and prohibited inside prison walls.[85] But with the aging of the prison population, even in a small state like New Hampshire, canes or walkers eventually had to be allowed despite the foreseeable results.[86] It is common knowledge that prison can be a violent and dangerous place for inmates, and it seems likely that the stress on older inmates would lead to increased medical costs overall.[87]

ii. *Variations Among Elder Inmates* Despite these common problems, the elderly inmate population is not homogeneous.[88] Scholars break the group of elderly prisoners down into three subcategories, each with different characteristics and responses to prison.[89] First,

80. *Id*. at 01:58.
81. *Id*. at 01:20.
82. *Id*. at 1:43.
83. *The Price of Punishment—Growing Old in Jail* (WBUR radio broadcast 2000), at 03:58, *available at* http://www.wbur.org/special/elderly.shtml [hereinafter *Old in Jail*].
84. *Id.* at 4:23.
85. *The Price of Punishment: Growing Old in Jail—Follow-up Conversation with Corrections Officer and a Criminologist Who Studies the Problems of Aging Inmates* (WBUR radio broadcast 2000), at 02:03, *available at* http://www.wbur.org/special/prison/elderly.shtml [hereinafter *Officer Conversation*].
86. *Id*. at 02:15.
87. Carrie Abner, *Graying Prisons: States Face Challenges of an Aging Inmate Population*, STATE NEWS, Nov.–Dec. 2006, at 8, 9–10, *available at* http://www.csg.org/pubs/Documents/sn0611GrayingPrisons.pdf.
88. GRANT, *supra* note 42, at 2; *see also* ANNO ET AL., *supra* note 40, at 10.
89. ANNO, ET. AL., *supra* note 40, at 10.

there are those who enter prison for the first time in middle age.[90] Second, there are habitual criminals who have been in and out of jail many times over the years.[91] Finally, there are prisoners who entered prison at a young age still serving long sentences.[92] Each of these groups reacts differently to the prison environment and may respond better to some prison programs than others.[93]

Prisoners who enter prison for the first time when they are middle-aged or older encounter what Professor Ronald H. Aday describes as a type of culture shock.[94] Often the transition fills them with feelings of hopelessness and depression.[95] These prisoners have lived long lives with no prior arrests and are shamed by their change in status.[96] These feelings of shame may be amplified because most first-time elderly offenders are incarcerated for serious crimes which bear a tremendous social stigma, like murder or sexual crimes.[97] Furthermore, many first-time elderly prisoners are set in their ways, with their own routines and patterns, which now have to give way to the needs of an intimidating new society.[98] Retreating into a deep depression is common among these new inmates.[99] This depression can be marked by extreme lethargy or by lashing out at officials or other inmates.[100] Recidivist inmates may experience fewer adjustment problems, owing to experience, but are the most likely to have addiction problems.[101] This group may be the least sympathetic, but it knows the game well enough to cause less trouble for prison officials.[102]

The third group, while not the most numerous, is perhaps the most archetypical of elderly prisoners. These individuals entered

90. *Id.*
91. *Id.*
92. *Id.*
93. ADAY, *supra* note 15, at 117.
94. *Id.* at 114.
95. *Id.*
96. *Id.* at 115.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 115–16. Certain inmates even view prison time as a respite from the "real world." *Id.* Aday writes of an inmate who commented "there is no rent [in prison] and no food bills" and one who has a "sister in a nursing home and it is costing her over $2000 a month." *Id.* The inmate continued, "look at that and look at how I am. What I got is hard to beat and it don't cost me nothing." *Id.* Professor Aday does note a contributing factor to this satisfaction was the fact that these inmates were grouped together with inmates of similar age and ability. *Id.*
101. ANNO ET AL., *supra* note 40, at 11.
102. *Id.*

prison at a young age and are still serving a long sentence.[103] They are most likely minorities from an impoverished background with limited educational opportunities who pled guilty to a crime and were given a life sentence.[104] Over the years, members of this group have settled into the prison routine and lost any ties to family and the outside world.[105] As Aday writes, "the only ones who remember [him] are his victims and legal system officials."[106]

For each of these groups, prison life erodes ties to family both by enforced separation from familial relationships and by the formation of a new support structure in the prison environment.[107] In some cases, family ties are disrupted before entering prison, for example, in the case of an elderly offender found guilty of a violent or sexual crime against a family member.[108] For some inmates, the breakdown in family ties can lead to fear of leaving prison.[109] Inmates find it progressively harder to maintain ties with their families as the years go by and cling to their memories of how relationships once were rather than confronting the painful fact their family group is changing and evolving without them.[110] Eventually, ambivalence about these unrealistic, static memories sets in and the prisoner begins to transfer those relationships to the institution.[111] What began as a coping mechanism reinforces the inmate's role as someone indistinguishable from the prison.[112]

103. ADAY, *supra* note 15, at 119.
104. *Id.*
105. *Id*.
106. *Id*.; *see also* Joanna Weiss, *Killer Is Free After Suit by Victims' Kin Tossed*, TIMES-PICAYUNE (New Orleans), Feb. 13, 1999, at A4. The story provides an example of the long memory of some victims. In 1995, twenty years after committing a double murder, the relatives of one of Paul "Tex" Chandler's victims carried on a long legal struggle to overrule a clemency decision. *Id.*
107. Fry, *supra* note 8, at 166.
108. ADAY, *supra* note 15, at 115.
109. Fry, *supra* note 8, at 166.
110. ADAY, *supra* note 15, at 123–24.
111. *Id*.
112. *Id.* at 124.

B. The Problems Elderly Inmates Pose to the Prison Health Care System and Vice Versa

All inmates are screened for "illnesses, chronic conditions, or disabilities"[113] during admission into prison, and housing and work assignments are based on the results of this screening.[114] If a health condition is present, the medical staff works with the inmate to create a treatment plan.[115] Female inmates are asked sex-specific questions to identify pregnancy and gynecological problems.[116] In addition, mental-health-related questions are used to identify prisoners who may pose a danger to themselves or others.[117]

Once a prisoner is admitted, the prison health care system is modeled on the military sick-call system.[118] This means that at a certain specified time a prisoner is responsible for organizing with other prisoners having health complaints and informing an authority that they want to visit the infirmary.[119] This system assumes a basically healthy population using sick call only when in acute need.[120] For older inmates, however, chronic illness and injury are an every day problem.[121] Another inevitable shortcoming of the system is that it is subject to abuse by inmates who may request medical services for nonmedical reasons.[122] Inmates, both young and old, sometimes use sick call to obtain "excuses from work, extra blankets, [or] an unscheduled shower."[123] Physicians and nurses are thus encouraged to be suspicious and skeptical of their patients, which complicates diagnosis and treatment, especially of a chronic condition.[124] Furthermore, because sick call visits are initiated by the patient rather than occur-

113. Ronald H. Aday & Jennifer J. Krabill, *Aging Offenders in the Criminal Justice System,* 7 MARQUETTE ELDER'S ADVISOR 237, 249 (2006).
114. Ronald H. Aday, *Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates*, 58 FED. PROBATION 47, 48 (1994).
115. Aday & Krabill, *supra* note 113, at 249.
116. ANNO ET AL., *supra* note 40, at 17.
117. Aday & Krabill, *supra* note 113, at 249.
118. ANNO ET AL., *supra* note 40, at 54 n.2.
119. *See, e.g.*, U.S. ARMY TRAINING AND DOCTRINE COMMAND, REGULATION 350-6: ENLISTED INITIAL ENTRY TRAINING POLICIES AND ADMINISTRATION 100–01 (2007), *available at* http://www.tradoc.army.mil/TPUBS/regs/r350-6.doc.
120. ANNO ET AL., *supra* note 40, at 49.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id*. at 49–50; *see also* Aday & Krabill, *supra* note 113, at 252.

ring under the advice of physicians, the result is often irregular service and not conducive to a treatment regimen.[125]

Typically, the presumed goal of the prison system is to punish the guilty.[126] However, society does not include either torture or neglect tantamount to torture in the concept of punishment. In the landmark prisoners' rights case, *Estelle v. Gamble*, the Supreme Court announced that the Eighth Amendment[127] obliges the government to provide medical care for prisoners.[128] The ban on cruel and unusual punishment forbids not only torture but any penal measure incompatible with "the evolving standards of decency that mark the progress of a maturing society."[129] Because an inmate has no alternative but to rely on prison authorities for medical treatment, any "deliberate indifference" on the part of prison officials to the health care needs of inmates constitutes "unnecessary and wanton infliction of pain."[130] This standard applies whether the failure is prison doctors' indifference to a prisoner's medical needs, prison guards denying or delaying access to medical services, or any prison official intentionally interfering with prescribed treatment.[131]

The standard of "deliberate indifference" becomes especially unwieldy in practice when it is applied to elderly prisoners with many chronic complaints.[132] The state corrections budget in Florida, for example, is determined on a per-inmate basis and does not distinguish between the medical needs of individual prisoners.[133] Long-term imprisonment is expensive, even for healthy inmates.[134] The cost of housing a prisoner for thirty years has been estimated at one million dollars; the cost of housing a prisoner for fifty years has been estimated at over two million dollars.[135]

125. ANNO ET AL., *supra* note 40, at 50.
126. Aday & Krabill, *supra* note 113, at 247.
127. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
128. 429 U.S. 97, 103 (1976).
129. *Id*. at 102.
130. *Id*. at 102–03.
131. *Id*. at 104–05.
132. Taylor, *supra* note 22 ("An old man comes in complaining about pain in his lower back, and you treat it and get him out the door, forgetting about high blood pressure and diabetes.").
133. Mitka, *supra* note 9, at 423.
134. ADAY, *supra* note 15, at 89.
135. *Id*.

Jonathan Turley, director of Projects for Older Prisoners, notes withholding care is not "advanced seriously by corrections professionals and not suggested by any policymaker, even the most conservative."[136] In fact, prison officials make great efforts to comply with legal mandates and prescribed treatment regimens.[137] In addition, prison health care workers are often very proud of the level of service they provide and balance concern for safety and regulations with genuine affection for inmates. A registered nurse in a women's prison who regards medical care delivery in one institution as "excellent" felt it unlikely that any of the inmates would have access to the "quality of care that they can get here on [a] daily basis."[138] However, viewing the system as a whole, Turley seems to reach a different conclusion.[139] Turley believes "[p]rison health care is significantly below the quality of health care in normal society . . . the fact that we don't see an infusion of money going into prison hospitals may reflect a certain societal valuation of the prisoner's life and health."[140] Relieving the tension between prisoners' health care needs and budgetary constraints will require creative problem solving.

C. Whether to Separate or Mainstream the Elderly Inmate Population

Routine is the keystone of a prisoner's life.[141] To achieve the structure and discipline necessary to promote safety and stability, inmates are scheduled to leave their cells at a specified time, arrive at the dining hall at a specified time, and muster for sick call at a speci-

136. Taylor, *supra* note 22. Projects for Older Prisoners was founded in 1989 when Turley, then teaching at Tulane, enlisted law students to assist him in a program designed to reduce both the prisons' high operating costs and the number of broken-down elders who die behind bars for nonserious offenses. Susan Lundstrom, *Dying to Get Out: A Study on the Necessity, Importance, and Effectiveness of Prison Early Release Programs for Elderly Inmates Suffering from HIV Disease and Other Terminal Centered Illnesses*, 9 BYU J. PUB. L. 155, 175–76 (1994). Now a professor at George Washington University, Turley has built the organization into a nationally known volunteer project with the goal of reducing recidivist crime by more efficiently using available prison resources. *Id.* at 176. The organization identifies inmates with a low risk of recidivism and assists them in presenting parole and pardon requests to the appropriate authorities. *Id*. at 177.

137. ADAY, *supra* note 15, at 89.

138. Nawal H. Ammar & Edna Erez, *Health Delivery Systems in Women's Prisons: The Case of Ohio*, 64 FED. PROBATION 19, 24–25 (2000).

139. Taylor, *supra* note 22.

140. *Id*.

141. Massie Mara, *supra* note 59, at 41.

fied time.[142] The elderly and physically infirm can disrupt this routine because of their varying degrees of mobility.[143] In some prisons, special lines for inmates with crutches and canes allow prisoners of limited mobility to leave for a destination before their fellows, thus giving them more time to cover the distance and ensuring that all of the prisoners arrive at the same time.[144] This accommodation is important not only for routine but to provide elderly prisoners access to adequate service, such as seats in the cafeteria at mealtime.[145] Weighing the needs of elderly prisoners against the impact they have on the institution as a whole raises the vexing question of whether elderly inmates should be congregated (separated from the general prison population) or mainstreamed (meaning mixed in with their younger cohabitants.)[146]

D. Should Elderly Prisoners Be Granted Early Release?

Older inmates, both those that are convicted at an older age and those that age in prison, have a recidivism rate close to zero.[147] Burl Cain, the warden of Louisiana's Angola Prison, characterized this phenomenon as "criminal menopause," defined as the tendency of prisoners to lose their inclination to commit crimes.[148] Believing in the rehabilitative theory of incarceration, many observers question why society should spend resources on elderly prisoners after they are no longer dangerous.[149] Many suggest early-release programs for low-risk, elderly prisoners as a solution to both the high cost of housing elderly prisoners and the prison space shortage because money and space could be better used incarcerating dangerous felons.[150]

142. *Id*.
143. *Id*. at 41–42.
144. *Id*. at 42.
145. *Old in Jail*, *supra* note 83, at 04:45.
146. ANNO ET AL., *supra* note 40, at 50.
147. Patricia S. Corwin, Comment, *Senioritis: Why Elderly Federal Inmates Are Literally Dying to Get Out of Prison*, 17 J. CONTEMP. HEALTH L. & POL'Y 687, 687–88 (2001).
148. Abramsky, *supra* note 46; *see also* Fields, *supra* note 1. Angola was once one of the nation's bloodiest prisons. *Id.* At one point, it was not uncommon for a murder to take place there every month. *Id.* In the last decade there have been only four prison murders there. *Id.*
149. *Old in Jail*, *supra* note 83, at 06:40.
150. *See* Jonathan Turley, Op-Ed, *An "Old" Prison Solution*, L.A. TIMES, Oct. 7, 2006, at B17.

III. Analysis

A. The Use of Telemedicine in the Prison System to Lower Health Care Costs and Improve Access

Telemedicine has been used to increase prisoner access to health care.[151] Before its advent, one of the major health costs in treating prisoners was the amount of money required to transport sick prisoners to specialists.[152] The increasingly specialized nature of American health care has made access to specialist care more difficult in remote regions of a state where prisons are most likely to be located.[153] Telemedicine refers to "the use of electronic communication and information technologies to provide or support clinical care at a distance."[154] Telemedicine allows a physician to direct diagnostic devices and instantly receive information about persons who need treatment from miles away.[155] Thus, one specialist can serve many locations, and one location has access to the services of many different specialists.[156]

For example, in the geriatric ward of the J.W. Estelle prison in East Texas, providers use four different video cameras. One is located in the emergency room allowing prison officials the ability to consult with an emergency room doctor on weekdays until late in the evening.[157] In addition, the health records of the inmates are simultaneously made available to the consulting doctor.[158] Denise Box, Huntsville Cluster Practice Manager, says the geriatric population of the prison is very satisfied with the telemedicine system.[159]

151. *See* Christopher J. Caryl, *Malpractice and Other Legal Issues Preventing the Development of Telemedicine*, 12 J.L. & HEALTH 173, 181 (1998).

152. AM. COLL. OF EMERGENCY PHYSICIANS, TELEMEDICINE IN EMERGENCY MEDICINE 7 (1998), http://www.acep.org/NR/rdonlyres/BA992307-A653-43EA-8331-0CBD0964B7D2/0/telemedicine.pdf.

153. NAT'L INST. OF JUSTICE, TELEMEDICINE CAN REDUCE CORRECTIONAL HEALTH CARE COSTS: AN EVALUATION OF A PRISON TELEMEDICINE NETWORK iv (1999), *available at* http://www.ncjrs.gov/pdffiles1/175040.pdf.

154. OFFICE FOR THE ADVANCEMENT OF TELEHEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2001 TELEMEDICINE REPORT TO CONGRESS 1 (2001), *available at* ftp://ftp.hrsa.gov/telehealth/report2001.pdf.

155. NAT'L INST. OF JUSTICE, *supra* note 153, at 3.

156. *Id*. at 4.

157. Video: Health Care for the Geriatric Offender Population (University of Texas Medical Branch, East Texas Geriatric Education Center 2004) at 30:00, *available at* http://etgec.utmb.edu/default.asp?ActivityID=25 (Comments of Denise Box, Practice Manager for Correctional Managed Care and Dr. Bobby Vincent, Medical Director for the Estelle Complex).

158. *Id*.

159. *Id*. at 31:00.

In the Texas penal system, transporting a geriatric prisoner from the Texas-Arkansas border to Galveston for a hospital appointment is a complicated multiday trip involving overnight stays in other facilities and several transportation changes.[160] Upon a prisoner's return, there is no guarantee that he or she will be assigned to the same cell, meaning a trip to a specialist can jeopardize what may be a good, stabilizing relationship with a cellmate, placement on the ground floor, or a lower bunk.[161] In this context, it is easily understood why prisoners would embrace the new technology.[162]

Studies have shown high rates of satisfaction with the results of telemedicine consultations among both doctors and patients in several different settings including prisons.[163] An early demonstration of telemedicine in the federal prison system added remote consultation with specialist health care providers to the ordinary methods of prisoner health care delivery.[164]

Practitioners in some specialties have accepted telemedicine quickly and easily.[165] In other areas, such as cardiology, there has been less reliance on the new technology.[166] The overall result is both a decrease in conventional consultations and an increase in the total number of consultations.[167] Psychiatric consultations in particular quickly became the province of telemedicine almost eliminating conventional consultations altogether.[168] In fact, in one study prison officials estimated the availability of psychiatric telemedicine resulted in more effective medication and monitoring, allowed easier consultation in a crisis situation, and averted as many as thirteen costly emergency air transfers of inmates to the psychiatric ward of local federal medical centers.[169] Even without these emergency savings, the study estimated an average cost of $71 per telemedical consultation as opposed to $108 for a conventional, in-prison, specialist consultation.[170]

160. *Id*. at 34:00.
161. *Id*. at 35:00.
162. OFFICE FOR THE ADVANCEMENT OF TELEHEALTH, *supra* note 154, at 42–43.
163. NAT'L INST. OF JUSTICE, *supra* note 153, at 31.
164. *Id*. at 11–13.
165. *Id*. at 14 (teleconsultations substituted for and supplemented conventional in-prison consultations).
166. *Id*. at 15.
167. *Id*.
168. *Id*.
169. *Id*. at 17 (telemedicine averted costly transfers to federal medical centers).
170. *Id*. at 25 (implications of these findings for expanding telemedicine to other prisons).

Other benefits to telemedicine include shorter delays in consultation, because more physicians are available, and a greater availability of quality specialists.[171] One study reported the average waiting time to see a specialist dropped from ninety-nine days before the use of telemedicine to twenty-three days after, with the largest decreases in waiting time among orthopedic and dermatological consults.[172] In terms of specialist quality, something as simple as access to bilingual specialists was greatly improved by telemedicine, with prison health administrators particularly impressed by the improved quality of psychiatric care.[173] Telemedicine also allows specialists from a wide variety of fields, some previously unavailable in the prison system, to aid inmates.[174] For example, allowing HIV-positive patients to confer with specialists in infectious diseases.[175] With greater availability, telemedicine could also give elderly prisoners access to doctors with specialized training in gerontology.

Among the barriers to wider access to telemedicine implementation in the prison system are questions surrounding legal liability and cultural conflicts.[176] Many doctors are hesitant to get involved with telemedicine because it is new.[177] Uncertainty surrounds issues of FDA regulation, joint liability between presenting and consulting physicians, product liability, and interstate licensing (the majority of telemedicine now occurs on an intrastate basis).[178] In addition, physicians may still not recognize the use of this technology as an adequate substitute for face-to-face care.[179] Time will resolve both of these problems as data is released and the technology becomes more commonplace. However, in the short term, the use of telemedicine is likely to remain limited enough that elderly inmates should be congregated around telemedicine-equipped facilities to maximize the benefits of this new technology.

171. *Id*. at 28 (other benefits of telemedicine).
172. *Id*. According to the report, specialists typically enter prisons on a "scheduled, periodic basis." *Id.* Thus it is not surprising that the greatest drop in waiting time would come from less-common medical specialties.
173. *Id*. at 29 (quality of specialists).
174. *Id*. at 29–30 (access to new specialists).
175. *Id*.
176. AM. COLL. OF EMERGENCY PHYSICIANS, *supra* note 152, at 9.
177. *Id.*
178. *Id*.
179. *Id*.

B. Congregate Housing for Elderly Convicts to Help Concentrate Finite Resources and Provide a Healthier Environment

According to a report released by the National Institute of Corrections, many problems associated with providing special services to elderly inmates can be eased by placing the proper staff and resources in a central location.[180] "[O]utpatient subspecialty care, hospital inpatient care, and rehabilitative and supportive services are easier to make at congregate facilities and are more cost effective owing to economies of scale."[181] A central location would also make elderly care costs more stable and predictable.[182] Increased predictability would be enough to justify centralization, as most states do not record the health care costs of any particular group of inmates.[183]

Inmates with long-term or previous prison experience may feel more comfortable and respond better to an environment of their peers rather than one in which they are mixed with younger offenders.[184] Many administrators feel that elderly prisoners exert a calming influence on the younger population,[185] but that influence is reduced as the age of inmates, and the accompanying physical disparity with the younger population, increases.[186] In congregate care, the troubled elderly first-offender may also have an easier time "learning the ropes" from experienced fellow inmates closer to his own age.[187]

Additionally, congregate housing allows prison officials to take account of different ability levels when making disciplinary and work policies,[188] including for example, the amount of time an elderly prisoner is permitted to get on the floor in case of an alarm.[189] It also gives officials the ability to make efficient decisions about environmental issues, such as bunk assignments, bathing facilities, access to health care, and levels of light and sound.[190]

180. ANNO ET AL., *supra* note 40, at 50.
181. *Id*.
182. *Id*.
183. PRICE, *supra* note 18, at 11.
184. ANNO ET AL., *supra* note 40, at 51.
185. Fry, *supra* note 8, at 165.
186. Elmer H. Johnson, *Care for Elderly Inmates: Conflicting Concerns and Purposes in Prisons, in* OLDER OFFENDERS: PERSPECTIVES IN CRIMINOLOGY AND CRIMINAL JUSTICE, *supra* note 8, at 157, 163.
187. ANNO ET AL., *supra* note 40, at 51.
188. *Id*.
189. *See Prison Health*, *supra* note 38, at 311.
190. ANNO ET AL., *supra* note 40, at 51.

Congregate housing also provides a good training ground for health care staff interested in the growing field of gerontology.[191] Yet, any successful congregate housing scheme would require additional specialized training for the corrections officers and staff.[192] This training would include learning the signs of depression, the aging process, and the constraints of living with chronic illness.[193] Guards would have to be willing and empowered to account for the special needs of the elderly prisoner population while still maintaining discipline.[194] Distinguishing between an old inmate who has reached his physical limits, a cranky, stubborn senior citizen who needs motivation, and a malingering convict requires both a sensitivity and refinement of judgment not usually associated with prison guards.[195] Long-term elderly inmates tend to have fewer disciplinary issues than the prison population at large, however, and given the proper training, corrections staff should be able to make the adjustment.[196]

A report by the National Institute of Corrections states that "[i]n 2000, more than 3,200 state prison inmates died nationwide, approximately 78% of them from natural causes."[197] Natural causes does not necessarily mean age-related,[198] but as the average age of the inmate population increases, the number of age-related deaths will corre-

191. *Id*. at 52.

192. *Id*.

193. *Id*. In contrast, the Illinois basic corrections officer curriculum does not include any training on the special needs of elderly prisoners. *See* ILL. BASIC CORR. OFFICERS TRAINING CURRICULUM DEV. PROJECT, MINIMUM STANDARDS BASIC CORRECTIONAL OFFICERS TRAINING COURSE 1–80 (2004).

194. ANNO ET AL., *supra* note 40, at 52; s*ee also* Ammar & Erez, *supra* note 138, at 24. The author relates the comments of a prison health care worker whose patient suffered from recurrent chest pain. *Id.* at 24. Certain that the patient would have a heart attack soon, the worker made an appointment with a cardiologist and tried to arrange transport for the patient. *Id.* Learning several days later that the patient had not been taken to the specialist, she asked a corrections officer why. *Id.* He told the health care worker that there had been fog the day of the appointment and the guards were understaffed. *Id.* He proposed to take the patient the next week. *Id.*

195. ANNO ET AL., *supra* note 40, at 52.

196. *Id.*

197. *Id.*; *see also* Fields, *supra* note 1. The state of Texas buried forty-three prisoners in 1975. *Id.* That number is up to about one hundred per year. *Id.* In 2004, twenty-nine inmates at Louisiana's Angola Prison died of natural causes, up from six in 1984. *Id.* As of the time of the filing of the story, twenty-three had died already in 2005, none from inmate-on-inmate violence. *Id.*

198. Massie Mara, *supra* note 59, at 39 ("Younger inmates may have AIDS or Hepatitis C and need not only medical care but also, in the later stages of the illness, long-term care.").

spondingly rise.[199] Dying is a complicated business nowadays,[200] and even people in the noninstitutionalized population with high levels of education need assistance with finances, insurance, wills, living wills, and funeral arrangements.[201] Prisoners may need additional assistance reconciling or reestablishing ties with family before they die.[202] These kinds of issues are all beyond the scope of a prisoner's constitutional right to health care, but they are aims "in keeping with the progress of a maturing society,"[203] and, if provided, would be most efficiently provided in a congregate environment.[204]

Many administrators, however, favor integrating elderly prisoners with the general population and offer several arguments in favor of their position.[205] Mainstreaming ensures elderly prisoners' access to the same variety of prison programs available to the general population.[206] However, by moving elderly prisoners to a potentially distant facility, family visitation may be complicated exacerbating the erosion of family ties.[207] A lack of contact with younger inmates may reinforce a sense of isolation and make adjustment upon release more difficult.[208] Some prison administrators worry that any special privileges extended to elderly inmates may be perceived as unfair to the general inmate population, leading to disruptions in discipline, if not legal problems.[209] Proponents of mainstreaming believe they can address the problems of elderly inmates without centralizing them, at least for the time being.[210] Arguments for accommodating serious criminals also undercuts the punitive purpose for incarceration.[211]

As correctional systems around the country struggle with the challenges posed by the elderly inmate population, more and more have embraced the idea of separate housing for geriatric inmates.[212] Many states have created special-needs facilities or retrofitted old fa-

199. ANNO ET AL., *supra* note 40, at 52.
200. *See id*.
201. *Id*. at 52–53.
202. *Id*.
203. Estelle v. Gamble, 429 U.S. 97, 102 (1976).
204. ANNO ET AL., *supra* note 40, at 52–53.
205. Fry, *supra* note 8, at 165.
206. ANNO ET AL., *supra* note 40, at 51.
207. GRANT, *supra* note 42, at 5.
208. PRICE, *supra* note 18, at 10.
209. Fry, *supra* note 8, at 165.
210. ANNO ET AL., *supra* note 40, at 51.
211. *Id*. ("[A] hint of hostility is sometimes evident in the arguments of the more outspoken advocates of . . . mainstreaming.").
212. ADAY, *supra* note 15, at 153.

cilities to accommodate this population.[213] These facilities include Pennsylvania's State Correctional Institution at Laurel Highlands, originally a state mental hospital, which for the last decade has housed only elderly inmates or those with assisted living needs.[214] Another example is the sixty bed geriatric center in the W.J. Estelle prison in Huntsville, Texas.[215] Many of these facilities use their bunks not only for elderly prisoners but for disabled and other special needs inmates as well.[216] In these facilities, inmates share cells with those similarly situated.[217] These facilities provide assisted living care and such simple, but important, amenities as handrails, lower bunks on ground floor wings, and wheelchair ramps.[218] Projects for Older Prisoners also supports congregate housing, noting that "[m]ore than 50% of the costs of maintaining prisoners are attributed to the salaries . . . of correctional officers."[219] As Turley and others have observed, while elderly prisoners might still pose a risk for certain types of crime, it is unlikely that they would undertake a physically rigorous prison escape.[220] Thus, with a population of elderly prisoners, prison administrators could rely on fewer guards.

C. Early-Release Programs as a Functional Solution

Of the many proposals for dealing with the growing crisis, one of the most common is for increased reliance on different forms of early release.[221] Compassionate release can be granted to elderly pris-

213. *Id*.; *see also* Donna Halvorsen, *Geriatric Inmates; Move Is Afoot to Start State's First Nursing Home for Elderly Prisoners*, STAR-TRIBUNE (Minneapolis), June 5, 1995, at 3B (noting as many as one hundred beds in a state run nursing home could be used to house medium security geriatric inmates and the estimated cost to keep prisoners in this setting was ten dollars a day less than the seventy-four-dollar cost of keeping them in a conventional prison).

214. Abner, *supra* note 87, at 11.

215. Chris Schreiber, *Behind Bars: Aging Prison Population Challenges Correctional Health Systems*, NURSEWEEK, July 19, 1999, http://www.nurseweek.com/features/99-7/prison.html.

216. ADAY, *supra* note 15, at 153.

217. *Id*.

218. *Id*. at 154.

219. Turley, *supra* note 150.

220. *Id*. For a more tongue-in-cheek take, see *The Graying of America's Prisons*, THE ONION, July 23, 1997, http://www.onion.com/content/node/38198 ("I'll tell you one upside to this: [j]ailbreaks and riots will take on more of a comical, pathetic quality.").

221. *See* Turley, *supra* note 150.

oners who are terminally ill where permitted by statute,[222] but this practice is not often followed.[223] Early release may not affect enough inmates to make a difference and might merely shift the financial burden of their care onto other government agencies.[224] Carl Wicklund, executive director of the American Probation and Parole Association, stated that "[a]lthough corrections may reduce costs through early release, the cost to taxpayers doesn't necessarily go away . . . society may still be burdened by the costs for caring for an offender" because aging offenders upon release likely lack savings, employment prospects or family support.[225] Turley has proposed that funding for a postrelease plan for these prisoners could be offset by the savings of their early releases.[226] "[I]t can be the difference," he said, "between zero recidivism and greater recidivism."[227]

One scholar studying extended sentence reviews recently found there were 1617 inmates in the federal prison system age fifty or older, each of whom had already served fifteen years or more.[228] Of this group, 580 were convicted of violent offenses, 83 were convicted of weapons offenses, and 5 were convicted of arson and explosives offenses.[229] Drug-related offenses in this group were the plurality, and nonviolent offenses the wide majority.[230] But it appears there will still be a significant population of elderly prisoners sentenced for violent offenses who would not be eligible for most envisioned early-release programs.[231]

Projects for Older Prisoners has proposed a plan to establish programs in law schools to identify and evaluate prisoners with a low risk of recidivism combined with a system of supervised release and alternative forms of incarceration, such as electronic bracelet programs.[232] This proposal would be a valid alternative for those prison-

222. Nadine Curran, Note, *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, 260 (2000).
223. *Id.*
224. Abner, *supra* note 87, at 4.
225. *Id.*
226. *Id*.
227. *Id*.
228. Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 191 (2005). "At the individual level, the ESR is a blend of clemency (and compassionate release), and . . . discretionary parole release." *Id.* at 190.
229. *Id*. at 192 n.82.
230. *Id*. at 192.
231. *Id.*
232. Turley, *supra* note 150.

ers to whom the program applies, especially those serving life for nonviolent crimes sentenced under three-strikes laws. However, this kind of early release program cannot address the problem of those who commit crimes in middle-age and have not yet served much of their sentences, or those violent offenders for whose crimes society demands a harsher penalty. A well-organized and vocal segment of the general population opposes the early release of these inmates.[233] In a report to the Pennsylvania legislature analyzing this issue, the Advisory Committee on Geriatric and Seriously Ill Inmates details receiving 201 letters or phone calls from members of the public.[234] Of those addressing the release of geriatric and seriously ill inmates and parole eligibility for lifers, two people wrote in support of both, and nine wrote in support of parole eligibility and requested help obtaining release of a loved one.[235] Additionally, the executive director of a domestic violence group wrote to support eligibility for those who had been determined not to pose a threat to society, adding that release "may be far from compassionate, as they may have no family or support system to sustain them."[236] Six pages of the report consisted of letters from people—individuals whose loved ones were victims of crimes, district attorneys, the executive directors of a dozen victims rights groups—who contacted the Committee to express their opposition to early release.[237] Thus, it is difficult to imagine the upside for a politician in supporting these reforms, except in the most innocuous cases.

233. Dana DiFilippo, *Kind of an Inmates' Old-folks Home*, PHILADELPHIA DAILY NEWS, May 8, 2006, at 3–4 (comments of the sister of a murder victim).

234. JOINT STATE GOV'T COMM'N, REPORT OF THE ADVISORY COMMITTEE ON GERIATRIC AND SERIOUSLY ILL INMATES 217 (2005), *available at* http://jsg.legis.state.pa.us/Inmates%20Report.PDF.

235. *Id.* at 217–18.

236. *Id*.

237. *Id*. at 218–24. One client of the Center for Victims of Violence and Crime, Pittsburgh, writes:

> I know that it is expensive to keep an inmate in prison for the rest of his or her natural life. However, has the advisory committee considered what the homicide has cost my family? We lost our beloved son. . . .We raised a productive and contributing member of the workforce who paid his taxes, went to church and coached baseball. . . .Do you really think that we would feel compassion for the inmate who killed our son if he became terminally ill?

Id. at 218. More remarkable is a letter from a Pittsburgh inmate writing: "Many lifers are not interested in parole, as it would only be a way for the state to push seriously ill and geriatric inmates onto county or Federal government." *Id*. at 232.

One ongoing experiment taking place in Michigan bears watching. Michigan leads the Midwest in incarceration rates with a prison population of 480 per 100,000 residents, as opposed to Ohio with 400 or Illinois with 350.[238] The corrections budget of the state, at $1.9 billion, not only eclipses the state's spending on colleges, but uses nearly one-fifth of the state's general fund.[239] Governor Jennifer Granholm has moved to close one prison facility and reduce the number of state inmates by 10%.[240] This reduction is to be composed of the elderly, the medically infirm, and those prisoners who can be deported to other countries.[241] This experiment is being undertaken in the wake of a scandal involving a multiple murderer who had been mistakenly released from custody,[242] as well as other political fallout,[243] and will provide useful insight to other state governments.

Stories like that reported by Professor Edith Flynn of Northeastern University do nothing to help the profile of early-release programs.[244] In a radio interview, Flynn related the experience of a Michigan inmate, a double amputee aged sixty-five or sixty-six, who was confined to a wheelchair.[245] Within three weeks of securing a compassionate release, this inmate allegedly wheeled himself into a bank armed with a sawed-off shotgun and robbed it alongside two accomplices.[246] He was soon caught and returned to prison for life.[247] While this scenario sounds like a Hollywood heist movie,[248] the dam-

238. Op-Ed, *Sensible Inmate Releases Can Reduce State Costs*, DETROIT NEWS, Feb. 23, 2007, at 8A.
239. *Id*.
240. *Id*.
241. *Id*.
242. *Id*.
243. *See* Heinlein, *supra* note 30. A more troubling, but seemingly minor, undercurrent in the ongoing debate is that prison reforms will be a blow to state workers in an already troubled economy. *See* Chris Christoff & Cecil Angel, *Prison to Be Closed by July 1*, DETROIT FREE PRESS, Feb. 21, 2007, at 1 (comments of Jackson, Michigan, Mayor Jerry Ludwig). While there is no denying that the closing of a prison can be a major setback to the economy of a small community, the underlying suggestion that prisons should exist for anything besides public safety seems to put the cart before the horse in a most unhelpful way.
244. *Old in Jail*, *supra* note 83, at 08:08.
245. *Id*.
246. *Id*. at 8:25.
247. *Id*. at 8:40.
248. *See* WHERE THE MONEY IS (USA Films 2000); *see also* Roger Ebert, Op-Ed, *Where the Money Is*, CHI. SUN-TIMES, Apr. 14, 2000, at 32, *available at* http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/20000414/REVIEWS/4140305/1023.

age of such an occurrence to compassionate release programs is all too real.

IV. Recommendations

States are making some progress in studying and addressing this problem,[249] but any survey of the literature will show the same recommendations and gives little hope for a "magic bullet."[250] Nevertheless, there is one tremendous value to repetition. Sooner or later it attracts attention. Education and increased discourse on this matter are important because the problem presents such a clear choice for society, and one that speaks deeply about our goals. The ongoing situation in Michigan shows the crippling expense of simply locking criminals away forever and putting them out of our minds.

Societal revenge is becoming a luxury item. During the recent economic downturn, states with budget shortfalls sought to make cuts or find less-expensive alternatives to criminal justice programs, which often rank third-highest in state spending after education and health care.[251] Some states, such as Arkansas, Kentucky, Montana, North Dakota, Oklahoma, and Washington, as well as Michigan, have begun experimenting with early-release programs.[252]

With restricted funds, we as a society have to ask ourselves: what dollar value we want to put on a victim's claim for retribution? On the lives of those prisoners for whom the government has taken responsibility? On our image of ourselves as an enlightened society? Does the possibility of long prison sentences act as a deterrent to prospective criminals, or does it only prevent those who have already committed crimes from doing so again? It is easy for a politician to gain political currency by appearing tough on crime. But once that politician is out of office, criminals will still be serving time and society will still be footing the bill. If we do not find the money to meet the increasing health care demands of aging prisoners, are we doing any more than sentencing criminals to a slower version of the death penalty? Locking prisoners away and washing our hands of them is

249. Corwin, *supra* note 147, at 689.
250. PRICE, *supra* note 18, at 10.
251. Patrick McMahon, *States Revisit 'Get-Tough' Policies as Revenue Slows, Prisons Overflow*, USA TODAY, Aug. 10, 2003, at 3A, *available at* http://www.usatoday.com/news/nation/2003-08-10-crime-usat_x.htm.
252. *Id.*

not a new idea in penal science, but it is one that modern corrections professionals and observers might hope was left behind.

On the other hand, how do we confront the fact that other law-abiding elderly members of our society do not have nearly as much access to medical care? Furthermore, if the purpose of the prison system is rehabilitation rather than punishment, are resources not still better spent on younger inmates who have a greater chance of becoming productive members of society? These issues implicate all questions of elderly inmate care.

In addition to more public debate on the issue, the country needs to accept the cost of the burden it has undertaken. Early-release programs apply to only a small number of eligible convicts. The elimination of the life-without-possibility-of-parole sentence may help, but it would not impact the problem for decades as inmates now in the system live out their sentences. Its elimination would also remove an important compromise between death penalty advocates and opponents. Sentencing guidelines and parole restrictions should be reformed to prevent most nonviolent offenders from being incarcerated into their declining years. But all of these programs still end up leaving a significant population of elderly offenders destined to die behind bars. Eventually, prison systems will have to increase the number of centralized facilities that are equipped to provide for the particular challenges of elderly prisoners.

V. Conclusion

In the years since *Estelle v. Gamble*, the idea of the state's responsibility to provide health care for prisoners has achieved an unshakeable constitutional footing. As a result of the confluence of this responsibility, the graying of the Baby Boomers, and the tough-on-crime sentencing laws of the 1980s and 1990s, a crisis is in the making. While any real study of the issue is still in its adolescence, it is encouraging that state prison systems have taken the issue to heart, gathering information and implementing recommendations. While the federal prison system has lagged behind on the issue, it too will benefit from state experimentation.

While positive examples have been provided by some states, others still cling to a policy of mainstreaming. The disadvantages of the policy of mainstreaming outweigh any advantages; congregating the elderly prisoner population is easier and more cost-efficient. The

same online technology improving prison health care with telemedicine could also provide the elderly in separate housing with access to the same training programs as their fellow inmates in the general population, and therefore avoid discrimination. One of the chief obstacles to congregated housing remains the desire to keep imprisonment unpleasant for prisoners. Regardless of the political, if not the moral, appeal of this idea, sooner or later taxpayers will have to question whether prisoners' suffering justifies the expense of continued punishment.

The problem of aging inmates and increasing costs is not going to go away, and while early-release programs present promising results, they are not workable on a scale sufficient to solve the problem. State and federal prison systems should make an investment in congregated housing in the near future to bring those members of the prison population that are most vulnerable and the most in need of care into a central location where the greatest savings can be achieved.