

# Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders

JALILA JEFFERSON-BULLOCK\*

“[C]arest thou not that we perish?”<sup>1</sup>

*I am 70 years old, and I have eight more years to spend in this prison—if I make it. None of my other siblings lived to see their 71st birthday. Lots of the young guys in here still feel like they have something to prove. They pick fights with each other, talk stuff to the guards, smuggle drug, phones, movies, and liquor in. Me, I’m over that. I read the Bible, exercise, and try to be a good example to the other guys. That’s how I spend my days. I guess that’s all I would do if I were out too. Except, I wouldn’t have to do it alone. I think a lot about my wife, been married forty years. My kids are grown and moved all over the country. And my grandbabies, I never can see them. Not being with them, knowing that I may die in here, all alone—that’s punishment on top of punishment.<sup>2</sup>*

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\* Jalila Jefferson-Bullock is an Associate Professor of Law at Duquesne University School of Law. She received her A.B. from Harvard College in 1997, M.A. in the Humanities from the University of Chicago in 1999, and J.D. from Harvard Law School in 2001. Thank you to Professor Jelani Jefferson-Exum and Professor Jamila Jefferson-Jones for their comments; the participants at the 2015 Lutie Lytle Black Women Law Faculty Writing Workshop for their comments; the participants at the 2018 Marquette University Law School Works-in-Progress Conference; Ryan Dorn, Adrienne Box, Ashlyn Grim, Joanne Parise, Maura Perri, and Brazitte Poole, my research assistants, for their excellent research and citation support; William J. Jefferson and Andrea G. Jefferson for their comments and constant encouragement; and Torey Bullock for his unfailing support.

<sup>1</sup> Mark 4:38 (King James).

<sup>2</sup> The subject is an ex-offender who is well known to the author. He wishes to remain anonymous.

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I. INTRODUCTION

Sentencing reform appears resurrected.<sup>3</sup> Following a brief hiatus and an expectedly unwelcoming recent federal response, sentencing reform is again reemerging as a major initiative.<sup>4</sup> Congress and the several states are poised to

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<sup>3</sup> See generally Peter Baker, '16 Rivals Unite in Push to Alter Justice System, N.Y. TIMES, Apr. 28, 2015, at A1 (covering the stances of the 2016 Presidential candidates); Peter Baker, Bill Clinton Disavows His Crime Law as Jailing Too Many for Too Long, N.Y. TIMES, July 16, 2015, at A16 (reporting Bill Clinton’s retraction of his tough-on-crime stance); Kelly Cohen, Criminal Justice Reform Poised to Take Off in 2018, WASH. EXAMINER (Dec. 30, 2017), <http://www.washingtonexaminer.com/criminal-justice-reform-poised-to-take-off-in-2018/article/2644603> [<https://perma.cc/3GVH-DNCU>] (exploring bipartisan support for criminal justice reform at the federal and state levels); Erik Eckholm, A.C.L.U. in \$50 Million Push to Reduce Jail Sentences, N.Y. TIMES, Nov. 7, 2014, at A14 (describing the A.C.L.U.’s efforts to reduce the incarceration rate); Editorial, Ending the Rikers Nightmare, N.Y. TIMES, June 24, 2015, at A22 (discussing attempted reforms and legal battles at Rikers Island); Editorial, Justice Kennedy’s Plea to Congress, N.Y. TIMES, Apr. 5, 2015, at SR10 (responding to Justice Kennedy’s stance that “total incarceration just isn’t working”); Bill Keller, Prison Revolt: A Former Law-and-Order Conservative Takes a Lead on Criminal-Justice Reform, NEW YORKER (June 29, 2015), <https://www.newyorker.com/magazine/2015/06/29/prison-revolt> [<https://perma.cc/6CCD-7GV9>] (explaining how “law-and-order conservative[s]” and liberals have found common ground in the effort to reduce the prison population).

<sup>4</sup> See Justice Reinvestment Initiative Brings Sentencing Reforms in 23 States, PEW CHARITABLE TR. (Jan. 22, 2016), available at <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/01/states-modify-sentencing-laws-through-justice-reinvestment> [<https://perma.cc/8DYT-RCXG>] (tracking various state sentencing reforms). See generally NICOLE D. PORTER, THE SENTENCING PROJECT, TOP TRENDS IN STATE CRIMINAL JUSTICE REFORM, 2017, (Jan. 2018), available at <https://www.sentencingproject.org/wp-content/uploads/2018/01/Top-Trends-in-State-Criminal-Justice-Reform-2017.pdf>

immediately accomplish major reform of the United States criminal sentencing structure.<sup>5</sup> Proposals that would, among other initiatives, drastically reduce criminal sentences, restore rehabilitative programs to inmates, generate sentencing parity, normalize probation for low-level offenses, and shrink the overall prison footprint are ambling through various legislative processes throughout the country.<sup>6</sup> Though groundbreaking and certainly welcome, these reforms largely ignore the special needs of the imprisoned elderly. One of the most foreseeable, yet ironically ignored, consequences of 1980's and 1990's harsh sentencing laws, is the dramatic upsurge in prison population through the predictable process of human aging. Coined the prison "silver tsunami" phenomenon, surging numbers of elderly inmates raises significant moral, health, and fiscal implications deserving keen scrutiny.<sup>7</sup> It is imperative, then, that any overhaul of criminal sentencing focuses on how to meaningfully address the graying of America's prisons.

Penned a "national human-made epidemic,"<sup>8</sup> the rapid growth of the elderly offender population requires immediate attention and corrective action. Presently, elderly inmates comprise a staggering 19% of the total prison population, a number continuing to rise.<sup>9</sup> The cost of medical care for elderly

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[<https://perma.cc/DH4E-CWM2>] (discussing states considering or that have already implemented sentencing reform legislation); Cohen, *supra* note 3 (discussing bipartisan support for sentencing reform). *But see* Editorial, *Donald Trump and the Undoing of Justice Reform*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/17/opinion/sunday/donald-trump-and-the-undoing-of-justice-reform.html> [on file with *Ohio State Law Journal*].

<sup>5</sup> See, e.g., Sentencing Reform and Corrections Act of 2017, S. 1917, 115th Cong. (2017); Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers in our National System Act of 2017, S. 1994, 115th Cong. (2017); Mens Rea Reform Act of 2017, S. 1902, 115th Cong. (2017); Prison Reform and Redemption Act, H.R. 3356, 115th Cong. (2017); Cohen, *supra* note 3. States, too, are joining this renewed criminal justice reform movement. Michigan, Florida, and Louisiana, among others, are currently undergoing massive sentencing reforms. *Id.*

<sup>6</sup> See *supra* note 5 and accompanying text.

<sup>7</sup> Martina E. Cartwright, *The Silver Tsunami: Aging Prisoners, Early Release, Guardianship and Prisoner Advocate Initiatives for Long Term Care Beyond the Prison Walls*, 1 TOURO L. CTR. J. AGING, LONGEVITY, L., & POL'Y 54, 54 (2016), available at <https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1003&context=jallp> [<https://perma.cc/CB59-65WG>]; see OSBORNE ASS'N, THE HIGH COSTS OF LOW RISK: THE CRISIS OF AMERICA'S AGING PRISON POPULATION 2 (July 2014), available at <http://www.osbornenry.org/news/unite-for-parole-and-prison-justice/osborne-aging-white-paper/> [<https://perma.cc/7S8N-A3BP>].

<sup>8</sup> OSBORNE ASS'N, *supra* note 7, at 2; see also Matthew Clarke, *Report Finds Fiscal Crisis of Increasing Low-Risk, High-Cost Older Prisoners*, PRISON LEGAL NEWS (Aug. 4, 2016), <https://www.prisonlegalnews.org/news/2016/aug/4/report-finds-fiscal-crisis-increasing-low-risk-high-cost-older-prisoners/> [<https://perma.cc/Z3YF-RY2U>] (reacting to the Osborne Association report).

<sup>9</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS 2 (May 2015),

offenders is five times greater for prisons with the greatest elderly population compared to those with the least amount of elderly inmates, due, in large part, to factors that naturally accompany growing older.<sup>10</sup> Prisoners, however, age even more rapidly than members of the unincarcerated general population, and therefore require varied medications, special diets, social interventions, and individualized supervision earlier.<sup>11</sup> By their own admission, prisons are ill-equipped to manage the mammoth health care, social, and other costs associated with imprisoning the elderly.<sup>12</sup> The costs of incarcerating aged offenders is, quite unsustainable.<sup>13</sup>

Additionally, continued incarceration of most classes of elderly offenders frustrates retributive and utilitarian goals of punishment, thereby creating a legal and moral punishment quandary. 18 U.S.C. § 3553(a) sets forth purposes of federal criminal punishment—retribution, deterrence, incapacitation, and rehabilitation.<sup>14</sup> Similarly, states must focus on all four recognized theories of punishment in their sentencing schemes.<sup>15</sup> For many aging in prison, enforcing sentences based on these factors is misaligned with modern punishment theories, rendering them illogical, unfair, and unnecessary.

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<https://oig.justice.gov/reports/2015/e1505.pdf> [<https://perma.cc/8QDL-XHPA>] [hereinafter IMPACT OF AN AGING INMATE POPULATION].

<sup>10</sup> *See id.* at ii, 51.

<sup>11</sup> *Id.* at 1–2.

<sup>12</sup> *Id.* at 16–17 (discussing the increased needs of older inmates compared to their younger counterparts and noting, “according to BOP officials, staff, and inmates, institutions lack adequate health services staff to address these needs”).

<sup>13</sup> *See, e.g.*, JULIE SAMUELS ET AL., URBAN INST., *STEMMING THE TIDE: STRATEGIES TO REDUCE THE GROWTH AND CUT THE COST OF THE FEDERAL PRISON SYSTEM* 7, 38 (Nov. 2013), available at <http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf> [<https://perma.cc/AAE3-3KNL>] (concluding that federal prison population growth is unsustainable and suggesting an expansion of compassionate release programs as one of many needed improvements); *see also* Editorial, *Prison Reform: Seize the Moment*, CHRISTIAN SCI. MONITOR (Aug. 12, 2013), <http://www.csmonitor.com/Commentary/the-monitors-view/2013/0812/Prison-reform-Seize-the-moment> [on file with Ohio State Law Journal] [hereinafter *Prison Reform*] (urging lawmakers to pursue sentencing reform). Eric Holder, U.S. Attorney Gen., Remarks at the Annual Meeting of the American Bar Association’s House of Delegates, in 26 FED. SENT’G REP. 75, 75–78, Dec. 2013 (also concluding that prison population growth is unsustainable and suggesting an expansion of compassionate release programs as one of many needed improvements); Memorandum from Michael E. Horowitz, U.S. Inspector Gen., U.S. Dep’t of Justice, to Eric Holder, U.S. Attorney Gen., U.S. Dep’t of Justice, Top Management and Performance Challenges Facing the Department of Justice (Dec. 11, 2013, reissued Dec. 20, 2013), available at <http://www.justice.gov/oig/challenges/2013.htm> [<https://perma.cc/AQB3-STPL>] (listing the “growing crisis in the federal prison system” as a top management and performance challenge).

<sup>14</sup> 18 U.S.C. § 3553(a) (2012).

<sup>15</sup> *See* PAUL H. ROBINSON ET AL., *CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES* 95–105 (4th ed. 2016). “Few observers would advocate reliance on a single one of these principles to the exclusion of all others, and probably no actual criminal-justice system has such a single-minded focus.” *Id.* at 95.

Further, current literature supports the theory of aging out of crime, a position that must be considered when justifying continued incarceration of the elderly.<sup>16</sup> According to the aging out theory, the propensity to engage in risky behaviors and commit crime is, in many ways, intimately connected to age.<sup>17</sup> Studies consistently isolate age as one of the most significant predictors of criminality for most crimes, with the likelihood to commit crimes peaking in late adolescence or early adulthood and decreasing as a person ages.<sup>18</sup> Many scholars agree that incarceration of most classes of elderly offenders is not necessary to deter crime, nor is it as fair, as retribution requires.<sup>19</sup>

One of the most seemingly promising proposals to quell the silver tsunami in federal prisons proved incredibly ineffective. In 2013, the Obama administration attempted to decrease the prison population by expanding federal compassionate release criteria to include early release of certain classes of elderly inmates.<sup>20</sup> Prior to this 2013 initiative, participation in the compassionate release process was limited to prisoners who could demonstrate sufficiently “extraordinary and compelling” circumstances warranting early release, including terminal illness, debilitating medical condition, and unique family caregiving responsibilities.<sup>21</sup> This Department of Justice-led proposal to include age among the categories that might give rise to extraordinary and compelling circumstances warranting a compassionate relief was lauded, generally, as a much needed inclusion.<sup>22</sup> Sadly, however, the 2013 reconfiguration of prisoner eligibility failed to provide any cognizable relief from prison graying. This is so because the Bureau of Prisons remains as the strict, less than compassionate gatekeeper, awarding only two aged-based compassionate releases since the 2013 amendment.<sup>23</sup> In its current form, compassionate release is not a reliable solution. This Article argues that because of the widespread agreement that the aging out of crime theory is solid and dependable, federal compassionate release policies must be reformed

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<sup>16</sup> *Infra* Part VI.B.

<sup>17</sup> *Infra* Part VI.B.

<sup>18</sup> *Infra* Part VI.B.

<sup>19</sup> *Infra* Part VI.B.

<sup>20</sup> See Holder, *supra* note 13, at 78; see also 18 U.S.C. § 3582(c) (2012) (relying on the notion that changed circumstances post-sentencing may render a criminal sentence inhumane, excessive, unjust, and, therefore, unwarranted, compassionate release allows for the early release of prisoners for extraordinary and compelling reasons); Jalila Jefferson-Bullock, *Are You (Still) My Great and Worthy Opponent?: Compassionate Release of Terminally Ill Offenders*, 83 UMKC L. REV. 521, 521 (2015).

<sup>21</sup> 18 U.S.C. § 3582(c) (2012).

<sup>22</sup> See Holder, *supra* note 13, at 78; *Prison Reform*, *supra* note 13.

<sup>23</sup> IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 45. See also Christie Thompson, *Little “Compassionate” About New Prison Release Initiative for Elderly, Ill*, SALON (Dec. 6, 2013), [http://www.salon.com/2013/12/06/bureaucrats\\_kept\\_this\\_woman\\_from\\_being\\_with\\_her\\_dying\\_husband\\_partner/](http://www.salon.com/2013/12/06/bureaucrats_kept_this_woman_from_being_with_her_dying_husband_partner/) [<https://perma.cc/9GHV-FZHM>] (finding that “prison officials still have almost total discretion over who is approved” for compassionate release).

immediately so that compassionate release is granted to all members of certain classes of elderly offenders for two principal reasons: (1) incarceration of certain classes of elderly offenders does not serve any retributive or deterrent purpose of punishment; and (2) incarceration of the elderly is fiscally unsound. This Article ultimately proposes a novel compassionate release model directly aligned with the underlying purposes of federal criminal punishment.<sup>24</sup>

This Article advocates for federal compassionate release of a certain class of elderly prisoners. Compassionate release, properly designed, stands as the most appropriate existing vehicle for unconditional immediate release of qualifying elderly inmates. With broadened application, compassionate release's original goal of providing judges the authority to offer compassion by granting release to worthy offenders for extraordinary and compelling reasons can be fulfilled. This Article does not propose that all elderly offenders be released; nor does it suggest that, for particularly heinous crimes, some very long prison terms may not be justified. Instead, it offers a new model of compassionate release which safeguards basic humanity and morality, ensures that offenders are fairly punished, meaningfully addresses the unsustainable fiscal and social costs of our present prison system, and vindicates the legitimate interest of the public in its safety.

Part I of this Article identifies the class of elderly offenders who would most benefit from a broadened compassionate release program. Part II contemplates the phenomenon of aging generally, and explores the special needs of the aging population and the policies and accommodations in place to meet those needs. Part III examines the loss of dignity that necessarily accompanies a criminal conviction, and discusses its role in stripping elderly prisoners of the benefits and considerations discussed in Part II. Part IV outlines the Bureau of Prisons-controlled federal compassionate release process, analyzes its critical flaws, and explains why so few elderly offenders benefit from it. Part V explores retributive and deterrent theories of punishment, applies them to current compassionate release practices, and concludes that realization of theories of punishment requires a broader application of compassionate release. Part VI calculates the cost of incarcerating the elderly, and concludes that fiscal responsibility requires broadened compassionate release policies. Finally, Part VII proposes a novel model of compassionate release that assures immediate release of deserving elderly offenders, while ensuring that punishment is proper and preserves community safety.

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<sup>24</sup> While this Article focuses on federal compassionate release, arguments articulated, principles relied upon, and any strategies taken by the federal government to correct and cure its compassionate release program may be replicated by the states.

## II. WHICH ELDERLY OFFENDERS SHOULD BE COMPASSIONATELY RELEASED?

The question of who is elderly is not plainly resolved.<sup>25</sup> According to scholars, “Social Security retirement benefits . . . begin at age sixty-five, or sixty-two if one takes ‘early’ retirement,” while “the Older Americans Act provides benefits for persons aged sixty and over.”<sup>26</sup> The elderly classification, however, is accelerated for inmates, and can include individuals as young as fifty.<sup>27</sup> For example, a 2012 report by the American Civil Liberties Union designates prisoners aged fifty and older as elderly, citing “poor health before entering prison and the stress of confinement once there” as factors leading to more rapid aging among prisoners.<sup>28</sup>

Scholars describe three main classes of elderly offenders: (1) those imprisoned for the first time; (2) those with long criminal histories who, for years, have alternated between freedom and incarceration; and (3) those who grow old in prison after being sentenced to a deservedly long sentence for a serious crime.<sup>29</sup> In analyzing appropriate sentence outcomes for these three classes of elderly offenders, scholars note that the first group “often commits serious crimes, has adjustment problems, and is at the highest risk for victimization by other inmates,” “the second group adjusts to prison life, but often lacks the skills necessary to cope in the community,” and “[t]he third group adjusts well to institutional life, but is very difficult to place in the community.”<sup>30</sup> These various attributes are used to prove levels of culpability and justify punishment.<sup>31</sup> Under this model, the first class of offenders might be considered less dangerous, not deserving of prison time, and more suited for rehabilitation, diversion, or probation.<sup>32</sup> Their transgressions may be fueled by sudden substance abuse, mental decline, or financial troubles that occur later in

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<sup>25</sup> See Linton Weeks, *An Age-Old Problem: Who Is ‘Elderly’?*, NPR (Mar. 14, 2013), <http://www.npr.org/2013/03/12/174124992/an-age-old-problem-who-is-elderly> [<https://perma.cc/4JNZ-TJDB>] (discussing the shifting definition of “elderly”).

<sup>26</sup> William E. Adams, Jr., *The Incarceration of Older Criminals: Balancing Safety, Cost, and Humanitarian Concerns*, 19 NOVA L. REV. 465, 467 (1995).

<sup>27</sup> For example, “[t]he National Institute of Corrections chooses the even younger age of fifty as the age which defines the older criminal.” *Id.*

<sup>28</sup> Kevin Johnson & H. Darr Beiser, *Aging Prisoners’ Costs Put Systems Nationwide in a Bind*, USA TODAY (July 10, 2013), <https://www.usatoday.com/story/news/nation/2013/07/10/cost-care-aging-prisoners/2479285/> [<https://perma.cc/K78G-VWGF>]. Following any or all of these models, approximately 250,000 state and federal prisoners may be classified as elderly. *Id.*

<sup>29</sup> See Adams, *supra* note 26, at 482.

<sup>30</sup> *Id.*

<sup>31</sup> See *id.* at 476.

<sup>32</sup> See *id.* at 477 (noting that “imprisoning people past a stage where they are dangerous, particularly if more dangerous criminals are released, puts society at greater risk of harm,” but also warning that giving older prisoners preferential treatment “raises special problems for probation officers”).

life, which may garner sympathy during sentencing.<sup>33</sup> The second group may be viewed as troublesome career criminals, with a higher propensity to engage in criminal behavior.<sup>34</sup> They, too, often succumb to substance abuse problems and experience mental health issues, but these problems are viewed as occurring throughout their adult lifetime and as the main reason why they are unable to escape the criminal justice system permanently.<sup>35</sup> Retributive punishment theory would punish them harshly, while deterrent principles might consider them desirable candidates for robust rehabilitation. The final category of offenders is subject to the most severe of criminal penalties for the most offensive of crimes.<sup>36</sup> They are considered, universally, as unsympathetic characters, whose incarcerative term must be exceedingly protracted in order to satisfy the tenets of retribution and deterrence.<sup>37</sup> There is, however, a fourth category of elderly offender which bears consideration. This Article proposes an additional concrete category which borrows qualities from the existing three. This final category is the one to which broadened compassionate release application must apply.

This new category consists of elderly prisoners who are victims of the unreasoned, excessively long sentences produced by so-called sentencing reform and its spillover effects.<sup>38</sup> Members of this fourth category may or may not be first time offenders, may or may not have long criminal histories, and have not been adjudged guilty of a heinous crime, but are serving lengthy sentences. This group deserves relief in the form of compassionate release. In addition to the unsustainable and steadily rising cost of imprisoning them, their continued incarceration offends acceptable and humane theories of punishment.<sup>39</sup> The essence of the problem is that this crisis is not set to expire without reform. It is here to stay and will only grow worse as offenders with lengthy sentences continue to age. Further, close scrutiny of our punishment system reveals that many elderly offenders would have been released years ago under a fairer, less stringent sentencing regime. The blame falls squarely on our government's lack of foresight and the inattention of the larger population.

In previous works, this author has argued that excessive sentences of incarceration are unreasoned, unfair, misaligned with theories of punishment, and must be amended forthwith.<sup>40</sup> In a misguided effort to reduce a perceived

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<sup>33</sup> See *id.* at 477–78.

<sup>34</sup> See *id.* at 480.

<sup>35</sup> See Adams, *supra* note 266, at 472.

<sup>36</sup> See *id.* at 482.

<sup>37</sup> See *id.* at 476.

<sup>38</sup> See IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 3.

<sup>39</sup> See *infra* Part V.

<sup>40</sup> See Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 73 (2014) [hereinafter *The Time Is Ripe*]; see also Jalila Jefferson-Bullock, *How Much Punishment Is Enough?: Embracing Uncertainty in Modern Sentencing Reform*, 24 J.L. & POL'Y 345, 398 (2015) [hereinafter *How Much Punishment Is Enough?*].



increase in crime and weaken judges' and parole boards' unfettered discretion in sentencing, reform seekers formed unlikely bipartisan support, and crafted, rather quickly, policies that continue to guide our criminal justice system. As a result of these collective efforts, Congress passed the "precedent-shattering" Comprehensive Crime Control Act of 1984.<sup>41</sup> It created the Sentencing Reform Act (SRA) and formed the Sentencing Commission, which established Sentencing Guidelines "regarding the appropriate form and severity of punishment for offenders convicted of federal crimes."<sup>42</sup> The SRA charged the Sentencing Commission to address Congress's concerns in the following three areas: "(1) [structuring] the previously unfettered sentencing discretion accorded federal trial judges . . . (2) [making] the administration of punishment . . . more certain; and (3) [targeting] specific offenders . . . for more serious penalties."<sup>43</sup> The SRA required imprisonment to be determinate in length, abolished parole, and rendered release subject to "good behavior" credits only.<sup>44</sup> The Sentencing Commission's legacy endures in the form of harsh mandatory sentences,<sup>45</sup> reduced parole opportunities,<sup>46</sup> and overcrowded prisons.<sup>47</sup>

This self-imposed tradition of imprisoning offenders for overly-lengthy periods of time has not produced its intended outcome. There remains "little evidence of any link between crime rates and imprisonment."<sup>48</sup> Further,

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<sup>41</sup> JORDAN BAKER ET AL., A SOLUTION TO PRISON OVERCROWDING AND RECIDIVISM: GLOBAL POSITIONING SYSTEM LOCATION OF PAROLEES AND PROBATIONERS 16 (Gemstone Program, Univ. Md. eds., 2002); *see also* U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION, *available at* [http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/USSC\\_Overview.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf) [<https://perma.cc/8FHY-5WTT>].

<sup>42</sup> *See* U.S. SENTENCING COMM'N, *supra* note 41, at 1.

<sup>43</sup> *Id.* Prior to sentencing standardization, judges enjoyed wide discretion in imposing indeterminate sentences. *See* BAKER ET AL., *supra* note 41, at 16.

<sup>44</sup> BAKER ET AL., *supra* note 41, at 16–17.

<sup>45</sup> *Id.* at 17; *see, e.g.*, FAMILIES AGAINST MANDATORY MINIMUMS, FEDERAL MANDATORY MINIMUMS (Nov. 11, 2015), *available at* <https://famm.org/wp-content/uploads/Chart-All-Fed-MMs.pdf> [<https://perma.cc/SEK3-Y4D6>] (providing a chart that shows the various statutes, offenses, sentence lengths, and dates of enactment of federal mandatory minimums); Russell L. Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269, 310–13 (2005) (criticizing mandatory minimum sentences from a retributivist perspective).

<sup>46</sup> *See, e.g.*, Press Release, Justice Policy Inst., How to Safely Reduce Prison Populations and Support People Returning to Their Communities (June 2010), [http://www.justicepolicy.org/images/upload/10-06\\_fac\\_forimmediaterelease\\_psa.pdf](http://www.justicepolicy.org/images/upload/10-06_fac_forimmediaterelease_psa.pdf) [<https://perma.cc/3QV9-8HRA>].

<sup>47</sup> Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 103–04 (1988); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-121, BUREAU OF PRISONS: OPPORTUNITIES EXIST TO ENHANCE THE TRANSPARENCY OF ANNUAL BUDGET JUSTIFICATIONS 1 (Dec. 2013), *available at* <http://www.gao.gov/assets/66/0/659518.pdf> [<https://perma.cc/9FJB-B6ZR>] (finding the federal inmate population has grown 27% between 2003 and 2013).

<sup>48</sup> *See* Weigel, *supra* note 47, at 104–05.

lengthier sentences increase recidivism, frustrate rehabilitation efforts, and are unfair and undeserved for most, if not all, offenses.<sup>49</sup> This sentencing scheme, born of the SRA, failed to achieve the uniformity, fairness, or crime control sought by reformers. For elderly offenders, however, the outcome is far worse. Category four elderly offenders are growing old and dying in prison because their initial sentences were overly-lengthy.<sup>50</sup>

Due to purported sentencing reforms, category four elderly prisoners remain the largest growing demographic in all prisons. Between 1993 and 2003, prisoners aged forty-five to forty-nine were the most rapidly increasing age demographic in correctional facilities.<sup>51</sup> Ten years later, by 2013, many had aged into the elderly prisoner category, and were not near sentence completion.<sup>52</sup> In 2000, three percent of the prison population was aged fifty-five and older. That number had risen to eight percent by 2010.<sup>53</sup> This represents a one hundred 66% increase in just one decade.<sup>54</sup> Further, there are over 150,000 prisoners over age fifty-five in state or federal correctional facilities.<sup>55</sup> Of that number, the population aged sixty-five and over is growing most rapidly.<sup>56</sup> In 2007, there were 16,100 prisoners over age sixty-five.<sup>57</sup> By 2010, the number

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<sup>49</sup> See, e.g., PAUL GENDREAU ET AL., PRISON POLICY INITIATIVE, THE EFFECTS OF PRISON SENTENCES ON RECIDIVISM (1999), available at <http://www.prisonpolicy.org/scans/e199912.htm> [<https://perma.cc/TNJ8-FCC7>] (citing D. R. Jaman et al., *Parole Outcome as a Function of Time Served*, 12 BRIT. J. CRIMINOLOGY 5, 7 (1972)) (“[T]he inmate who has served a longer amount of time, becoming more prisonised in the process, has had his tendencies toward criminality strengthened and is therefore more likely to recidivate than the inmate who has served a lesser amount of time.”); VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 6 (2010), available at <https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf> [<https://perma.cc/ARE3-NTPN>] (“[L]onger prison sentences were associated with a three percent increase in recidivism. Offenders who spent an average of 30 months in prison had a recidivism rate of 29%, compared to a 26% rate among prisoners serving an average sentence of 12.9 months.”); Jelani Jefferson Exum, *Forget Sentencing Equality: Moving from the “Cracked” Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95, 122–30 (2014) (explaining the failure of lengthy drug sentences to satisfy any purposes of punishment); Shawn D. Bushway & Emily G. Owens, *Framing Punishment: Incarceration, Recommended Sentences, and Recidivism*, 56 J.L. & ECON. 301, 304 (2013) (estimating that “a 10 percent increase in the recommended sentence . . . is associated with a 1.2 percent increase in recidivism”).

<sup>50</sup> See Jefferson-Bullock, *The Time Is Ripe*, *supra* note 40, at 82–83.

<sup>51</sup> See NAT’L ASS’N OF AREA AGENCIES ON AGING, SUPPORTING AMERICA’S AGING PRISONER POPULATION: OPPORTUNITIES & CHALLENGES FOR AREA AGENCIES ON AGING 4–5 (Feb. 23, 2017), [https://www.n4a.org/Files/n4a\\_AgingPrisoners\\_23Feb2017REV20\(2\).pdf](https://www.n4a.org/Files/n4a_AgingPrisoners_23Feb2017REV20(2).pdf) [<https://perma.cc/9AZU-9MPE>].

<sup>52</sup> See *id.* at 5.

<sup>53</sup> See *id.* at 4.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> NAT’L ASS’N OF AREA AGENCIES ON AGING, *supra* note 51, at 4.

<sup>57</sup> *Id.*

had grown to 26,200, representing a 63% increase.<sup>58</sup> According to a recent study, 41% of prisoners aged fifty-one or older are serving prison terms of more than twenty years or life sentences, and 20% of prisoners aged sixty-one to seventy are currently serving prison sentences of more than twenty years.<sup>59</sup> This compares to 11% of prisoners between the ages of thirty-one and forty who are serving prison terms that exceed twenty years.<sup>60</sup>

The federal prison population is faring far worse than those in state prisons, is growing more quickly, and will continue to age.<sup>61</sup> According to Human Rights Watch, 7,771 federal prisoners are serving sentences ranging from thirty years to life, while “[a]nother 12,612 have sentences of 20 to 30 years.”<sup>62</sup> Between 2000 and 2009, the number of federal prisoners aged fifty-one and over increased by 76%, from 14,275 to 25,160.<sup>63</sup> By comparison, the federal prison population only grew 43%, from 129,329 to 185,273.<sup>64</sup> The phenomenon is that older prisoners are now serving longer sentences than younger prisoners.<sup>65</sup> While the aforementioned prison terms are set for a specified term of years, “in practice they will amount to life sentences”<sup>66</sup> for many elderly offenders. It bears remembrance that the SRA extinguished the federal parole system, and that, for most of these offenders, early release is not an option. It is imperative, then, that the United States remedy its mistake immediately by broadening compassionate release standards so that they apply to category four elderly offenders. A close look at aging in America further reveals the travesty that has befallen these offenders.

### III. AGING IN AMERICA

The deteriorations concomitant with aging affect both those who are imprisoned and those who are free. Assessing the condition of and intentional care afforded to older, unincarcerated Americans is critical to understanding the maltreatment of elderly inmates. The population of older Americans is among the most rapidly growing in the country, and is projected to reach 89 million by 2050.<sup>67</sup> This figure represents more than double the elderly population in

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<sup>58</sup> *Id.*

<sup>59</sup> See HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 26 (Jan. 2012), [http://www.hrw.org/sites/default/files/reports/usprisons\\_0112webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/usprisons_0112webwcover_0.pdf) [<https://perma.cc/529F-5VFR>].

<sup>60</sup> *Id.*

<sup>61</sup> See *id.* 33–34.

<sup>62</sup> *Id.* at 41.

<sup>63</sup> *Id.* at 40.

<sup>64</sup> *Id.*

<sup>65</sup> See HUMAN RIGHTS WATCH, *supra* note 59, at 26.

<sup>66</sup> *Id.* at 30.

<sup>67</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH AND HUMAN SERVS., THE STATE OF AGING AND HEALTH IN AMERICA 2013 1 (2013), available at <http://www.cdc.gov/aging/pdf/state-aging-health-in-america-2013.pdf> [<https://perma.cc/5V4J-ZPRJ>] [hereinafter STATE OF AGING 2013].

2010.<sup>68</sup> In addition to being highly populous, older people are also among the most vulnerable of populations due, in part, to the sometimes significant physical and mental decline that naturally accompanies aging.<sup>69</sup> As the body ages, physical functionality necessarily becomes more limited, and while “most functions remain adequate, the decline in function means that older people are less able to handle various stresses.”<sup>70</sup> Likewise, a “mild decline in mental function is nearly universal” with age and may lead to increased forgetfulness or difficulty in mastering new concepts.<sup>71</sup> More severe physical and mental limitations consistently plague the elderly as well.<sup>72</sup> In response, American government and society have crafted various accommodations to respond to the needs of the elderly.<sup>73</sup> Although elderly inmates often experience even greater mental and physical deterioration due to aging, the incarcerated elderly are not included in societal benefits accorded the elderly population at large.<sup>74</sup>

### A. *Physical Deterioration of the Elderly*

Physical decline is an innate circumstance of age. The first signs of aging often involve the musculoskeletal system, followed by the eyes and ears.<sup>75</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *See id.* at 3–9.

<sup>70</sup> Richard W. Besdine, *Changes in the Body with Aging*, MERCK CONSUMER MANUAL (May 2017), <https://www.merckmanuals.com/home/older-people's-health-issues/the-aging-body/changes-in-the-body-with-aging> [<https://perma.cc/5V3V-7MVB>]; *see also* Jennifer E. Graham et al., *Stress, Age, and Immune Function: Toward a Lifespan Approach*, 29 J. BEHAV. MED. 389, 396 (2006) (concluding that psychological “[s]tress can not only mimic but also exacerbate the effects of aging”).

<sup>71</sup> Richard W. Besdine, *Overview of Aging*, MERCK CONSUMER MANUAL (May 2017), <https://www.merckmanuals.com/home/older-people%E2%80%99s-health-issues/the-aging-body/overview-of-aging> [<https://perma.cc/S7QU-KNEV>]; *see also* Caroline N. Harada et al., *Normal Cognitive Aging*, 29 CLINICS GERIATRIC MED. 737, 738 (2013) (“Conceptual reasoning, memory, and processing speed, decline gradually overtime.”).

<sup>72</sup> STATE OF AGING 2013, *supra* note 67, at 3 (stating heart disease, cancer, stroke, chronic lower respiratory diseases, Alzheimer’s disease, and diabetes are the leading causes of death as people age).

<sup>73</sup> *See generally* Andrew Soergel, *Aging in America: Land of the Free, Home of the Gray*, U.S. NEWS & WORLD REP. (Oct. 11, 2017), <https://www.usnews.com/news/best-states/articles/2017-10-11/aging-in-america-how-states-are-grappling-with-a-growing-elderly-population> [on file with *Ohio State Law Journal*] (describing ways businesses, lawmakers, and individuals are responding to an aging population); Geeta Nayyar, *5 Ways to Help Elderly Loved Ones Age Independently*, HUFFPOST (Mar. 21, 2013), [https://www.huffingtonpost.com/geeta-nayyar-md/caregiving-5-ways-to-help-elderly-age-independently\\_b\\_2878966.html](https://www.huffingtonpost.com/geeta-nayyar-md/caregiving-5-ways-to-help-elderly-age-independently_b_2878966.html) [<https://perma.cc/WD39-DXB5>] (detailing ways that individuals can accommodate aging loved ones who wish to live independently).

<sup>74</sup> Nadine Curran, *Blue Hairs in the Big House: 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, 226 (2000).

<sup>75</sup> Besdine, *supra* note 70; *see also* Zoran Milanovic et al., *Age-Related Decrease in Physical Activity and Functional Fitness Among Elderly Men and Women*, 8 CLINICAL

As human beings grow older, their cells age, “function less well,” and sometimes die.<sup>76</sup> Organ health relies upon the presence of healthy, thriving cells, thus as cell numbers decrease, organs perform increasingly poorly.<sup>77</sup> Cell presence decreases “markedly” in the testes, ovaries, liver, and kidneys with age.<sup>78</sup> Further, some organs, including the heart and blood vessels, urinary organs, and brain are “more likely to malfunction under stress than others,” and “[A] decline in one organ’s function . . . can affect the function of another.”<sup>79</sup> Bones and joints are also affected, considerably, by age. The body’s diminished ability to absorb calcium with age, coupled with decreased Vitamin D levels, renders bones weaker and therefore more prone to breakage.<sup>80</sup> The bones most affected include the femur at the hip, radius and ulna at the wrist, and vertebrae.<sup>81</sup> Swallowing becomes more difficult and choking is increasingly likely, as “[c]hanges in vertebrae at the top of the spine cause the head to tip forward.”<sup>82</sup> Further, “[T]he cartilage that lines the joints tends to thin, partly because of the wear and tear of years of movement . . . and the joints may be slightly more susceptible to injury.”<sup>83</sup> This type of joint damage can lead to “osteoarthritis, which is one of the most common disorders of later life.”<sup>84</sup>

Research demonstrates that 85% of aged Americans possess at least one chronic health condition, and that two-thirds of aged Americans suffer two or more chronic conditions.<sup>85</sup> Kidney and urinary tract malfunction are natural occurrences, among others. As people age, “[t]he kidneys tend to become smaller because the number of cells decreases,” and “[t]hey may excrete too much water and too little salt, making dehydration more likely.”<sup>86</sup> As a result,

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INTERVENTIONS AGING 549, 555 (2013) (finding that reduction of muscle strength and changes in agility and endurance are common in the aging process).

<sup>76</sup> Besdine, *supra* note 70; *see also* Milanovic et al., *supra* note 75, at 550 (detailing the accelerating loss of muscle fibers with age).

<sup>77</sup> Besdine, *supra* note 70 (also noting that not all organs lose significant numbers of cells with age, such as the brain of a healthy older person).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; ALVARO MACIEIRA-COELHO, *BIOLOGY OF AGING* 3 (2003) (noting that “[m]any functions of the organism . . . are maintained during aging under normal conditions, but fail under stress” and that “[t]he effect of stress on morbidity is well documented”). *See generally* Thomas S. Ulen, *The Law and Economics of the Elderly*, 4 *ELDER L.J.* 99, 101–03 (1996) (describing the biology of aging); Curran, *supra* note 74, at 239 (addressing the physical and mental alterations to the human body when aging).

<sup>80</sup> Besdine, *supra* note 70; *see also* MACIEIRA-COELHO, *supra* note 79, at 121 (discussing the degradation of connective tissue such as bone and cartilage); Curran, *supra* note 74.

<sup>81</sup> Besdine, *supra* note 70.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Growing Mental and Behavioral Health Concerns Facing Older Americans*, AM. PSYCHOL. ASS’N (2018), <http://www.apa.org/about/gr/issues/aging/mental-health.aspx> [<https://perma.cc/7BPU-MSCT>]; *see* STATE OF AGING 2013, *supra* note 67, at 6.

<sup>86</sup> Besdine, *supra* note 70.

“[c]ertain changes in the urinary tract may make controlling urination more difficult.”<sup>87</sup> Thus, older people urinate more and may experience increased instances of incontinence.<sup>88</sup> For men, the prostate may enlarge, resulting in a host of urinary and other medical challenges.<sup>89</sup> A weakened immune system is also a common side effect of aging which may explain why cancer is “more common among older people,” vaccines are “less protective in older people,” and certain infections are more frequent and more likely to result in death.<sup>90</sup> Basic age-related physical infirmities also include, weakened muscles, increased body fat, vision problems, hearing loss, arthritis, high blood pressure, presbyopia, gum disease, shingles, and susceptibility to type 2 diabetes, among others.<sup>91</sup> Insomnia also plagues the elderly.<sup>92</sup>

### B. *Mental Decline of the Elderly*

Age does not lead to “an inevitable loss of all cognitive abilities,” nor to a confluence of mental disorders.<sup>93</sup> Physicians agree, however, that “[A]n individual’s state of physical health and other biological factors are generally more telling influences on mental health than is the person’s chronological age.”<sup>94</sup> Ordinary cognitive decline, however, does occur with age, yet typically occurs in areas that do not reduce overall functionality, including fluid intelligence, short-term memory recall, divided attention, language retrieval, speed of processing, and problem solving.<sup>95</sup> Instead, various “social,

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> MACIEIRA-COELHO, *supra* note 79, at v (also noting dental erosion and prostate gland enlargement in older men); Besdine, *supra* note 70; *see also* National Institute on Aging, *8 Areas of Age-Related Change*, NIH MEDLINEPLUS, Winter 2007, at 10–13, <https://medlineplus.gov/magazine/issues/pdf/winter2007.pdf> [<https://perma.cc/5FLY-UKU9>] (summarizing areas of major change, including increased risk of shingles and gum disease); Ulen, *supra* note 79, at 101–02 (generally describing age-related physical changes); Curran, *supra* note 74, at 239 (quoting Ulen, *supra* note 79, and describing how age-related physical and mental maladies affect inmates in particular).

<sup>92</sup> W. Vaughn McCall, *Sleep in the Elderly: Burden, Diagnosis and Treatment*, 6(1) PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 9, 9 (2004); *see also* *Growing Mental and Behavioral Health Facing Older Americans*, *supra* note 85 (stating geropsychologists regard insomnia as one behavioral health issue that affects the elderly).

<sup>93</sup> *Cognitive Skills & Normal Aging*, EMORY UNIV. ALZHEIMER’S DISEASE RES. CTR. (2017), [http://alzheimers.emory.edu/healthy\\_aging/cognitive-skills-normal-aging.html](http://alzheimers.emory.edu/healthy_aging/cognitive-skills-normal-aging.html) [<https://perma.cc/H6NB-T6KZ>].

<sup>94</sup> Barry D. Lebowitz & George Niederehe, *Concepts and Issues in Mental Health and Aging*, in HANDBOOK OF MENTAL HEALTH AND AGING 6 (James E. Birren et al. eds., 2d ed. 1992). Likewise, “patterns of mental illness in the aged must be referenced against the individual’s physical health, consumption of medications, the possibility of undetected underlying diseases, and the like.” *Id.*

<sup>95</sup> *See Cognitive Skills and Normal Aging*, *supra* note 93.

psychological, and biological factors determine the level of mental health of a person at any point of time.”<sup>96</sup>

Specific, frequently-occurring social factors, however, may contribute to mental health decline among the elderly.<sup>97</sup> These stressors include loss of the “ability to live independently because of limited mobility, chronic pain, frailty . . . bereavement . . . or disability,” and similar situations that may result in “isolation, loss of independence, loneliness and psychological distress.”<sup>98</sup> Accordingly, although the majority of older adults experience good mental health, “many older adults are at risk of developing mental disorders, neurological disorders, or substance abuse problems.”<sup>99</sup> Mental disabilities comprise almost 7% of all disabilities suffered by the elderly.<sup>100</sup> Suicide rates are also disproportionately high, with nearly 25% of deaths from “self-harm” attributed to the elderly population.<sup>101</sup> Unfortunately, even in the general population, mental health problems in the elderly are “under-identified by health care professionals and older people themselves, and the stigma surrounding mental illness makes people reluctant to seek help.”<sup>102</sup>

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<sup>96</sup> *Mental Health: Strengthening Our Response*, WORLD HEALTH ORG. (Mar. 30, 2018), <http://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response> [<https://perma.cc/KJP2-R5XH>]; *Mental Health of Older Adults*, WORLD HEALTH ORG. (Dec. 12, 2017), <http://www.who.int/en/news-room/fact-sheets/detail/mental-health-of-older-adults> [<https://perma.cc/M33N-AETR>] [hereinafter *Mental Health of Older Adults*]; see also MACIEIRA-COELHO, *supra* note 79, at 3 (“The effect of stress on morbidity is well documented.”); Curran, *supra* note 74, at 239 (“[P]hysical and mental impairments are exponentially aggravated in the elderly inmate.”); Ulen, *supra* note 79, at 101–02 (“[A]ging [is] a natural process that involves predictable changes in the physical and mental makeup of the person . . .”). See generally Brie Williams & Rita Abraldes, *Growing Older: Challenges of Prison and Reentry for the Aging Population*, in PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES 56–69 (Robert Greifinger ed., 2007) (describing the various challenges faced by the imprisoned elderly).

<sup>97</sup> See Theresa E. Seeman, *Health Promoting Effects of Friends and Family on Health Outcomes in Older Adults*, 14 AM. J. HEALTH PROMOTION 362, 363 (2000).

<sup>98</sup> Arvind Mathur, *Mental Health in Old Age*, 13 J. INDIAN ACAD. GERIATRICS 3 (2017).

<sup>99</sup> *Mental Health of Older Adults*, *supra* note 96.

<sup>100</sup> *Id.*

<sup>101</sup> *Growing Mental and Behavioral Health Concerns Facing Older Americans*, *supra* note 85. According to the Centers for Disease Control and Prevention, 15.08 per every 100,000 people age 65–69 died of suicide in 2016, with the rate increasing for every age group after age 69 up to age 65. This is higher than the average rate for the general population, which is 13.92 per every 100,000 people. Web-based Injury Statistics Query and Reporting System, *Fatal Injury Data*, CTRS. FOR DISEASE CONTROL & PREVENTION <https://webappa.cdc.gov/sasweb/ncipc/mortrate.html> [<https://perma.cc/S2K5-XYJQJ>] (select 1999 to 2016 for year range, select suicide for intent or manner or the injury, select age group as an output group, select submit request); see also *Mental Health of Older Adults*, *supra* note 96 (noting that the World Health Organization has included suicide, among other disorders, as a “priority condition” for older people).

<sup>102</sup> *Mental Health of Older Adults*, *supra* note 96. Cf. Curran, *supra* note 74, at 226 (“[I]mportant issues facing elderly prisoners are not given enough attention.”).

The link between mental health and physical deterioration is well established.<sup>103</sup> Mental disorders can aggravate naturally declining physical health and overall functionality.<sup>104</sup> For example, the World Health Organization reports that “untreated depression in an older person with heart disease can negatively affect its outcome.”<sup>105</sup> Further, heart disease, arthritis, and hypertension “particularly influence the degree of mental and functional disability,”<sup>106</sup> and elderly patients who suffer from them “have higher rates of depression than those who are healthy.”<sup>107</sup>

This combination of physical and mental depreciation can lead to feelings of loneliness and isolation among the elderly.<sup>108</sup> The disengagement theory, which is widely referred to as the first theory of aging, relies on this concept of isolation to explain how certain people age.<sup>109</sup> Though it has been replaced by the more modern theories like socioemotional selectivity theory and life span theory,<sup>110</sup> disengagement theory principles remain critical to understanding the psyche of the elderly population. According to the disengagement theory, aging is relational and occurs because older people have less social interaction with others.<sup>111</sup> This theory suggests that the weakening of relationships is considered inevitable as older people become “less involved

<sup>103</sup> See generally *Mental Health of Older Adults*, *supra* note 96 (“Mental health has an impact on physical health and vice versa.”).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Lebowitz & Niederehe, *supra* note 94, at 6.

<sup>107</sup> *Mental Health of Older Adults*, *supra* note 96.

<sup>108</sup> See Anne-Marie Botek, *Combatting the Epidemic of Loneliness in Seniors*, AGING CARE (Mar. 5, 2018), <https://www.agingcare.com/articles/loneliness-in-the-elderly-151549.htm> [<https://perma.cc/SQS4-NCKV>].

<sup>109</sup> *Theories of Aging*, PHYSIOPEDIA, [https://www.physio-pedia.com/Theories\\_of\\_Aging](https://www.physio-pedia.com/Theories_of_Aging) [<https://perma.cc/B87S-BHBQ>].

<sup>110</sup> *Id.* The Disengagement Theory “refers to an inevitable process in which many of the relationships between a person and other members of society are severed and those remaining are altered in quality.” *Id.* Activity Theory is a theory that “describes the psychosocial aging process” and “emphasizes the importance of ongoing social activity.” *Id.* The Neuroendocrine Theory “elaborates on wear and tear by focusing on the neuroendocrine system,” which is the “complicated network of biochemicals that govern the release of hormones which are altered by the walnut size gland called the hypothalamus located in the brain.” *Id.* The Free Radical Theory “describes any molecule that has a free electron, and this property makes it react with healthy molecules in a destructive way.” *Id.* The Membrane Theory of Aging is the “age-related changes of the cells ability to transfer chemicals, heat and electrical processes that impair it.” *Id.* The Mitochondrial Decline Theory focuses on the “power producing organelles found in every cell of every organ” and is an “essential part of preventing and slowing aging.” *Id.* The Cross-Linking Theory “it is the binding of glucose (simple sugars) to protein (a process that occurs under the presence of oxygen) that causes various problems” and when the binding has occurred, “the protein becomes impaired and is unable to perform as efficiently.” *Id.*

<sup>111</sup> *Theories of Aging*, *supra* note 109; see also Frieder R. Lang & Laura L. Carstensen, *Close Emotional Relationships in Late Life: Further Support for Proactive Aging in the Social Domain*, 9 PSYCHOL. & AGING, 315, 315–16 (1994).



with life than they were as younger adults.”<sup>112</sup> While experts no longer regard disengagement as the preeminent aging theory, its efficacy and significance persist.<sup>113</sup> Literature demonstrates that individuals become increasingly disengaged from society and relationships as they age, which has a negative effect on the aging process.<sup>114</sup> In response, there is a cognizable and influential movement promoting provision for the elderly by encouraging healthy familial ties, strong health care support, and community respect and involvement.<sup>115</sup>

### C. *The Elderly Population Requires “Tender Loving Care”*

Gerontology suggests that elderly populations require caregiving to combat the unique challenges that accompany aging.<sup>116</sup> One central component of this concept of special care is proper training of health providers and communities.<sup>117</sup> The World Health Organization recommends that health care providers and communities adopt specific treatment and care methodologies that provide appropriate training for health professionals in geriatric care, assist in preventing chronic mental and physical disorders that commonly accompany age, develop “age-friendly services and settings,” and pattern viable long-term and palliative care policies.<sup>118</sup>

Social interventions are also critical in sustaining elderly individuals’ overall health and well-being.<sup>119</sup> Studies show that elderly people enjoy a better quality of life if they sustain strong familial ties.<sup>120</sup> Family is “central to the support of the geriatric patient” and a “key component of the planning in a long-

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<sup>112</sup> *Theories of Aging*, *supra* note 109; Elaine Cumming et al., *Disengagement A Tentative Theory of Aging*, 23 *SOCIOMETRY* 23, 34–35 (1960).

<sup>113</sup> Cumming et al., *supra* note 112, at 25; *see also Theories of Aging*, *supra* note 109.

<sup>114</sup> Cumming et al., *supra* note 112, at 34–35 (explaining the disengagement theory); Lang & Carstensen, *supra* note 111, at 315–17 (discussing various psychological theories relating to the effects of aging on interrelationships); Seeman, *supra* note 97, 363–65 (finding that social relationships have both health-promoting and damaging effects in older adults);

<sup>115</sup> *See* Seeman, *supra* note 97, at 367–68; *see also* Lang & Carstensen, *supra* note 114, at 322 (finding those with “nuclear family members” or those who supplement their “inner circle” elsewhere “felt more socially embedded than those who did not”).

<sup>116</sup> *See generally* Anthony F. Jerant et al., *The TLC Model of Palliative Care in the Elderly: Preliminary Application in the Assisted Living Setting*, 2 *ANNALS FAM. MED.* 54, 56–57 (2004) (noting that palliative care “must be a collaborative enterprise among physicians, patients, and their loved ones”).

<sup>117</sup> *Mental Health of Older Adults*, *supra* note 96; *see also* Adam Drewnowski & William J. Evans, *Nutrition, Physical Activity, and Quality of Life in Older Adults: Summary*, 56A *J. GERONTOLOGY (SPECIAL ISSUE II)* 89, 92–93 (2001) (“Health promotion strategies, policies, and educational approaches now target the aging population. Among these are activities conducted in senior centers, congregate housing, life care facilities, and retirement villages.”).

<sup>118</sup> *Mental Health of Older Adults*, *supra* note 96.

<sup>119</sup> *See* Seeman, *supra* note 97, at 367.

<sup>120</sup> *Id.* at 365–66.

term continuum of care” for both physical and mental health.<sup>121</sup> Those without family support may continue to thrive with the help of community and other outreach programs.<sup>122</sup> Good mental and physical health in the golden years requires the development and maintenance of meaningful, nurturing relationships.<sup>123</sup>

Communities recognize that the elderly routinely need supplementary assistance and care to accommodate their unique circumstances.<sup>124</sup> Unincarcerated elderly individuals “have access to [critical] services which enable them to improve their quality of life,” including “health care aides, home meal delivery, specialized transportation, sidewalks with wheel chair ramps, mental health programs, recreational services and Medicare for the ever-increasing costs of medical attention.”<sup>125</sup> However, “[o]nce a prison sentence begins, these benefits stop.”<sup>126</sup> Though imperfect, United States society has identified, appreciates, and attempts to respond to the plight of the general population of elderly people.<sup>127</sup> It is tragic, then, that elderly offenders receive none of the same tender loving care. Elderly offenders are not treated as elderly prisoners, they are simply treated as unworthy and undignified prisoners, receiving no love and little, if any, care.

#### IV. THE UNDIGNIFIED PRISONER

Both United States society and the criminal justice system overwhelmingly view incarcerated people as undeserving of compassion.<sup>128</sup> This is strikingly evident in the case of elderly prisoners who are not afforded the care and consideration that is commonly bestowed upon the general elderly population.<sup>129</sup> Older offenders are not viewed as elderly, but simply as

<sup>121</sup> Lebowitz & Niederehe, *supra* note 94, at 18.

<sup>122</sup> Lang & Carstensen, *supra* note 111, at 322.

<sup>123</sup> *Id.* at 18 (explaining the “continuum of care . . . could include community-based services such as activity centers, day care, congregate meals, assisted housing, and respite care, as well as institutional services in the hospital or nursing-home setting”).

<sup>124</sup> See Drewnowski & Evans, *supra* note 117, at 92–93.

<sup>125</sup> Curran, *supra* note 74, at 226.

<sup>126</sup> *Id.*

<sup>127</sup> Leobowitz & Niederehe, *supra* note 94, at 18–19 (discussing the family-based and community-based services attempting to address and care for the needs of the elderly).

<sup>128</sup> *Id.*; Curran, *supra* note 74, at 244 (stating that “compassion shown the elderly by family, friends, and caregivers is replaced by the indifferent correction officer”). See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 206 (2010) (explaining that compassion for prisoners is a matter of choice).

<sup>129</sup> See Curran, *supra* note 74, at 244–45; 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, 271–74 (1998).

prisoners. They therefore share the label of “subhuman” with their more youthful incarcerated counterparts.<sup>130</sup>

In the United States criminal justice system, offenders are universally considered undignified.<sup>131</sup> In legal scholarship, the term, “human dignity,” is not well-defined, and has accurately been described as “terribly, even terrifyingly vague.”<sup>132</sup> Scholars have, however, attempted to identify dignity as two distinct concepts: (1) social dignity and (2) moral dignity.<sup>133</sup> Social dignity is labeled as “hierarchical,” “relative,” “nonessential,” and easily lost with a downward departure in social status.<sup>134</sup> Conversely, moral dignity is expressed as “an essential characteristic of all persons” and a “necessary attribute of individuals who satisfy the minimum requirements of personhood.”<sup>135</sup> Social dignity is a social construct that relies solely on social status, while moral dignity is a benefit automatically associated simply with being human.<sup>136</sup> While some scholars disagree,<sup>137</sup> this Article offers that, for offenders, these two theories of dignity are inextricably linked, and, to a certain degree, may be viewed as indistinguishable. Criminal punishment, particularly incarceration, is socially and morally degrading because it incontrovertibly extirpates offenders’ social standing and overall acceptance as equally human. As a result of imprisonment, prisoners suffer both social and moral indignation.

Professor Howard Garfinkel has characterized criminal punishment as a “degradation ceremony”<sup>138</sup> that confirms an offender’s moral deficiency and “reflects . . . [his] low status.”<sup>139</sup> A degradation ceremony is “[a]ny communicative work between persons, whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types.”<sup>140</sup> Professor Garfinkel depicts degradation ceremonies as arising from moral indignation, a mode of “public denunciation,” whose result is the “ritual

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<sup>130</sup> Jefferson-Bullock, *supra* note 20, at 556 (citing Zulficar Gregory Restum, *Public Health Implications of Substandard Correctional Health Care*, 95 AM. J. PUB. HEALTH 1689, 1690 (2005)).

<sup>131</sup> See generally ALEXANDER, *supra* note 128.

<sup>132</sup> Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 533 (2004).

<sup>133</sup> *Id.* at 534.

<sup>134</sup> *Id.* at 534–35.

<sup>135</sup> *Id.* at 535.

<sup>136</sup> *Id.*

<sup>137</sup> According to Professor Dubber, “A constitutional criminal law committed to maintaining the human dignity of all persons as such, including those convicted of a crime, would face the difficult task of differentiating social indignity from human indignity.” *Id.* at 546. But see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001) (discussing means to depoliticize criminal law).

<sup>138</sup> Howard Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 420 (1956).

<sup>139</sup> Dubber, *supra* note 132, at 547.

<sup>140</sup> Garfinkel, *supra* note 138, at 420.

destruction of the person being denounced.”<sup>141</sup> Scholars also note that the “psychology of punishment” is “the psychology of degradation,” and that “[w]hen human beings punish, they tend, in the very act of punishment, to create a relationship of inequality.”<sup>142</sup> According to Professor James Q. Whitman, “[t]he relationship between punisher and punished is indeed one of the core, definitional relationships of inequality in human society, and one of the core definitional relationships of disrespect.”<sup>143</sup> Further, he writes of the “intoxication of status degradation”<sup>144</sup> as unleashing the worst in the punisher as he attempts to put the prisoner “in his place.”<sup>145</sup> Incarceration pronounces the degradation ceremony to a higher degree.

Scholars frequently brand offenders’ loss of dignity and respect as “stigma,”<sup>146</sup> and expose stigma’s existence by citing the myriad collateral consequences that accompany criminal convictions, all of which serve to diminish ex-offenders’ social status and moral status.<sup>147</sup> Professor Jamila Jefferson-Jones accurately argues that the stigma that inevitably follows a criminal conviction results in lasting reputational damage that renders the offender morally corrupt, and therefore, socially undesirable.<sup>148</sup> She writes that “stigma is a ‘socially inferior attribute’ that marks the carrier as one who deviates from prevailing social norms.”<sup>149</sup> Further, ex-offender stigma “taints the carrier as one possessing weak character,”<sup>150</sup> rendering them somehow less

<sup>141</sup> *Id.* at 421.

<sup>142</sup> James Q. Whitman, *A Plea Against Retributivism*, 7 *BUFF. CRIM. L. REV.* 85, 106 (2003).

<sup>143</sup> *Id.*

<sup>144</sup> JAMES Q. WHITMAN, *HARSH JUSTICE* 23 (2003).

<sup>145</sup> *Id.* at 22.

<sup>146</sup> *The Time Is Ripe*, *supra* note 40, at 99–100; Jamila Jefferson-Jones, *A Good Name: Applying Regulatory Takings Analysis to Reputational Damage Caused by Criminal History*, 116 *W. VA. L. REV.* 497, 504–07 (2013); *see also* Regina Austin, “*The Shame of it All*”: *Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 *COLUM. HUM. RTS. L. REV.* 173, 174–75 (2004) (finding criminals to suffer from “[s]tigmatas [that] produce significant social and psychological effects”); David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One’s Name*, 2009 *BYU L. REV.* 1277, 1312 (2009) (“Criminal conviction . . . represents a serious social stigma . . .”).

<sup>147</sup> Jefferson-Jones, *supra* note 146, at 503–07; *see also* Jefferson-Bullock, *The Time Is Ripe*, *supra* note 40, 99–100 (discussing how stigma attaches and affects a criminal). Merriam-Webster defines “stigma” as “a mark of shame or discredit.” *Stigma*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/stigma> [<https://perma.cc/G82P-22YX>]; Austin, *supra* note 1466, at 174–75.; Wolitz, *supra* note 146, at 1312 (“[C]onviction has social meaning and changes a person’s social status.”).

<sup>148</sup> Jefferson-Jones, *supra* note 146, at 504–08.

<sup>149</sup> *Id.* at 505 (quoting ROBERT M. PAGE, *CONCEPTS IN SOCIAL POLICY TWO: STIGMA* 2–6 (Vic George & Paul Wilding eds., 1986)).

<sup>150</sup> *Id.*

human than those who have never been convicted.<sup>151</sup> Stigmatized offenders are “not quite human,” which allows society to exercise “varieties of discrimination, through which we effectively . . . reduce his [the offender’s] life chances.”<sup>152</sup> While the reputational damage that Professor Jefferson-Jones and others criticize flows from the various collateral consequences that ex-offenders suffer (which the Supreme Court has consistently insisted are not punishments),<sup>153</sup> the stigma which she identifies is also borne by prisoners. In the words of Professor James Q. Whitman:

Criminal punishment does not only visit measured retribution on blameworthy offenders. Nor does it only deter. Nor does it only express considered condemnation. It also expresses contempt. We do indeed harbor a strong natural tendency to perceive offenders as “dangerous and vile,” and therefore to strike them hard: Human beings are so constituted that they typically want, not to punish in a measured way, but to crush offenders like cockroaches.<sup>154</sup>

This stigma is an unavoidable component of offender status, generally. According to Professor Markus Dubber, “it is not only punishment that degrades. It is the ascription of the label ‘offender’ that degrades . . . the level of degradation thus increases as the suspect becomes a defendant becomes a convict becomes an inmate.”<sup>155</sup> Even Justice Brennan argues that incarceration “strips a man of his dignity.”<sup>156</sup> Likewise, other scholars have described the dignity interests of offenders as “narrow.”<sup>157</sup> This Article argues that they are virtually non-existent. Like all prisoners, we treat elderly inmates as highly stigmatized and undignified offenders. Inhumane prison conditions illustrate this point.

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<sup>151</sup> ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 5 (1963).

<sup>152</sup> *Id.*

<sup>153</sup> *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 105–06 (2003) (finding sex offender registration laws are nonpunitive); *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997) (finding indefinite civil commitment of convicted sex offenders not a punishment).

<sup>154</sup> Whitman, *supra* note 142, at 98.

<sup>155</sup> Dubber, *supra* note 132, at 547.

<sup>156</sup> William J. Brennan, Jr., U.S. Assoc. Supreme Court Justice, *The Constitution of the United States: Contemporary Ratification*, Address at Georgetown University Law Center (Oct. 12, 1985), in William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 442 (1986).

<sup>157</sup> Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 506 (2010).

### A. Prison Life, Generally

The evidence is clear that the prison environment is “criminogenic,”<sup>158</sup> “escalate[s] the severity of a recidivist’s crimes,”<sup>159</sup> and “rendering debilitation much more likely than rehabilitation.”<sup>160</sup> The prison atmosphere drains inmates of their essential humanity, “[w]hether by introducing petty criminals to more violent offenders, forcing prisoners into racist gangs, or subjecting them to violence and rape.”<sup>161</sup> Inmates suffer unsound, unreliable medical care, use of excessive force by prison guards, lack of basic sanitation, extreme temperatures, and a multitude of other experiences that pose risks to prisoner health, safety, and general well-being.<sup>162</sup> Often inmates “simply idly pass the time all day

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<sup>158</sup> *The Time Is Ripe*, *supra* note 40, at 88–89 (quoting John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES (Dec. 12, 2012), <http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?r=0> [on file with *Ohio State Law Journal*]).

<sup>159</sup> *Id.* at 89 (quoting JORDAN BAKER ET AL., A SOLUTION TO PRISON OVERCROWDING AND RECIDIVISM: GLOBAL POSITIONING SYSTEM LOCATION OF PAROLEES AND PROBATIONERS 19 (2002)).

<sup>160</sup> In previous works, this author has argued that excessively lengthy prison sentences produce ruinous outcomes by transforming inmates into “hardened criminals who are more likely to reoffend.” *Id.* at 87–88. See *United States v. Blake*, 89 F. Supp. 2d 328, 345 (E.D.N.Y. 2000); *How Much Punishment is Enough?*, *supra* note 40, at 399. See generally Press Release, Bureau of Justice Statistics, U.S. Dep’t of Justice, National Correctional Population Reaches New High Grows by 117,400 During 2000 to Total 6.5 Million Adults (Aug. 26, 2001), available at <http://www.justice.gov/opa/pr/2001/August/429ag.htm> [<https://perma.cc/JQ25-VNKN>]; [hereinafter Press Release, National Correctional Population Reaches New High]; Press Release, Bureau of Justice Statistics, U.S. Dep’t of Justice, U.S. Correctional Population Reaches 6.3 Million Men and Women Represents 3.1 Percent of the Adult U.S. Population (July 23, 2000), available at <http://www.bjs.gov/content/pub/press/pp99pr.pr> [<https://perma.cc/6HGD-56N2>] [hereinafter Press Release, U.S. Correctional Population].

<sup>161</sup> See *Blake*, 89 F. Supp. at 344. Additionally, lengthy prison sentences and higher spending has not decreased state recidivism. In the state system, over 40% of offenders return to prison within three years of release. Richard A. Viguier, Opinion, *A Conservative Case for Prison Reform*, N.Y. TIMES (June 9, 2013), <http://www.nytimes.com/2013/06/10/opinion/a-conservative-case-for-prison-reform.html?mcubz=0> [on file with *Ohio State Law Journal*]. This number is close to 60% in some states. *Id.*; *The Time Is Ripe*, *supra* note 40, at 87.

<sup>162</sup> See *The Time Is Ripe*, *supra* note 40, at 84; See Lauren Salins & Shepard Simpson, Note, *Efforts to Fix a Broken System: Brown v. Plata and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1161–62 (2013). Alan Blinder, *In U.S. Jails, a Constitutional Clash over Air-Conditioning*, N.Y. TIMES (Aug. 15, 2016), <https://www.nytimes.com/2016/08/16/us/in-us-jails-a-constitutional-clash-over-air-conditioning.html?mcubz=0> [on file with *Ohio State Law Journal*]; Michele Deitch & Michael B. Mushlin, Opinion, *What’s Going on in Our Prisons?*, N.Y. TIMES (Jan. 4, 2016), <https://www.nytimes.com/2016/01/04/opinion/whats-going-on-in-our-prisons.html?mcubz=0> [on file with *Ohio State Law Journal*]; Martin Garbus, Opinion, *Cruel and Usual Punishment in Jails and Prisons*, L.A. TIMES (Sept. 29, 2014),

long” because rehabilitative educational programs, libraries, and drug program funding have been cut.<sup>163</sup> Furthermore, a shortage of rehabilitative programs leads to increased recidivism, such that many inmates never ultimately escape prison life.<sup>164</sup> Together, these conditions strip inmates of their basic humanity, regardless of age.

Lack of safe, appropriate housing, in the form of prison overcrowding, exemplifies the undignified position that prisoners hold.<sup>165</sup> In prior works this author has asserted that prison overcrowding has produced three tragic effects:

First, overcrowding leads not only to restricted living space but also a strain on all resources. These may be as inconsequential as library books and television lounge seating or as important as hygiene and medical supplies. Inmates frequently face decreased exercise and washroom availabilities as well. Poor hygiene and poor sanitary conditions combine with the increased spread of infective diseases to render health care extremely difficult to administer effectively. Secondly, self-improvement and rehabilitative programs, such as academic, employment and vocational training are almost always curtailed. The failure of these programs adversely affects reintegration of offenders back into society. And finally, a lack of work opportunities may lead to inmate idleness, reinforcing the maxim that idleness breeds discontent and aggression.<sup>166</sup>

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<http://www.latimes.com/opinion/op-ed/la-oe-garbus-prison-cruel-and-unusual-20140930-story.html> [https://perma.cc/EU58-4LYN].

<sup>163</sup> See, e.g., *Rehabilitation Programs Can Cut Prisons Cost, Report Says*, ORANGE COUNTY REG. (July 1, 2007), <https://www.ocregister.com/2007/07/01/rehabilitation-programs-can-cut-prisons-cost-report-says/> [https://perma.cc/X67K-KV5H] (discussing how rehabilitation programs can cut prison costs); see also, e.g., *The Time Is Ripe*, *supra* note 40, at 88 (discussing how the lack of rehabilitation programs leads to recidivism); Michael Rothfeld, *As Rehab Programs Are Cut, Prisons Do Less to Keep Inmates from Returning*, L.A. TIMES (Oct. 17, 2009), <http://articles.latimes.com/2009/oct/17/local/me-rehab17> [https://perma.cc/L59W-KTC6] (describing how inmates return to prison because they are not given adequate training to cope with life outside prison); Mike Ward, *State Jails Struggle with Lack of Treatment, Rehab Programs*, AM. STATESMAN (Dec. 30, 2012), <http://www.statesman.com/news/news/state-regional-govt-politics/state-jails-struggle-with-lack-of-treatment-rehab-/nTh8q/> [https://perma.cc/3NL5-VRHT] (describing how potential rehabilitation plan could help reduce recidivism).

<sup>164</sup> See Rothfeld, *supra* note 163.

<sup>165</sup> *Infra* notes 165–68 and accompanying text.

<sup>166</sup> *The Time Is Ripe* *supra* note 40, at 84; see also BAKER ET AL., *supra* note 41, at 33–34 (discussing the effects of prison overcrowding); *Prison Overcrowding*, JOHN HOWARD SOC’Y ALBERTA, <http://www.johnhoward.ab.ca/pub/pdf/C42.pdf> [https://perma.cc/38XV-HSJQ] (discussing the adverse effects of overcrowding on inmates); Verne C. Cox et al., *Prison Crowding Research: The Relevance of Prison Housing Standards and a General Approach Regarding Crowding Phenomena*, 39 AM. PSYCHOL. 1148, 1156 (1984) (finding prison overcrowding to have negative effects on inmates).

Prison overcrowding brings enormous pressure to bear on already strained resources and further dehumanizes inmates.<sup>167</sup> The effect that prison overcrowding has had on elderly prisoners can be explained as follows:

While *Estelle* and *Farmer* were shaping the civil rights of prisoners with regard to their medical care, other forces were shaping the actual delivery of such care. The prisoner population in this country skyrocketed during this period. Increased numbers of prisoners in jail and prison created more demand for health care services, and thus higher costs. The prisoner population not only grew, it aged. Longer sentences and a decline in the number of prisoners granted parole led to a generation of prisoners who would grow old behind bars.<sup>168</sup>

Lack of mental health services may be among the most demoralizing consequences of imprisonment.<sup>169</sup> Mentally ill inmates face heightened danger in prison, including increased “physical and sexual victimization by staff and other inmates, perhaps because of their inability to sufficiently assess danger and modify behavior to ward off attacks.”<sup>170</sup> Scholars cite the risks facing mentally ill prisoners:

[S]tudies confirm that prisoners with serious mental illnesses are more likely than non-disordered prisoners to violate prison rules and to be punished or otherwise reside in isolation, where they may be especially susceptible to decompensation, psychotic break, and suicide ideation. Mentally disordered prisoners may also experience greater levels of stress and physical danger—and be less likely to receive adequate mental health care . . . .<sup>171</sup>

Collectively, each of these elements of prison life denies inmates basic human dignity. For elderly prisoners, however, the indignation is far worse. The increase in aged offenders is a major cause of prison overcrowding in minimum security, low security, and prison medical facilities.<sup>172</sup> Reform, therefore, has become an issue of compassion.<sup>173</sup>

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<sup>167</sup> See Joel H. Thompson, *Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 635, 638–39 (2010).

<sup>168</sup> See *id.* (referencing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) and *Farmer v. Brennan*, 511 U.S. 825, 835 (1994)).

<sup>169</sup> See *infra* notes 169–72.

<sup>170</sup> E. Lea Johnston, *Modifying Unjust Sentences*, 49 GA. L. REV. 433, 442 (2015).

<sup>171</sup> *Id.* at 442–43.

<sup>172</sup> *Id.*

<sup>173</sup> Viguerie, *supra* note 161.



### B. *Prison Life for the Elderly*

Criminal justice reforms triggered the aging of the prison population. Between 1981 and 1990, the number of elderly inmates doubled.<sup>174</sup> During the past thirty years, the number of elderly prisoners in state and federal facilities grew by 94%.<sup>175</sup> In the last two decades, the number of elderly prisoners has risen by 750%.<sup>176</sup> Currently, elderly inmates comprise a disproportionate number of the inmate population residing at institutions, and require higher levels of medical care, increased instances of outside care, and enhanced levels of “catastrophic care.”<sup>177</sup> According to Bureau of Prisons (BOP) data, at the end of Fiscal Year 2013, “aging inmates made up 26 percent of the population of minimum-security institutions, 23 percent of the population of low-security institutions, and 33 percent of the population of medical centers.”<sup>178</sup> By their own admission, prison staff is not responsible for the daily care nor equipped to handle the care of an increasingly grayer prison population.<sup>179</sup> According to a 2015 Office of Inspector General (OIG) report, Bureau of Prisons institutions are struggling to maintain adequate levels of appropriately trained staff to manage the elderly inmate population.<sup>180</sup> As a result, elderly inmates endure a host of indignities in prison specific to their aged status.<sup>181</sup>

Prison facilities lack basic structures necessary to accommodate the aged. Prisons’ physical designs are not suited for the elderly.<sup>182</sup> For example, most prison facilities do not employ larger doors or ramps, and are, therefore, not designed for inmates with limited mobility, including those requiring wheelchairs, walking aids, bedrails, or “lift-type bathing equipment.”<sup>183</sup> Climbing stairs and into upper-level bunks can be hazardous as inmates age.<sup>184</sup> Further, aged prisoners must bear “uncomfortable temperatures, dampness, and

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<sup>174</sup> See Nancy Neveloff Dubler, *The Collision of Confinement and Care: End-of-Life Care in Prisons and Jails*, 26 J.L. MED. & ETHICS 149, 150 (1998) (“Nationally, the number of inmates fifty-five and older more than doubled between 1981 and 1990.”).

<sup>175</sup> Christine Vestal, *Study Finds Aging Inmates Pushing Up Prison Health Care Costs*, PEW CHARITABLE TRUSTS <https://www.pewtrusts.org/en/research-and-analysis/blogs/state-line/2013/10/29/study-finds-aging-inmates-pushing-up-prison-health-care-costs> [https://perma.cc/EM3Y-VR6M]. In this study, elderly prisoners are categorized as those who are fifty-five years of age and older. *Id.*

<sup>176</sup> William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 855 (2009). From 2006–2011, only twenty-four inmates per year were granted a compassionate release. IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 44.

<sup>177</sup> IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 7, 15, 18.

<sup>178</sup> *Id.* at 6.

<sup>179</sup> *Id.* at 16–17.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 18–24.

<sup>182</sup> See Ronald H. Aday, *Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates*, 58 FED. PROB. 47, 48 (1994).

<sup>183</sup> See Curran, *supra* note 74, at 245.

<sup>184</sup> HUMAN RIGHTS WATCH, *supra* note 59, at 46.

loud noise levels” that are part and parcel of prison life, but more inhospitable to the elderly.<sup>185</sup> Elderly inmates find it difficult to navigate unforgiving prison designs, and often retreat into isolation.<sup>186</sup> Further, some elderly inmates experience incontinence, which “is not uncommon among the elderly.”<sup>187</sup> When this occurs, they “may be ostracized and even physically assaulted by other inmates who are offended by the smell.”<sup>188</sup>

Also, elderly prisoners are often lodged in facilities with younger, more robust prisoners, which may lead to far more sinister outcomes.<sup>189</sup> Older inmates report experiencing abuse at the hands of younger inmates, who “regularly hustle and cheat older prisoners and extort payments for gambling losses and other debts.”<sup>190</sup> According to recent studies, “[c]ertain types of inmates seem to be more frequently targeted for abuse, especially those who are small, weak, and vulnerable,” such as older inmates, who “may also be at higher risk of victimization if housed with much younger inmates.”<sup>191</sup> This dysfunctional relationship between older and younger inmates is commonly referred to as “wolf-prey” syndrome.<sup>192</sup> To survive, “some older inmates employ survival techniques, such as feigning mental illness,” “while others rely on prison staff for support and protection.”<sup>193</sup> Still, others endure painful mental effects, including depression, “institutional neurosis,” and overall mental deterioration and decline.<sup>194</sup> Prison staff, however, is ill-equipped to effectively handle elderly prisoners’ special needs.<sup>195</sup>

While all inmates suffer from a lack of educational and recreational programs in prison, aging inmates suffer even more.<sup>196</sup> As prisons swell with aging inmates, essential prisoner resources are strained.<sup>197</sup> When there are programs, they are rarely designed to meet the specific “educational, physical, psychological, social, and rehabilitative needs of older persons.”<sup>198</sup> Accordingly, recreational programs are “rarely tailored to older, frailer bodies,” and elder inmates must compete with younger inmates for access to recreational

<sup>185</sup> Curran, *supra* note 74, at 245 (quoting Brown, *supra* note 129, at 272).

<sup>186</sup> Aday, *supra* note 182, at 48.

<sup>187</sup> HUMAN RIGHTS WATCH, *supra* note 59, at 59.

<sup>188</sup> *Id.*

<sup>189</sup> Aday, *supra* note 182, at 49 (noting that “an increasing number of states” house older inmates separately, thereby admitting some do not) (emphasis added).

<sup>190</sup> Brown, *supra* note 129, at 272.

<sup>191</sup> HUMAN RIGHTS WATCH, *supra* note 59, at 58.

<sup>192</sup> Brown, *supra* note 129, at 260 n.4, 272 n.60.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 274.

<sup>195</sup> See Adams, *supra* note 26, at 485.

<sup>196</sup> See HUMAN RIGHTS WATCH, *supra* note 59, at 68.

<sup>197</sup> See *id.* at 68–69. State courts have recently made similar conclusions. For example, California courts have found prisons so overcrowded as to be deemed criminogenic, thereby ordering states to reduce prison populations; see also Brown v. Plata, 563 U.S. 493, 556 (2011) (Scalia, J., dissenting).

<sup>198</sup> HUMAN RIGHTS WATCH, *supra* note 59, at 68.

facilities and equipment.<sup>199</sup> Programs simply do not exist to “address the realities of aging or to help them understand and protect their health in later years.”<sup>200</sup> A study reports that as a result, “[m]any . . . older prisoners . . . have little to do besides read, watch television, or talk to each other.”<sup>201</sup>

It must be noted that, due to lack of access to medical and dental facilities, poor diet, and other social factors, the rate of aging in prison is dramatically accelerated.<sup>202</sup> According to medical professionals, “[a] prisoner aged fifty may be classified by society as [ ] middle-aged; he may, in fact, already be an elderly person if many of his years have been spent in the prison system.”<sup>203</sup> This is due to lack of care and frequent engagement in risky behaviors, which leads to premature aging.<sup>204</sup> Due to poor care prior to incarceration and substandard care during imprisonment, elderly inmates are far more likely to suffer from chronic physical and mental ailments than are younger prisoners.<sup>205</sup> According to studies, 82% of inmates over sixty-five suffer chronic illness, requiring consistent care.<sup>206</sup> This escalation in physiological age may result in as much as a “ten-year aging differential” between prisoners’ rates of aging and those of the general population.<sup>207</sup> Consequentially, as prisons become “grayer,” prison inmates’ medical problems increase substantially, through acceleration.<sup>208</sup> Age-related medical problems of the general population, including dementia, cardiac ailments, failing eyesight, high blood pressure, and cancer occur much more frequently.<sup>209</sup> Despite a clear need for geriatric medical care, prison facilities lack medical staff and services necessary for such care.<sup>210</sup> As a result, additional staff and “phenomenal” rates of overtime pay are required to escort prisoners in need to outside specialists,

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<sup>199</sup> *Id.* at 69.

<sup>200</sup> *Id.* at 68.

<sup>201</sup> *Id.*

<sup>202</sup> See Dubler, *supra* note 174, at 150.

<sup>203</sup> *Id.*

<sup>204</sup> Jean Mikle, *Health Care Costs for Older Inmates Skyrocket*, USA TODAY (Mar. 31, 2013), <http://www.usatoday.com/story/news/nation/2013/03/31/health-care-costs-for-older-inmates-skyrocket/2038633/> [<https://perma.cc/U9ZG-79Y4>].

<sup>205</sup> See Vestal, *supra* note 175 (discussing the negative effect of prison overcrowding on BOP’s ability to provide adequate patient care); Dubler, *supra* note 174, at 150. See generally NATHAN JAMES, CONG. RESEARCH SERV. R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES AND OPTIONS 9 (2016), available at <https://www.fas.org/sgp/crs/misc/R42937.pdf>.

<sup>206</sup> HUMAN RIGHTS WATCH, *supra* note 59, at 73.

<sup>207</sup> Dubler, *supra* note 174, at 150.

<sup>208</sup> *Id.*

<sup>209</sup> See *id.* at 150–51; Vestal, *supra* note 4. See generally James, *supra* note 205 (citing U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 63 (2011) (discussing the negative effect of prison overcrowding on BOP’s ability to provide adequate patient care)).

<sup>210</sup> IMPACT OF AN AGING INMATE POPULATION, *supra* note 10, at 21.

and critical care is often delayed due to a lack of both.<sup>211</sup> BOP reports that the average wait times to see outside specialists are between 114 and 256 days.<sup>212</sup>

Regular, daily care also suffers. Elderly prisoners are often unable to participate in daily inmate life, including basic prisoner work duty.<sup>213</sup> Although work can be a source of great pride and can offer necessary income, most prison programs are aimed at younger prisoners and work assignments, many of which involve intensive manual labor, are simply not suited for the elderly.<sup>214</sup> This is so even though officials attempt to match inmates with suitable work details.<sup>215</sup> Scores rely on inmate companions, should they be available, to assist in daily living activities, such as dressing, eating, wheelchair assistance, sight loss assistance, and receiving medications.<sup>216</sup> BOP has made an administrative decision that they are not bound to provide such daily care.<sup>217</sup> In their words, “All inmates are expected to perform activities of daily living, including dressing, cleaning their cells, and moving around within the institution.”<sup>218</sup> This type of policy works to further alienate elderly prisoners who need daily assistance with basic care.

Prison officials have failed to respond adequately to any of these concerns. Most correctional facilities do not provide training covering the unique needs of elderly inmates and lack social workers to provide much-needed assistance.<sup>219</sup> In 2014, there were only thirty-six social workers in all of BOP’s institutions.<sup>220</sup> One institution reported one social worker for every 1,000 inmates.<sup>221</sup> Corrections officers, who interact with prisoners daily, are not trained to recognize changes in inmates’ mental or physical conditions and often miss small, yet noticeable changes requiring medical attention.<sup>222</sup> Prison staff remains untrained to communicate effectively with older inmates. Studies suggest that training should include “the communication skills needed with older adult inmates as the process of aging can affect the clarity and the speed of speech as well as thought processes.”<sup>223</sup> Further, prison officials lack the

<sup>211</sup> See IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 15; Vestal, *supra* note 175. See generally James, *supra* note 205 (discussing inadequacies in prison funding).

<sup>212</sup> IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 18.

<sup>213</sup> Johnson & Beiser, *supra* note 28. Warden Burl Cain of the Louisiana State Penitentiary notes that of 1,000 prison field workers, only 600 to 700 are physically able to complete assigned tasks due to age-related physical decline. *Id.* One third of Louisiana State Penitentiary inmates are over the age of fifty and many cost over \$100,000 to incarcerate. *Id.*

<sup>214</sup> See Curran, *supra* note 74, at 246.

<sup>215</sup> See HUMAN RIGHTS WATCH, *supra* note 59, at 69.

<sup>216</sup> See IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 19.

<sup>217</sup> See *id.*

<sup>218</sup> *Id.*

<sup>219</sup> HUMAN RIGHTS WATCH, *supra* note 59, at 63.

<sup>220</sup> IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 21.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 22.

<sup>223</sup> HUMAN RIGHTS WATCH, *supra* note 59, at 67.

patience and flexibility to adapt strict rules to an elderly population, to whom those rules may not always be best suited.<sup>224</sup> The result is that an “older prisoner may end up with his legitimate needs not being satisfied,” as prison officials are not trained to “[balance] fairness to the elderly with consistency.”<sup>225</sup> Even worse, currently, there is a shortage of staff to fill federal prison guard and other pertinent positions.<sup>226</sup> Last year, reports arose that “[h]undreds of secretaries, teachers, counselors, cooks and medical staffers were tapped . . . to fill guard posts across the [system] because of acute officer shortages and overtime limits . . . .”<sup>227</sup> Union officials warn that “staffers could die if authorities proceed with a plan to eliminate more than 6,000 positions” because “[b]udget cuts lead to deaths in federal prison.”<sup>228</sup> The aforementioned issues give rise to security concerns that also bear consideration.

Finally, prisoner end-of-life care is compromised as well.<sup>229</sup> In previous works, this author has written of the indignities suffered by terminally ill prisoners in prison hospitals and hospices, arguing that prison end-of-life care is unconstitutionally inadequate because the objectives of medical care and correction are incongruous.<sup>230</sup> The goal of prison is to punish, while the aim of medical care is to “diagnose, comfort, and cure.”<sup>231</sup> The incompatibility of these two purposes is even more obvious at the end of a prisoner-patient’s life when the “prisoner-patient’s access to health care is controlled completely by prison guards and is ‘limited by whether a guard chooses to allow the inmate to seek treatment.’”<sup>232</sup> Accordingly:

[I]t is precisely at the end of life that the goals of medicine—to diagnose, comfort, and cure—and the mandate of corrections—to confine and punish—clash most directly. The antagonism, suspicion, and fear that have governed the relationship between the inmate and authorities prior to the last stage of

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 62.

<sup>226</sup> Kevin Johnson, *Federal Prison Workers Hope ‘Three Billboards’ Will Help Them Fight Trump’s Budget Cuts*, USA TODAY (Mar. 6, 2018), <https://www.usatoday.com/story/news/politics/2018/03/05/federal-prison-workers-hope-three-billboards-help-them-fight-trumps-budget-cuts/396107002/> [<https://perma.cc/2AKG-TU9M>] [hereinafter Johnson, *Federal Workers*]; Kevin Johnson, *As Federal Prisons Run Low on Guards, Nurses and Cooks are Filling In*, USA TODAY (Feb. 13, 2018), <https://www.usatoday.com/story/news/politics/2018/02/13/ill-equipped-and-inexperienced-hundreds-civilian-staffers-assigned-guard-duties-federal-prison-secur/316616002/> [<https://perma.cc/7J6B-UJV3>] [hereinafter Johnson, *Prisons Run Low*].

<sup>227</sup> Johnson, *Prisons Run Low*, *supra* note 226.

<sup>228</sup> Johnson, *Federal Workers*, *supra* note 226.

<sup>229</sup> *Infra* notes 226–35.

<sup>230</sup> Jefferson-Bullock, *supra* note 20, at 540.

<sup>231</sup> *Id.*; see also Dubler, *supra* note 174, at 151.

<sup>232</sup> Jefferson-Bullock, *supra* note 20, at 541; Michele Westhoff, *An Examination of Prisoners’ Constitutional Right to Healthcare: Theory and Practice*, 20 HEALTH L. 3, 3 (2008).

illness continue to define and constrain that relationship during the inmate's dying.<sup>233</sup>

Further:

According to prison health care scholars, "prison medical facilities are frequently small, old, and crowded, and equipment and supplies are either unavailable or outdated. Support staff is often inadequate, security protocols may interfere with the physician's medical decision making, prisoners often make for uncooperative and disrespectful patients, and some doctors fear for their own safety in prisons. What's more, there is evidence that prison doctors lose status among their physician-colleagues."<sup>234</sup>

As a result, prison officials experience difficulty recruiting competent, qualified doctors, and end-of-life care fails to "resolve concerns about the dignity of dying in the harsh environment of prison."<sup>235</sup> Plans for a good death, surrounded by loved ones are thwarted by inflexible visiting hours, unwelcoming visiting venues, and less qualified doctors.<sup>236</sup> Prison simply is not fashioned to house dying inmates or inmates with any measure of special need.

Together, the above-mentioned treatment brings elderly prisoners within the coverage of "undignified" as scholars have defined it. Scholars note that "'human dignity has come to be accepted as a core value of [human rights] jurisprudence.' The human rights model of dignity seeks to provide robust protections for the dignity of individuals who are incarcerated."<sup>237</sup> According to Professor Michael Pinard, "the United States concept of dignity is an end point that cannot be passed."<sup>238</sup> An approach focused on dignity would "aim to truly reintegrate these individuals into society" by seeking to "restore the individuals . . . to their prior status," instead of "degrad[ing] and marginalizing them."<sup>239</sup> We must restore dignity to elderly offenders. The most readily identifiable proposed solution to this problem, however, provides no cognizable relief. The current compassionate release model does not provide the type of reprieve originally intended.

<sup>233</sup> Dubler, *supra* note 174, at 151.

<sup>234</sup> Jefferson-Bullock, *supra* note 20, at 542 (quoting Westhoff, *supra* note 232, at 7).

<sup>235</sup> Jefferson-Bullock, *supra* note 20, at 541; HUMAN RIGHTS WATCH, *supra* note 59, at 86.

<sup>236</sup> Jefferson-Bullock, *supra* note 20, at 547 (citing Dubler, *supra* note 174, at 151).

<sup>237</sup> Pinard, *supra* note 1577, at 519 (quoting Arthur Chaskalson, *Human Dignity as a Constitutional Value*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* (David Kretzmer & Eckart Klein eds., 2002)).

<sup>238</sup> Pinard, *supra* note 157, at 521.

<sup>239</sup> *Id.* at 526–27.

## V. THE PROBLEM WITH COMPASSIONATE RELEASE

In 2013, then United States Attorney General Eric Holder announced that compassionate release policies would be expanded to include more classes of ill and non-violent elderly offenders.<sup>240</sup> This pronouncement responded to a scathing and embarrassing Department of Justice (DOJ) report criticizing the BOP's chronic mishandling of the compassionate release program.<sup>241</sup> In the report, BOP was cited for running an inefficient, ineffective system that neglected to adhere to reasonable deadlines, lacked clear standards for review, and failed to realize the abundant cost savings attendant to compassionate release.<sup>242</sup> OIG complained that BOP unfairly denied elderly inmates who should have been eligible for compassionate release.<sup>243</sup> In response, BOP promulgated rules in both 2013 and 2015 to remedy deficiencies and to expand compassionate release to elderly and ill offenders.<sup>244</sup> Policy amendments, however, failed to result in any cognizable relief. Instead of following proper directives and creating a novel category of elderly release candidates, BOP relied on three existing policies.<sup>245</sup> According to a new 2016 OIG responsive report, "these provisions...already existed at the time of the BOP's earlier compassionate release policy, and none had resulted in the release of many BOP inmates."<sup>246</sup>

The process remains unduly burdensome.<sup>247</sup> BOP's first amended Guideline allows for compassionate release of inmates who are seventy years and older and have served thirty years or more of their sentence for an offense that was committed on or before November 1, 1987, under 18 U.S.C.

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<sup>240</sup> Eric Holder, U.S. Attorney Gen., Speech at the American Bar Association's Annual Meeting in San Francisco (Aug. 16, 2013).

<sup>241</sup> See generally U.S. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE I-2013-006, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 1 (2013), available at <https://oig.justice.gov/reports/2013/e1306.pdf> [<https://perma.cc/6A7A-EAS5>] [hereinafter COMPASSIONATE RELEASE PROGRAM] (criticizing the BOP's implementation of the Compassionate Release Program).

<sup>242</sup> *Id.* at 11.

<sup>243</sup> See IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at iii.

<sup>244</sup> FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT: COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 (C)(1)(A) AND 4205(G) 3 (Aug. 12, 2013), available at [https://www.bop.gov/policy/progstat/5050\\_048.pdf](https://www.bop.gov/policy/progstat/5050_048.pdf) [<https://perma.cc/3E8W-LGRB>] [hereinafter PROGRAM STATEMENT]; FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, CHANGE NOTICE: COMPASSIONATE RELEASE/REDUCTION IN SENTENCE PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 (C)(1)(A) AND 4205(G) 3 (Mar. 25, 2015), available at [https://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) [<https://perma.cc/LZ9R-9SKH>] [hereinafter CHANGE NOTICE].

<sup>245</sup> See IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 42.

<sup>246</sup> *Id.* at 42–43.

<sup>247</sup> Jefferson-Bullock, *supra* note 20, at 525.

§ 3559(c).<sup>248</sup> Under the second Guideline, elderly offenders may be eligible for compassionate release if they are at least sixty-five years old; are suffering from a chronic or serious medical condition related to the aging process; are experiencing deteriorating mental or physical health that substantially diminishes their ability to function in a correctional facility for which conventional treatment promises no substantial improvement; and have served at least 50% of their sentence.<sup>249</sup> Lastly, the third Guideline applies to inmates without medical conditions who are age sixty-five and older, and have served the greater of ten years or 75% of their sentences.<sup>250</sup>

These “new” policies further demonstrate the chokehold that BOP maintains over the compassionate release process. Prior to new rule implementation, only 0.01 percent of prisoners received compassionate releases annually in the federal system.<sup>251</sup> Despite hundreds of applications in process annually, only a yearly average twenty-four federal inmates were granted compassionate release between 2006 and 2011.<sup>252</sup> Subsequent to rule modifications, numbers of authorized requests in succeeding years were equally unimpressive. Though enacted in 2013, inmates were not eligible for release under the first Guideline until 2017.<sup>253</sup> Only eighteen inmates met the requirements of the first Guideline at that time.<sup>254</sup> The second provision directly defies previous Guideline policy by requiring elderly inmates to complete fifty percent of their sentence in order to be eligible for release.<sup>255</sup> The BOP inappropriately justifies this time requirement by balancing time served against “the resources that the Department spent to prosecute the inmate.”<sup>256</sup> Finally, the third Guideline has been severely misconstrued. BOP staff report Guideline Three as “unclear,” and have only applied it to prisoners who have served both a minimum of ten years and 75% of their sentence.<sup>257</sup> Consequently, only elderly prisoners with greater than ten year sentences are candidates for compassionate release under Guideline Three.<sup>258</sup> As a result of BOP’s profoundly restrictive policies, elderly compassionate releases are scarce. From August 2013 through September 2014, zero of fifty-two elderly inmates who applied received Guideline one compassionate releases, zero of two-hundred and three applying elderly inmates received Guideline two compassionate

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<sup>248</sup> IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 42; *see also* 18 U.S.C. § 3559(c) (2012) (covering violent felony offenses).

<sup>249</sup> IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 42–43.

<sup>250</sup> *Id.* at 43.

<sup>251</sup> Berry, *supra* note 176, at 868.

<sup>252</sup> *See* COMPASSIONATE RELEASE PROGRAM, *supra* note 241, at 1. *See generally* IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 44 (discussing disparity between large quantity of compassionate release applications and small quantity of approvals).

<sup>253</sup> IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 42.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 43.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 46.

<sup>258</sup> *Id.* at 45.



releases, and two of ninety-three elderly inmates requesting Guideline three compassionate releases received them.<sup>259</sup> Between 2014 and 2017, a total of 3,182 inmates requested compassionate releases.<sup>260</sup> Three hundred six requests were granted.<sup>261</sup> BOP admits that eighty-one inmates have died while their requests were pending.<sup>262</sup> BOP has crafted implementation guidelines that render compassionate release policies meaningless.

Compassionate release is designed to permit judges to review prisoners' sentences to determine whether, under sufficiently extraordinary and compelling circumstances post-sentencing, they remain just.<sup>263</sup> In such situations, the granting of compassionate release relies on a basic, fundamental belief that, due to an inmate's altered circumstance, humanity and decency demand early release.<sup>264</sup> There are both legal and moral justifications for compassionate release.<sup>265</sup> The legal defense asserts that impending death, sickness, extreme family responsibilities, or age have cancelled a prisoner's debt to society, such that release, prior to the completion of the prisoner's sentence, is warranted because imprisonment is no longer owed.<sup>266</sup> The moral virtue of compassionate release is grounded in basic humanity, and commands that we treat, among others, dying prisoners as worthy of a dignified death, prisoners who are sole providers as critical to the fabric of their families, and aged prisoners as deserving of the opportunity to live their golden years outside of the confines of a prison.<sup>267</sup> When compassionate release is granted, achieving the traditional goals of the penal system are outweighed in favor of realizing compassion.<sup>268</sup> Compassionate release is not, however, driven solely by compassion.<sup>269</sup> Research suggests the staggering financial burdens and the minimal public safety benefit of imprisoning the elderly support a broadened

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<sup>259</sup> IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 45.

<sup>260</sup> Letter from Stephen E. Boyd, Assistant Attorney Gen., U.S. Dep't of Justice, Office of Legislative Affairs, to Senator Brian Schatz (Jan. 16, 2018), *available at* <https://famm.org/wp-content/uploads/Response-from-BOP-re.-Compassionate-Release-Letter-1-16-2018.pdf> [<https://perma.cc/DL5Y-FL9S>] [hereinafter Letter from Boyd to Schatz].

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> See Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse Than the Disease?*, 3 WIDENER J. PUB. L. 799, 804–05 (1994).

<sup>264</sup> See *id.* at 804. This is so as long as the U.S. Bureau of Prisons determines that the inmate is no longer a threat to society. See also Jefferson-Bullock, *supra* note 20, at 523 (discussing different rationales for compassionate release programs).

<sup>265</sup> Russell, *supra* note 2633, at 802; Jefferson-Bullock, *supra* note 20, at 523.

<sup>266</sup> Jefferson-Bullock, *supra* note 200, at 523.

<sup>267</sup> *Id.*

<sup>268</sup> Russell, *supra* note 263, at 805.

<sup>269</sup> Brie Williams et al., *For Seriously Ill Prisoners, Consider Evidence-Based Compassionate Release Policies*, HEALTH AFF. BLOG (Feb. 6, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20170206.058614/full> [<https://perma.cc/665U-M9MT>].

view of compassionate release application.<sup>270</sup> In theory, compassionate release should be a reliable remedy for combatting the silver tsunami. In practice, however, compassionate release has veered far from its initial vision.

Compassionate releases are rarely granted because BOP continues to usurp judicial power and only grants compassionate releases in the most narrow of circumstances.<sup>271</sup> BOP has effectively apprehended the compassionate release process by creating an internal review scheme that is contrary to both statutory language and congressional intent.<sup>272</sup> In order to prevail, prisoners must struggle through four strict, time-consuming layers of BOP review before their case may be brought before a judge.<sup>273</sup> This is so even though 18 U.S.C. § 3582(c) gives *courts* the power to reduce or end a prisoner's sentence of incarceration (upon motion of the Director of BOP) for "extraordinary or compelling reasons that warrant reduction" subject to section 3553(a) factors, if applicable, and guidelines established by the Sentencing Commission.<sup>274</sup> Title 18, § 3553(a) of the United States Code sets forth purposes of federal punishment, while United States Sentencing Guidelines, § 1B1.13 offers a policy statement providing four examples of extraordinary and compelling circumstances for which compassionate release is appropriate.<sup>275</sup> Although the ultimate authority rests with the courts, BOP resolves compassionate release requests first, without judicial oversight.<sup>276</sup> This unduly burdensome process must be reformed to ensure relief to the elderly.

In addition to inappropriately assuming the role of the courts, BOP's revised program Guidelines result in an illiberal program that favors denial over permitting release.<sup>277</sup> Furthermore, in determining whether the amended Guidelines are met, BOP weighs the likelihood of reoffending in an outdated, biased manner.<sup>278</sup> These limiting Guidelines, along with BOP's commandeering of the process, effectively obliterate opportunities for elderly compassionate release.<sup>279</sup> Further, they stand opposed to Congress' original intent that judges maintain authority in compassionate release situations.<sup>280</sup> The vision of a reformed, more flexible program remains unrealized. BOP's rationale for controlling compassionate release in such a heavy handed fashion is that elderly offenders, as a class, still pose a danger to society and therefore, do not deserve

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<sup>270</sup> *Id.*

<sup>271</sup> Jefferson-Bullock, *supra* note 20, at 530.

<sup>272</sup> *Id.* at 525.

<sup>273</sup> *Id.*

<sup>274</sup> 18 U.S.C. §§ 3553(a)-(b), 3582(c) (2012).

<sup>275</sup> 18 U.S.C. § 3553(a); U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 (2012) [hereinafter SENTENCING GUIDELINES].

<sup>276</sup> See Jefferson-Bullock, *supra* note 20, at 531.

<sup>277</sup> See generally *id.* (outlining program BOP uses to process compassionate release requests).

<sup>278</sup> *Id.* at 527.

<sup>279</sup> *Id.* at 525.

<sup>280</sup> *Id.*

a reduction in sentence.<sup>281</sup> Purposing this thinking, BOP relies on an antiquated and unfounded belief that long criminal sentences deter crime and effectively satisfy retribution.

## VI. INCARCERATION OF CATEGORY FOUR ELDERLY OFFENDERS DOES NOT FULFILL ANY GOAL OF CRIMINAL PUNISHMENT

For many classes of elderly offenders, the punishment of incarceration may be viewed as essentially meaningless and valueless. This is so because incarceration of the elderly fails to fulfill any theory of criminal punishment. The goals of federal punishment are expressed in the provisions of 18 U.S.C. § 3553(a), which melds utilitarian and retributivist theories of punishment.<sup>282</sup> This hybrid approach purports to punish offenders for both a larger societal benefit and to justly penalize moral blameworthiness.<sup>283</sup> Among the governing principals of punishment enumerated in the statute are deterrence of specific offenders, distribution of just punishment, and effective offender rehabilitation.<sup>284</sup> Utilitarian and retributivist theories of punishment differ in their punishment goals.<sup>285</sup> The goal of the utilitarian theory of punishment is to prevent or reduce future crime, while that of retribution is to ensure that offenders receive their “just desserts.”<sup>286</sup> Neither the goal of crime prevention nor the “eye for an eye” value is satisfied by narrowly-applied compassionate release policies.

### A. *The Problem with Deterrence*

Deterrence cannot reasonably justify incarceration of category four elderly offenders. Incapacitation aims to specifically deter because it demands physical restraint as punishment in order to categorically prohibit individual offenders from engaging in future crimes.<sup>287</sup> Theoretically, incarceration is considered general deterrence as well because it is crafted to threaten would-be offenders against engaging in crime by publicizing imprisonment as its consequence.<sup>288</sup> However, it is well established that lengthy incarceration fails

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<sup>281</sup> See CHANGE NOTICE, *supra* note 244.

<sup>282</sup> See 18 U.S.C. § 3553(a) (2012).

<sup>283</sup> See *id.*

<sup>284</sup> *Id.*

<sup>285</sup> See PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 74 (2008) [Hereinafter ROBINSON DISTRIBUTIVE].

<sup>286</sup> See *id.*

<sup>287</sup> *Id.* at 9.

<sup>288</sup> See *id.* at 9.

to deter crime, whether specifically or generally.<sup>289</sup> This is most evident when studying recidivism statistics.<sup>290</sup>

Further, scholars contend that current deterrence models are flawed because they are unable to predict future conditions.<sup>291</sup> General deterrence hopes that the public crime prevention message invoked at sentencing will remain the same throughout the sentence, thus deterring others from committing crime. Specific deterrence is persuaded that personalized punishment is necessary to prohibit future crimes of the offender. Neither of these factors is true in the case of elderly prisoners. When prisoners become older, age, not the punishment, deters them. The incapacitation believed, at sentencing, to be required to deter, is no longer useful or necessary. According to Professor Paul Robinson, current deterrence models are flawed because they are unable to predict future conditions.<sup>292</sup> In his words, “not only does reliable deterrence analysis require information that is not now available and an understanding of the interrelation among the relevant factors that we do not now have, but it also requires a constant updating of the analysis because the relevant factors themselves are constantly in motion.”<sup>293</sup> This disregard of change extinguishes any meaningfulness in deterrence-centered sentencing models, and such meaninglessness is glaringly evident as offenders age. Modern research clearly shows that age, not length of sentence, is an “adequate predictor of recidivism.”<sup>294</sup> Elderly inmates share the lowest recidivism rates among inmates and “pose almost no threat to public safety.”<sup>295</sup>

### B. *Aging out of Crime*

Criminologists and sociologists confirm that propensity for criminality is, in many respects, directly informed by age.<sup>296</sup> This is commonly referred to as the theory of “aging out” of crime.<sup>297</sup> For many years, scholars have suggested that criminal patterns may be conceptualized by a “single peak occurring fairly early in the life cycle (usually in the late teens for most offenses)

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<sup>289</sup> *Id.* at 51; see Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 954–55 (2003).

<sup>290</sup> Press Release, U.S. Correctional Population, *supra* note 160; see also Press Release, National Correctional Population Reaches New High, *supra* note 160.

<sup>291</sup> OSBORNE ASS’N, *supra* note 7, at 5.

<sup>292</sup> See Robinson & Darley, *supra* note 289, at 980.

<sup>293</sup> *Id.*

<sup>294</sup> OSBORNE ASS’N, *supra* note 7, at 5.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> JEFFREY T. ULMER & DARRELL STEFFENSMEIER, *The Age and Crime Relationship: Social Variation, Social Explanations*, in *THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY* 377, 391 (Beaver et al. eds., 2015).

with steady declines thereafter.”<sup>298</sup> According to this theory, the combination of self-control and opportunity regulates criminality.<sup>299</sup> The likelihood of engaging in criminal conduct decreases as self-control develops with age.<sup>300</sup> Risky behaviors are attractive and more present in youth, and adults generally engage in a less risky lifestyle and have more access to non-criminal thrills should they still feel the need to engage in risky behavior.<sup>301</sup> Thus, crime generally persists in youth and desists in older age.

The aging out theory suggests that propensity for criminality relies upon a delicate balance of both biological and social factors.<sup>302</sup> Persistence in crime during youth is explained by “a lack of social controls, few structured routine activities, and [less] purposeful human agency.”<sup>303</sup> Desistance from crime in adulthood is rationalized by a “confluence of social controls, structured routine activities, and purposeful human agency.”<sup>304</sup> In many respects, “the link between age and criminal involvement is explained by physical development and aging” because “physical abilities, such as strength, speed, prowess, stamina and aggression,” which are necessary for “successful commission of many crimes, for protection, for enforcing contracts, and for recruiting and managing reliable associates” decrease significantly with age.<sup>305</sup> Additionally, as one physically ages, the social factors accompanying adulthood bear more heavily on decision making processes, thereby rendering criminality less attractive.<sup>306</sup> Sociological factors related to marriage, children, employment, and community expectations lead to a loss of willing co-conspirators, changed goals that no longer include risk-taking, age-related expectations to “settle down,” and an overall appreciation that crime simply “does not pay.”<sup>307</sup> Scholars note that “the rise in crime in adolescence to the edge of young adulthood, and crime’s decline with age thereafter reflects both the biological process of aging as well as the roles, norms, and socially constructed perspectives that accompany aging.”<sup>308</sup>

Even BOP acknowledges the existence of the aging out phenomenon.<sup>309</sup> By their own admission, “age is one of the biggest predictors of misconduct” in

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<sup>298</sup> Charles R. Tittle & Harold G. Grasmick, *Criminal Behavior and Age: A Test of Three Provocative Hypotheses*, 88 J. CRIM. L. & CRIMINOLOGY 309, 312 (1997).

<sup>299</sup> *Id.* at 313–14.

<sup>300</sup> *See id.* at 314.

<sup>301</sup> *Id.* at 318.

<sup>302</sup> *Id.* at 310–11; ULMER & STEFFENSMEIER, *supra* note 297, at 379–81.

<sup>303</sup> ROBERT J. SAMPSON & JOHN H. LAUB, *A General Age-Graded Theory of Crime: Lessons Learned and the Future of Life-Course Criminology*, in 14 ADVANCES IN CRIMINOLOGICAL THEORY: INTEGRATED DEVELOPMENTAL & LIFE-COURSE THEORIES OF OFFENDING 165, 166 (David P. Farrington ed., 2004).

<sup>304</sup> *Id.*

<sup>305</sup> ULMER & STEFFENSMEIER, *supra* note 297, at 379.

<sup>306</sup> *Id.* at 390.

<sup>307</sup> *Id.* at 391.

<sup>308</sup> *Id.* at 389.

<sup>309</sup> *See* IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 38.

prison and “inmates tend to ‘age out’ of misconduct” as they grow older.<sup>310</sup> Older inmates “generally try to avoid conflict and ‘do their time’ as quietly and easily as possible,” and utilize “passive precautionary behaviors such as keeping more to oneself, avoiding certain areas of the prison, spending more time in one’s cell, and avoiding activities” to remain free from danger.<sup>311</sup> Younger inmates, on the other hand, are more prone to directly confront dangerous situations that occur in prison.<sup>312</sup> BOP data reveals that elderly inmates accounted for only 10% of all misconduct incidents for 2013, although they comprised 19% of the total inmate population.<sup>313</sup> Additionally, elderly misconduct violators commit less serious infractions than their younger counterparts, with 67% of aging inmates’ misconduct at “moderate or low severity compared to sixty percent of younger inmates misconduct” during 2013.<sup>314</sup> BOP social workers and case managers report that elderly inmates’ infractions do not usually involve the type of violence or aggression that is typical of younger inmates.<sup>315</sup> Older inmates are far less likely to “engage in predatory behavior, be physically aggressive, get into physical fights, keep weapons, or exploit other inmates.”<sup>316</sup>

Moreover, statistics show that older inmates experience far lower post-release re-arrest rates than younger inmates.<sup>317</sup> According to a 2015 OIG report of inmates aged fifty and older who were released between 2006 and 2010, 15% were arrested for new crimes within three years of release.<sup>318</sup> An additional 7% of new arrests were for probation violations.<sup>319</sup> It is noteworthy that of that 15% of elderly recidivists, none were aged seventy and older.<sup>320</sup> These numbers may be better appreciated when considered with data chronicling overall national recidivism rates. In 2009, the Bureau of Justice Statistics reported that the “recidivism rate for 20-year-old released prisoners is approximately 60 percent, but drops dramatically as individuals become older,” slowing down around age forty, but continuing to “fall as prisoners approach 80 and older.”<sup>321</sup> Further, a 2015 Bureau of Justice Statistics report of recidivism rates for all ages of offenders between 2005 and 2010 conveys that 68% of offenders were arrested

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<sup>310</sup> *Id.*

<sup>311</sup> HUMAN RIGHTS WATCH, *supra* note 59, at 59–60.

<sup>312</sup> *Id.* at 59.

<sup>313</sup> See IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 52.

<sup>314</sup> *Id.* at 38.

<sup>315</sup> *Id.*

<sup>316</sup> HUMAN RIGHTS WATCH, *supra* note 59, at 61.

<sup>317</sup> See IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, 38.

<sup>318</sup> *Id.* at 39.

<sup>319</sup> *Id.* at 40.

<sup>320</sup> *Id.*

<sup>321</sup> KIDEUK KIM & BRYCE PETERSON, AGING BEHIND BARS: TRENDS AND IMPLICATIONS OF GRAYING PRISONERS IN THE FEDERAL PRISON SYSTEM, 1, 5 (Apr. 2014), available at <https://www.urban.org/sites/default/files/publication/33801/413222-Aging-Behind-Bars-Trends-and-Implications-of-Graying-Prisoners-in-the-Federal-Prison-System.PDF> [<https://perma.cc/9PNK-RCD8>].

for new crimes within three years of release and 77% were arrested for new crimes within five years of release.<sup>322</sup> Likewise, the probability of parole violations also declines with age. Elderly offenders comprise an incredibly small percentage of recidivists. The aging out theory further proves that incarceration does not deter elderly offenders. It does not satisfy retribution either.

### C. *The Problem with Retribution*

Retribution insists that offenders must be punished fairly, based solely on the extent of their moral blameworthiness.<sup>323</sup> Retribution's core justification is proportionality, and retribution's assurance is that punishment will always be proportional, and therefore, fair.<sup>324</sup> According to punishment scholars, desert may fall into in two separate, yet coincidental, categories: desert pragmatism and desert moralism.<sup>325</sup> Desert pragmatism or empirical desert adopts the "community's shared principles of justice" in assigning liability and, ultimately, punishment.<sup>326</sup> Desert moralism or deontological desert relies upon "abstract principles of moral right and goodness."<sup>327</sup> These "bottom-up" and "top-down" theories, respectively, work collaboratively to ensure overall justice, so that "each offender receives the punishment deserved, no more, no less."<sup>328</sup> The United States' current system of punishment neglects to satisfy any retributive purpose because it lacks fairness. Comprehensively, desert does not support current-day incarceration as the principal mode of punishment because the types of lengthy periods of incapacitation employed by our criminal justice system are inherently disproportionate, and so unfair.<sup>329</sup> Singularly, incapacitation fails to punish certain classes of elderly offenders proportionally as well.

Proportionality is the cornerstone of retributive punishment theory.<sup>330</sup> It may be viewed as a "basic right" and a "fundamental principle of justice that emanates directly from the state's essential duty to protect the personal right[s]

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<sup>322</sup> MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUST., RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 7 (Apr. 2014), available at <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> [<https://perma.cc/4X42-6MR4>].

<sup>323</sup> See ROBINSON DISTRIBUTIVE, *supra* note 285, at 136–40.

<sup>324</sup> *Id.* Desert may be categorized thusly: vengeful desert, deontological desert, and empirical desert. *Id.* Each category apportions blameworthiness differently. *Id.* Vengeful desert considers moral blameworthiness from the point of view of the victim. *Id.* at 137. Deontological desert examines moral blameworthiness based on the views of moral philosophers. *Id.* at 138–39 Empirical desert distributes moral blameworthiness according to the community's shared justice beliefs. ROBINSON DISTRIBUTIVE, *supra* note 269, at 139–40.

<sup>325</sup> PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 19 (2006).

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> See *The Time Is Ripe*, *supra* note 40, at 107.

<sup>330</sup> Amit Bindal, *Rethinking Theoretical Foundations of Retributive Theory of Punishment*, 51 J. INDIAN L. INST. 307, 311 (2009).

of its constituents.”<sup>331</sup> In the context of criminal sentencing, proportionality requires a critical assessment of the degree of an offender’s moral blameworthiness, succeeded by a reckoning of whether any proposed sentence is aligned therewith.<sup>332</sup> In evaluating proportionality, criminal sentencing should face the “particular paradox” of guarding the specific rights of the victim, *and* the offender.<sup>333</sup> In practice, a complete proportionality prototype actually borrows from utilitarianism by considering the offender’s individual characteristics, and asking what punishment imposed on a specific offender would be proportional to that specific crime *and* whether the punishment imposed will effectively deter the offender from offending in the future.<sup>334</sup> Modern egalitarian interpretations maintain that retributive punishment must value offender and victim dignity by determining the outer limits of punishment and constraining punishment to the “precise amount of suffering necessary to restore just distributions of the burdens of the law.”<sup>335</sup> Proportionality demands that punishment also be considered from the point of view of the offender.<sup>336</sup> This, however, is not the case in the United States criminal justice system. Our current system of punishment is comprised, chiefly, of the type of unnecessarily lengthy sentences that are improperly focused solely on the crime and the victim. One significant factor motivating this impropriety is certainly the stigma attached to incarceration. Another may be the inability to measure proportionality accurately.

Scholars suggest that proportionality must be assessed both qualitatively and quantitatively, but that its qualitative nature is more reliable.<sup>337</sup> Just as “it is difficult to know or control which particular details of an offender or offense inform a decision-maker’s assessment of desert,”<sup>338</sup> it is also nearly impossible to measure how much punishment is enough.<sup>339</sup> Nevertheless, quantitative proportionality cannot be disregarded.

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<sup>331</sup> Dubber, *supra* note 132, at 538.

<sup>332</sup> *Id.* at 539.

<sup>333</sup> *Id.* at 538; *see also* Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 537 (2008) (suggesting a three-factor test of harm, culpability, and proportionality).

<sup>334</sup> Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783, 787–88 (2008).

<sup>335</sup> Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1299–1302 (2006).

<sup>336</sup> Balmer, *supra* note 334, at 786.

<sup>337</sup> Ristroph, *supra* note 335, at 1327.

<sup>338</sup> *Id.* at 1296 (“Racial bias, fear, [and] disgust... can shape desert assessments, but... do so under cover of a seemingly legitimate moral judgment.”).

<sup>339</sup> ROBINSON DISTRIBUTIVE, *supra* note 285, at 129; *How Much Punishment Is Enough?*, *supra* note 40, at 398.



#### D. Retribution and Quantitative Proportionality

The retributive theory of punishment is grounded in perceptions of punishment as fair, and may include moral philosopher's perceptions and those of the community. Scholars agree that desert is only effective if the general population is convinced of its fairness.<sup>340</sup> In this context, proportionality is the cornerstone of fairness. Quantitative proportionality ponders the duration of a period of punishment to determine whether it is fair or deserved.<sup>341</sup> For desert to function fairly, proportionality must be measurable—retribution requires punishment no more and no less than what is deserved, “solely because the offender deserves it.”<sup>342</sup> Individual assessments are required for a punishment to survive retribution scrutiny. Incarceration of most classes of elderly offenders is both “collective and de-individualized” in a manner that offends retribution.<sup>343</sup> This is so because the lengthy measure of time does not fit each offender and his crime.

Further, like deterrence, desert presupposes that conditions that could render the sentence unfair will not materialize while the sentence is being served. Once an offender no longer poses a threat to society, general deterrence considerations can no longer be justified. Likewise, when an offender who is serving a typical lengthy sentence ages, his original sentence is no longer fair, and retributivist theories of punishment lose value. The punishment, a life sentence, in a prison that is ill-suited to meet the elderly inmates' basic health, emotional, psychological, and physical needs, is too harsh to fit the crime. Additionally, studies reveal that “[t]he majority of offenses do not, in society's opinion, merit sentences as harsh as the death penalty or even life in prison,” and result in the imposition of “much stiffer penalties than were originally deemed appropriate by the legislature.”<sup>344</sup> Our intuitions of justice and fairness do not align with a conversion to a life sentence. The changed condition of aging renders continued incarceration of the elderly unfair, and therefore misaligned with retribution. Some scholars suggest that retribution can only be accurately measured by factoring conditions that exist at the time the crime was

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<sup>340</sup> ROBINSON DISTRIBUTIVE, *supra* note 285, at 96 (“Deviating from a community's intuitions of justice can inspire resistance and subversion among participants—juries, judges, prosecutors, and offenders—where effective criminal justice depends upon acquiescence and cooperation . . . [I]iability and punishment rules that deviate from a community's shared intuitions of justice undermine that reputation. The system's intentional and regular deviations from desert also undermine efficient crime control because they limit law's access to one of the most powerful forces for gaining compliance: social influence. The greatest power to gain compliance with society's rules of prescribed conduct may lie not in the threat of official sanction but rather in the influence of the intertwined forces of social and individual moral control.”). *Id.*

<sup>341</sup> John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 89 (2010).

<sup>342</sup> Christopher, *supra* note 45, at 282.

<sup>343</sup> Pinard, *supra* note 157, at 510.

<sup>344</sup> Westhoff, *supra* note 232, at 10.

committed.<sup>345</sup> Modern-day reformers agree, however, that “increasing age and infirmity may change the calculus against continued incarceration and in favor of some form of conditional release.”<sup>346</sup> In practice, courts commonly utilize safety valve procedures that allow them to “look-back” at a sentence and reconsider it.<sup>347</sup> Compassionate release should be used in the same way.

The health, social, and daily care indignities that older offenders suffer transform their prison experience into one that may have been proportional at sentencing, but no longer remains so. Prisons are simply not equipped or interested in providing basic, necessary care for offenders as they age. For that reason, incarceration of the elderly is quantitatively disproportionate. Retribution can be better understood, however, by focusing on its qualitative elements. An examination of Eighth Amendment proportionality is instructive in this area.

#### *E. Retribution, the Eighth Amendment, and Qualitative Proportionality*

The Eighth Amendment prohibition against cruel and unusual punishment has been interpreted to proscribe excessive or disproportionate punishments.<sup>348</sup> While retribution’s definition is well-established, considerable scholarly commentary notes the Supreme Court’s inability to craft a concrete interpretation of Eighth Amendment proportionality.<sup>349</sup> In response, some scholars suggest that Eighth Amendment proportionality is born of retributive proportionality, and that the essential meanings of both are identical.<sup>350</sup> According to Professor John Stinneford, “[T]he historical evidence demonstrates that the focus of the Cruel and Unusual Punishments Clause . . . was retributive rather than utilitarian.”<sup>351</sup> He suggests that the Court’s confusion regarding Eighth Amendment proportionality can be remedied by looking to retributive proportionality.<sup>352</sup> To do so, the distinction between punishment’s justification and its purpose must be acknowledged.<sup>353</sup> He writes that punishment’s justification “gives the punishment the quality of justice” or “ensures that the offender gets his due.”<sup>354</sup> On the other hand, punishment’s purposes “are the good things we hope to achieve through it,

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<sup>345</sup> HUMAN RIGHTS WATCH, *supra* note 59, at 90.

<sup>346</sup> *Id.* at 88.

<sup>347</sup> *See id.* at 90 (discussing one example, “in states where sentences are set between a minimum and maximum range,” and “parole boards are either explicitly required or tacitly permitted to reassess the seriousness of the offense in determining how long the prisoner should serve”).

<sup>348</sup> *See e.g.*, *Weems v. United States*, 217 U.S. 349, 349–50 (1910).

<sup>349</sup> John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 904–06 (2011).

<sup>350</sup> *Id.* at 899.

<sup>351</sup> *Id.* at 965.

<sup>352</sup> *Id.* at 967–68.

<sup>353</sup> *Id.* at 962.

<sup>354</sup> *Id.*

without respect to what is due to the offender as a matter of justice.”<sup>355</sup> He reasons correctly that “a punishment is permissible only to the extent that it is justified,” but will be deemed disproportionate, and therefore, excessive, if it is found to exceed the “bounds of justice.”<sup>356</sup> In assessing whether punishment is within bounds and appropriately proportionate, qualitative factors must be closely considered.

Scholars suggest that Eighth Amendment proportionality analyses disallow examination of the quantity of punishment, but must appraise only its qualitative value instead.<sup>357</sup> This line of reasoning is focused on the dignity interests inherent in Eighth Amendment jurisprudence. Under it:

[T]he Eighth Amendment acts primarily to prohibit unreasonable degradations of the person in the administration of punishment. If sufficient regard is given to this notion, the argument that the Eighth Amendment prohibits “excessive” quantitative punishments is weakened, and the argument that the Eighth Amendment only prohibits qualitatively disproportionate punishments is strengthened. This is because the length of a custodial sentence—or more generally the temporal length of any imposed sentence—has no apparent connection to the dignity interest. Rather, the dignity interest speaks directly to the *type* of punishment imposed—in other words, the qualitative character of the punishment.<sup>358</sup>

Qualitative proportionality review, therefore, does not focus on time served, but seeks to identify whether inmates’ experiences of confinement are proportional to the crime committed, the culpability of the offender, or both.<sup>359</sup> Qualitative proportionality pertains to the conditions of imprisonment, and contemplates circumstances, such as inadequate medical care, overcrowding, shortage of educational opportunities, and the absence of rehabilitative services, among others.<sup>360</sup> To comport with proportionality, conditions of incarceration must not offend human dignity. Proportionality demands that punishments are not “violative of [the] inherent dignity of human beings,”<sup>361</sup> thereby limiting government’s power to punish.<sup>362</sup> While this author disagrees that quantity must be disregarded, she does contend that it is a less reliable measure of

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<sup>355</sup> Stinneford, *supra* note 349, at 962.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 899 (“[T]his Article shows that proportionality should be measured primarily in relation to prior punishment practice. The proposed approach will align the Court’s proportionality jurisprudence more closely with the core purposes of the Cruel and Unusual Punishments Clause.”).

<sup>358</sup> Castiglione, *supra* note 341, at 107–08 (footnote omitted).

<sup>359</sup> *Id.* at 79.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 100.

<sup>362</sup> Dubber, *supra* note 132, at 538.

proportionality than quality.<sup>363</sup> Scrutiny of qualitative factors will determine whether punishment meets the proportionality requirement of retribution and the Eight Amendment.

For the elderly, conditions of imprisonment are almost universally disproportionate. As discussed in Part II, elderly inmates suffer a host of indignities specific to their age.<sup>364</sup> Prisons have been described as unsuitable nursing homes, lacking in basic supplies, adequate medical care, accommodated facilities, and qualified staff sufficient to support an aging population.<sup>365</sup> Prisoners are confined in an environment where they are at high risk for contracting communicable diseases, and where they lack access to care that would allow them to manage chronic health problems and avoid preventable consequences of certain diseases.<sup>366</sup> Together, these factors create an environment where elderly inmates are degraded and where their dignity is destroyed in violation of theories of retribution and Eighth Amendment qualitative proportionality. As a final matter, this burden has simply become too costly.

## VII. INCARCERATION OF THE ELDERLY IS COST-PROHIBITIVE

Caring for an elderly prison population is a costly endeavor that can be avoided. It is estimated that prison geriatric care can range from \$60,000–\$69,000 per year, per inmate, while the cost of incarcerating a younger, more robust inmate is approximately \$20,000–\$30,000 per year.<sup>367</sup> Prisons systems must bear this massive financial burden singularly because Medicaid and Medicare eligibility for prisoners is severely limited.<sup>368</sup> Broadly applied compassionate release programs could relieve the government’s financial burden by shifting care costs from the overburdened Department of Corrections to Medicare and Medicaid, where the costs would be “largely invisible.”<sup>369</sup>

As a direct result of prison overcrowding and subsequent graying, the cost of funding corrections has risen to unsustainable levels. Included in the cost of housing offenders is the cost of food service, medical treatment, grounds

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<sup>363</sup> Castiglione, *supra* note 341, at 108 (explaining that some scholars refer to the temporal duration of a sentence as a liberty or autonomy interest, rather than a proportionality issue).

<sup>364</sup> *See infra* Part II.B.

<sup>365</sup> *See id.*

<sup>366</sup> *See* Nancy Dubler, *Ethical Dilemmas in Prison and Jail Healthcare*, HEALTH AFF. BLOG (Mar. 10, 2014), <http://healthaffairs.org/blog/2014/03/10/ethical-dilemmas-in-prison-and-jail-health-care/> [<https://perma.cc/44HA-NUBB>]; James S. Marks & Nicholas Turner, *The Critical Link Between Health Care And Jails*, HEALTH AFF. BLOG (Mar. 1, 2014), <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2013.1350>.

<sup>367</sup> Dubler, *supra* note 174, at 151; *see* JAMES, *supra* note 205, at 9. Additionally, the costs to states is more than \$50 billion per year, second only to the spending amount of Medicaid. Viguerie, *supra* note 161. *See also* HUMAN RIGHTS WATCH, *supra* note 59, at 6.

<sup>368</sup> HUMAN RIGHTS WATCH, *supra* note 59, at 78.

<sup>369</sup> Dubler, *supra* note 174, at 154.

upkeep, waste removal, utilities provisions, facility maintenance and repair, guard service, and personnel.<sup>370</sup> In fiscal year 2014, the BOP budget consisted of 25% of the entire DOJ budget, while it was only 20% of the budget in FY 2000.<sup>371</sup> BOP's rate of growth is "twice that of the rest of the DOJ."<sup>372</sup> Three primary drivers of increased prison costs are expenditures on utilities, food, and medical care, but none of these factors has been as pronounced as the increase in the per capita cost of inmate medical care.<sup>373</sup> Granting compassionate release to elderly prisoners would significantly reduce DOJ and BOP budgets and ease taxpayer burdens.<sup>374</sup>

Furthermore, an increasingly grayer prison population is a significant factor in the upsurge in prison health care costs, especially for costs related to end-of-life care.<sup>375</sup> Health care costs for elderly prisoners, who are more likely to experience chronic medical conditions and terminal illness, are "two to three times that of the cost for other inmates."<sup>376</sup> According to a recent DOJ study:

From FY 2010 to FY 2013, the population of inmates over the age of 65 in BOP-managed facilities increased by 31 percent, from 2,708 to 3,555, while the population of inmates 30 or younger decreased by 12 percent, from 40,570 to 35,783. This demographic trend has significant budgetary implications for the Department because older inmates have higher medical costs.... Moreover, inmate health services costs are rising: BOP data shows that the cost for providing health services to inmates increased from \$677 million in FY 2006 to \$947 million in FY 2011, a 40 percent increase.<sup>377</sup>

Prisons in the United States contain "an ever growing number of aging men and women" who are "suffering chronic illnesses, extremely ill, and dying."<sup>378</sup> The cost of housing and caring for elderly prisoners is simply unsustainable and irrational. According to analysts, it is estimated that releasing infirmed prisoners could save correctional systems "\$900 million during the first year alone" and would not jeopardize public safety.<sup>379</sup>

Moreover, little attention is afforded to the particularly significant topic of elderly inmate reentry and the inordinate associated costs. As scholars

<sup>370</sup> SAMUELS ET AL., *supra* note 13, at 44.

<sup>371</sup> *Id.* at 7.

<sup>372</sup> *Id.*

<sup>373</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 47, at 16; VESTAL, *supra* note 175.

<sup>374</sup> See generally VESTAL, *supra* note 175 (describing the fiscal burden the prison system incurs from medical costs of elderly prisoners).

<sup>375</sup> See *id.*

<sup>376</sup> *Id.*

<sup>377</sup> Memorandum from Inspector Gen. Michael Horowitz to the Attorney Gen. & Deputy Attorney Gen., Top Management and Performance Challenges Facing the Department of Justice (Dec. 2013) [<https://perma.cc/AC6A-HMDD>].

<sup>378</sup> Caroline M. Upton, *A Cell for a Home: Addressing the Crisis of Booming Elder Inmate Populations in State Prisons*, 22 ELDER L.J. 289, 290 (2014) (quoting HUMAN RIGHTS WATCH, *supra* note 59, at 4).

<sup>379</sup> Press Release, How to Safely Reduce Prison Populations, *supra* note 46, at 4.

correctly note, “sooner or later, one of two things will happen to an aging prisoner: she will either be released from prison or she will die behind bars.”<sup>380</sup> Lengthy prison terms destroy families and communities.<sup>381</sup> This is especially true for category four elderly inmates who have spent several years in prison. Following a lengthy prison term, elderly inmates are released into a completely transformed environment.<sup>382</sup> Due to years of displacement, support from families, friend, and communities is strained or non-existent.<sup>383</sup> Many are completely devoid of or have outdated employment skills and may be barred, as ex-offenders, from engaging in certain employment or from receiving specific government benefits.<sup>384</sup> All of the aforementioned, coupled with chronic health issues, disease, and the decline that accompanies life in prison, render many category four offenders in need of residential, social, transportation, health, and financial support.<sup>385</sup> In assessing the fiscal impact of narrow compassionate release policies, these costs must be calculated as well. In computing these costs, the effect of the extraordinary degree of stigma to which ex-offenders are subjected must also be gauged.

The fiscal impact of refusing to release category four elderly offenders is exceedingly larger than contemplated thus far. According to recent studies, ex-offenders aged fifty and over are more likely to experience unemployment and possess less resources for retirement than those who have never been imprisoned.<sup>386</sup> In addition to the immediate cost savings associated with releasing category four offenders, there are also longer-term financial impacts that must be addressed. By confining these inmates for so long, we are setting them up to become wholly dependent on the government for the remainder of their lives, should they survive until released. This can be avoided by implementing a novel, broadened compassionate release model that is humane, aligned with theories of punishment, fiscally responsible, and socially respectable.

## VIII. REMEDIES

Law and policymakers consistently bemoan this exceedingly flawed, rigid, BOP-controlled compassionate release process. A 2013 OIG report chronicling the numerous flaws of the compassionate release process, recommended four major amendments to cure deficiencies: (1) provide guidance to prison staff regarding appropriate compassionate release non-medical and medical criteria; (2) ensure timely responses to compassionate

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<sup>380</sup> HUMAN RIGHTS WATCH, *supra* note 59, at 80.

<sup>381</sup> See *The Time Is Ripe*, *supra* note 40, at 75.

<sup>382</sup> NAT'L ASS'N OF AREA AGENCIES ON AGING, *supra* note 51, at 3.

<sup>383</sup> *Id.*; see also HUMAN RIGHTS WATCH, *supra* note 59, at 80 (describing the eroded support systems of elderly prisoners).

<sup>384</sup> See NAT'L ASS'N OF AREA AGENCIES ON AGING, *supra* note 51, at 3.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

release requests and appeals; (3) craft formal procedures to inform inmates about compassionate release; and (4) create a system to track requests and denials in order to ensure transparency and appropriate oversight.<sup>387</sup> BOP responded to each recommendation, but implemented reforms in their perennial role as jailers.<sup>388</sup> They attempted to provide guidance to staff regarding compassionate release medical criteria by promulgating rules limiting medical release to inmates with terminal or debilitating illnesses who were either “diagnosed with a terminal, incurable disease and whose life expectancy is eighteen...months or less” or whose debilitation prohibits or severely limits self-care.<sup>389</sup> BOP’s amendments, however, were narrowly construed, and fitness was reserved only for inmates who could definitively prove that they would expire within twelve months.<sup>390</sup> The debilitation requirement ignored the large and most expensive group of ill inmates to care for, those with chronic illnesses, who may still be capable of self-care, but whose decline occurs daily and is impossible to monitor in a prison environment.<sup>391</sup> Likewise, non-medical release criteria were not markedly expanded.<sup>392</sup> While the elderly were included, they were limited severely by age.<sup>393</sup> BOP restricted non-medical elderly releases to inmates ages sixty-five and older who had served the greater of 75% of their sentence or ten years.<sup>394</sup> In addition to limiting this provision to a minute number of inmates, it also created significant confusion because staff applied it incorrectly.<sup>395</sup> In addition, BOP improved their response time, but not by an impressive measure.<sup>396</sup> The response process averages between 141 and 196 days, and BOP concedes that between 2014 and 2018, eighty-one inmates died before their requests could be processed.<sup>397</sup> BOP claims to have provided a mechanism for communicating compassionate release’s availability to inmates, yet fails to offer transparency in this regard.<sup>398</sup> Finally, BOP did create a tracking system, but declines to publish it with any regularity.<sup>399</sup> BOP refuses to craft meaningful revisions and restore dignity to thousands of elderly inmates.

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<sup>387</sup> See OFFICE OF INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM 56 (Apr. 2013) [hereinafter 2013 OIG REPORT]; COMPASSIONATE RELEASE PROGRAM, *supra* note 241, at 56.

<sup>388</sup> See PROGRAM STATEMENT, *supra* note 244, at 4.

<sup>389</sup> *Id.* at 3.

<sup>390</sup> See IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 41, 45–46.

<sup>391</sup> See *id.* at 44.

<sup>392</sup> See *id.*

<sup>393</sup> See PROGRAM STATEMENT, *supra* note 244, at 4.

<sup>394</sup> *Id.*

<sup>395</sup> See IMPACT OF AN AGING POPULATION, *supra* note 9, at 45–46; see also *supra* Part IV.

<sup>396</sup> See Letter from Boyd to Schatz, *supra* note 260; *supra* Part IV.

<sup>397</sup> *Id.*; see *infra* Part IV.

<sup>398</sup> COMPASSIONATE RELEASE PROGRAM, *supra* note 241, at ii.

<sup>399</sup> See generally IMPACT OF AN AGING INMATE POPULATION, *supra* note 9 (illustrating the BOP’s failure to provide timely and transparent responses to OIG recommendations).

In reply to BOP's tepid amendments, OIG offered an additional report in 2015 with added recommendations, specifically targeting compassionate release for the elderly.<sup>400</sup> In the report, OIG requested that more substantial elderly compassionate release procedures be implemented immediately.<sup>401</sup> The report uncovered BOP's lack of appropriate staffing, infrastructure, and programming to care for elderly inmates adequately.<sup>402</sup> The report also emphasized the exorbitant fiscal impact of imprisoning elderly inmates, including their significantly increased medical costs.<sup>403</sup> Further, it revealed that BOP unfairly limits elderly compassionate release to inmates who have already served ten years, excluding inmates whose sentences amount to ten years or less.<sup>404</sup> OIG recommended lifting the ten year time-served requirement and also lowering age eligibility to fifty years old in order to recognize the actual physiological age of most prisoners.<sup>405</sup> Together, implementation of these reforms portends the preservation of both human dignity and cost. According to OIG in 2013, in "releasing 100 inmates with serious medical conditions from the medical referral centers each year, the BOP could potentially realize cost savings of at least \$5.8 million annually."<sup>406</sup> Three years later, BOP has not implemented these particular reforms or any substantial amendments.<sup>407</sup>

BOP's narrow compassionate release policies continue to invite criticism. In 2016, the Sentencing Commission suggested that non-medical elderly compassionate release be expanded to apply to inmates seventy years and older who have served "at least ten years or 75 percent of his or her term of imprisonment, whichever is less."<sup>408</sup> Also, in a 2016 report to Congress advocating for the reform of compassionate release standards, the Congressional Research Service suggests that "Congress could consider modifications to the requirements for sentence reduction under 18 U.S.C. Section 3582(c)(1)(A) to allow more inmates to have their sentences reduced."<sup>409</sup> Further, in 2017, members of the Appropriations Committee of the United States Congress directed BOP to respond to recommendations from OIG and the Sentencing

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<sup>400</sup> *See id.* at 53–54.

<sup>401</sup> *Id.*

<sup>402</sup> *See id.* at 47, 51–52.

<sup>403</sup> *See id.* at 10–16.

<sup>404</sup> *Id.*

<sup>405</sup> IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 47.

<sup>406</sup> *See* 2013 OIG REPORT, *supra* note 389, at 45; *see also* COMPASSIONATE RELEASE PROGRAM, *supra* note 241, at 45–46 (describing the potential cost savings upon expansion of the compassionate release program).

<sup>407</sup> *See generally* IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 65 (analyzing the varying degrees of BOP's responsiveness to the OIG's recommendations).

<sup>408</sup> U.S. SENTENCING COMM'N, 2016 AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY 2 (Apr. 2016), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160428\\_RF.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160428_RF.pdf) [<https://perma.cc/H CZ8-Y5CL>].

<sup>409</sup> JAMES, *supra* note 205, at 15.



Commission to implement additional compassionate release reforms.<sup>410</sup> Committee members requested information regarding the following: steps undertaken to implement requested reforms; reasons why recommendations have not or cannot be implemented; numbers of granted and denied compassionate release requests for the last five years, including criteria relied upon; dates between initial requests and final decision, categorized by criteria relied upon; and numbers of prisoners who died awaiting decision.<sup>411</sup> Five months later, BOP replied by two-page letter.<sup>412</sup> The letter offers a few short tables with statistics documenting requests and denials, categorized accordingly.<sup>413</sup> Most concernedly, the letter asserts that BOP has considered the aforementioned Sentencing Guidelines recommendations, but will continue to use their existing policy at this time.<sup>414</sup> Despite Congress' inquiry, BOP does not address OIG's recommendations at all.<sup>415</sup> Clearly, BOP is not committed to reform, and will not cede control of the compassionate release program. BOP is too intractable in its narrow purposes of security and of assuring that an inmate serves all of the time to which he is sentenced, to author significant change. The process, then, must be wrested from BOP and placed where it squarely belongs—in the hands of judges. Further, Congress should assist in limiting the discretion normally accorded agencies like BOP in the area of rulemaking. The limits for BOP must be more proscribed and detailed.

Compassionate release still remains the most appropriate means to accomplish early release of elderly offenders. It is clear that overly lengthy incarcerative sentences are misaligned with theories of punishment.<sup>416</sup> Further, it is also evident that, due to excessive imprisonment periods, a disconcertingly large, ever-growing population of inmates will age in prison.<sup>417</sup> Finally, it is indisputable that prison systems are not equipped to effectively manage the obligations of an expanding aging inmate population and are not inclined to increased expenditures to become prepared to do so.<sup>418</sup> If more broadly applied and adequately designed, compassionate release is a ready vehicle for relief of the incarcerated elderly.

In previous works, this author has urged amending compassionate release procedures so that eligibility criteria is clearly defined, inmates are informed that they can avail themselves of compassionate release opportunities,

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<sup>410</sup> H.R. 3267, 115th Cong. (2017).

<sup>411</sup> *Id.*; see also Letter to Thomas R. Kane, Acting Dir., Fed. Bureau of Prisons and Hon. to J. Rod Rosenstein, Deputy Attorney Gen. U.S. Dep't of Justice (Aug. 3, 2017), available at <https://www.schatz.senate.gov/imo/media/doc/2017.08.03%20Letter%20to%20BOP%20and%20DAG%20re.%20Compassionate%20Release%20FINAL.pdf>. [<https://perma.cc/6VSL-S3NR>].

<sup>412</sup> See Letter from Boyd to Schatz, *supra* note 260.

<sup>413</sup> See *id.*

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> See *supra* Part IV.

<sup>417</sup> See *supra* Part I.

<sup>418</sup> See *supra* Parts III.B. and VII.

inmate requests are tracked, and eligibility determinations are more appropriately placed squarely in the hands of judges.<sup>419</sup> Two of these remedies remain pertinent today. BOP now offers processes and programs to inform inmates of the availability of compassionate release.<sup>420</sup> Inmate requests are also being tracked.<sup>421</sup> Eligibility requirements must still be clearly defined and eligibility determinations must be restored to judges.

### *A. Compassionate Release Procedures Must Clearly Define and Reform Eligibility Criteria*

The compassionate release process must be revised immediately because it fails to provide sound criteria and standards for evaluative purposes. The requirements are far too strict and arbitrary. Even when BOP attempted to craft more explicit Guidelines, those revised Guidelines continued to invite ambiguity and confusion.<sup>422</sup> For example, BOP staff report Guideline Three as “unclear” and have failed to apply it as intended.<sup>423</sup> Further, language describing which pathologies qualify as terminal or sufficiently debilitating illnesses limit candidates beyond its originally intended reach.<sup>424</sup>

Eligibility should be extended to all category four offenders. Congress should borrow from the 2015 OIG report and extend compassionate release to all elderly offenders aged fifty and over who have served a noteworthy portion of their sentence.<sup>425</sup> OIG adopts the National Institute of Corrections (NIC) definition of an aging inmate as aged fifty or above.<sup>426</sup> BOP never gives a reasoned approach to selecting sixty-five and seventy years of age as appropriate benchmarks.<sup>427</sup> NIC, on the other hand, has conducted extensive research and has “recommended since 1992 that correctional agencies nationwide define aging inmates as starting at age fifty.”<sup>428</sup> Following that standard addresses overcrowding, surging costs, and increases the candidate pool “more than sevenfold.”<sup>429</sup> Were this age definition adopted, OIG predicts a cost savings of approximately \$28 million in one year.<sup>430</sup> OIG further recommends that the

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<sup>419</sup> See Jefferson-Bullock, *supra* note 20, at 559–63.

<sup>420</sup> See IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 65; see also Letter from Boyd to Schatz, *supra* note 260.

<sup>421</sup> FAMS. AGAINST MANDATORY MINIMUMS, NEW COMPASSIONATE RELEASE RULES: BREAKING IT DOWN 4 (Aug. 12, 2018), available at <https://fam.org/wp-content/uploads/FAMM-explains-new-compassionate-release-rules.pdf>. [<https://perma.cc/DN3M-ZRAV>].

<sup>422</sup> See *supra* Part IV.C.

<sup>423</sup> IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 45.

<sup>424</sup> *Id.* at 47. See also COMPASSIONATE RELEASE PROGRAM, *supra* note 241, at 15–19.

<sup>425</sup> IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 47.

<sup>426</sup> *Id.*

<sup>427</sup> See *id.* at 49.

<sup>428</sup> *Id.* at 47.

<sup>429</sup> *Id.*

<sup>430</sup> IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 48.

time served requirement be revised.<sup>431</sup> BOP currently interprets this rule to mean that “an inmate must serve both 10 years and at least 75 percent of his or her sentence,” which “excludes almost half of the BOP’s aging inmate population because many sentences are too short for the inmate to be eligible for compassionate release.”<sup>432</sup> Per OIG, this restrictive practice excluded 45% of 4,384 eligible inmates from consideration because their sentences were ten years or less.<sup>433</sup> OIG advocates only maintaining the requirement that elderly inmates serve at least 75% of their sentence.<sup>434</sup> OIG is moving in the right direction. Research proves that fifty years of age is a precise measure of aging inmates due to inmate physiology and the phenomenon of aging out of crime.<sup>435</sup> However, the time served quantum should be reduced. Until terms of incarceration are logically calculated, time served should be reduced to 50 percent.

Adopting these proposed reforms will assist in restoring dignity to elderly offenders. Category four offenders have already served sufficient time to meet the objectives of sentencing set out in 3553(a) objectives.<sup>436</sup> Relaxing the compassionate release process will allow them to receive critical social services, restore essential family and community ties, secure necessary medical care, and relieve them of some of the stigma of reentering society at a far advanced age. It will reconstruct their humanity and ensure their renewed placement in society.

### *B. Eligibility Determination Should Be Placed Squarely in the Hands of Judges*

Finally, Congress never intended to grant BOP the measure of power that they wield over the compassionate release process.<sup>437</sup> BOP has improperly usurped the process, preventing judges from ever seeing the petitions of elderly inmates seeking compassionate release.<sup>438</sup> This prohibits judges from determining whether an inmate’s circumstances are appropriately “extraordinary and compelling.”<sup>439</sup> This authority must be returned to judges. The BOP’s role should be limited to determining age eligibility and providing information regarding the inmates’ prison disciplinary record only. That disciplinary information can then be vetted by judges.

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<sup>431</sup> See *id.* at 49.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> See *supra* Part V.B.

<sup>436</sup> See IMPACT OF AN AGING INMATE POPULATION, *supra* note 9, at 49.

<sup>437</sup> See *supra* Part V.

<sup>438</sup> *Id.*

<sup>439</sup> See *supra* Part IV.

BOP has modified its process, yet has not relinquished control to judges.<sup>440</sup> Per current policy, inmates' requests must be approved by the Warden, General Counsel, Assistant Director of the Correctional Programs Division or Medical Director (for medical releases), and finally the BOP Director before being sent to the Assistant United States Attorney.<sup>441</sup> Further, only the Warden's decision is appealable.<sup>442</sup> Judges, not the BOP, are best positioned to render impartial decisions concerning release because BOP's principal role is to confine. They simply cannot operate outside of the limits of their responsibility as jailers.<sup>443</sup> Release can simply never be an integral component of BOP's ultimate vision and responsibility.

The Warden's role should be restricted to verifying the inmate's age and identifying whether the inmate has a prison disciplinary record that demonstrates an inability to interact safely outside of the prison environment. Unlike the BOP Director, Wardens participate in and understand the daily lives of the inmates they supervise. The Director of BOP has no direct contact with prisoners and should not garner a significant role in the compassionate release decision-making process. Instead, Wardens should provide: (1) age verification and (2) a report chronicling relevant disciplinary information. Minor infractions and those that occurred toward the beginning of a lengthy sentence should not be included in the disciplinary report. Only violations occurring closer in time and those of a serious nature should be taken into consideration and forwarded to the judge. Upon verifying the inmate's age and reviewing the disciplinary record, the Warden should alert the Director of BOP, who should automatically send the prisoner's file to the sentencing judge for approval. Participation by the Regional Director and the prosecuting Assistant Attorney General is unjust and unwarranted. The Regional Director has no direct knowledge of the inmate's conduct in the prison facility. Apart from desiring to uphold the inmate's conviction, the Assistant Attorney General remembers the inmate as his worthy opponent of the past. The sentencing judge can then determine whether the inmate's disciplinary record, if any, suggests an innate inability to operate safely and freely. Again, the judge will not review every infraction—only those recent in time and of major incident. The judge's decision would be appealable through the courts.

## IX. CONCLUSION

The time again appears ripe for criminal sentencing reform.<sup>444</sup> This time, however, we must cover the plight of the elderly prisoner and include provisions to meet their needs. In this new era of reform, deliberations must

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<sup>440</sup> PROGRAM STATEMENT, *supra* note 244, at 12.

<sup>441</sup> *See id.* at 11.

<sup>442</sup> *See id.* at 13.

<sup>443</sup> *See generally The Time Is Ripe*, *supra* note 40 (noting the various institutional deficiencies of the penal system).

<sup>444</sup> *See supra* note 4 and accompanying text.

include sound, well-researched recommendations. Law and policymakers must consider both the short-term and far reaching effects of their work. The silver tsunami rages. Its force was as easily predictable as the prison overcrowding crisis and the associated exorbitant costs. Modern-day reformers must use research and best practices to identify and acknowledge the foreseeable consequences of proposed amendments. They must work to restore dignity to offenders by amending the compassionate release program so that it applies much more broadly.

The original goal of compassionate release was to maintain human dignity by permitting judges to correct sentences, which, due to radically changed circumstances, are no longer just.<sup>445</sup> In 2013, DOJ determined that compassionate release's goals should expand further by allowing judges to consider releasing elderly offenders as well.<sup>446</sup> With this announcement, the DOJ made a policy decision, rooted in research and data, that offenders eventually age out of crime, and therefore pose considerably less risk to societal safety than younger offenders. DOJ also counted the cost to incarcerate the elderly prison population and correctly concluded that it is simply not worth taxpayers' money.<sup>447</sup> Unfortunately, in practice, compassionate release's primary goals are thwarted by BOP, and relief is only granted in the strictest of circumstances. As sentencing reform once again takes center stage, we must remember to quell the silver tsunami. This can be accomplished by broadening compassionate release procedures.

Dignity need not be earned. It exists as an integral aspect of humanness. Our prison system is neither capable nor inclined to create a dignified environment for most elderly offenders, especially category four elderly offenders. Their humanity requires a more just outcome.

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<sup>445</sup> *Id.*

<sup>446</sup> See 2013 OIG REPORT, *supra* note 389, at 65; COMPASSIONATE RELEASE PROGRAM, *supra* note 241, at 75.

<sup>447</sup> See 2013 OIG REPORT, *supra* note 389, at iii.

