

PAYING FOR THE GRAYING: HOW CALIFORNIA CAN MORE EFFECTIVELY MANAGE ITS GROWING ELDERLY INMATE POPULATION

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I. INTRODUCTION

California's corrections system is at a breaking point. The walls of the prisons are bulging as a result of "three-strikes" and truth-in-sentencing legislation, which requires offenders to serve longer sentences and greater proportions of those sentences.¹ These longer sentences are leading to a greater number of inmates, which leads to mounting medical and mental health needs.² Recently, California has proved incapable of meeting the needs of its growing inmate population. A federal court found that overcrowding in California prisons has resulted in the provision of constitutionally inadequate medical and mental health care to inmates in violation of inmates' Eighth Amendment protection against cruel and unusual punishment.³ In order to provide constitutionally adequate care, the court mandated that California release about forty thousand inmates over the next two years, reducing its prison system to 137.5 percent of its design capacity.⁴

In the interests of public safety, California cannot indiscriminately release inmates. Instead, the State must consider long-term measures that will improve its corrections system. One measure that is consistently met with resistance by legislators is release and alternative custody for elderly inmates.⁵ Elderly inmates represent the most costly population to support, and, upon release, this group has the lowest rates of recidivism.⁶ By implementing a risk-classification scheme for elderly inmates, California could release low-risk elderly offenders and separate other elderly offenders from the general prison population. Elderly offenders removed from the general population would be placed in institutions designed to meet their unique needs. Such measures would be cost-effective, allowing

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¹ RONALD H. ADAY, AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS 10 (2003).

² See *id.* at 14-15.

³ *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2010 U.S. Dist. LEXIS 2711, at *30 (N.D. Cal. Jan. 12, 2010).

⁴ *Id.* at *32.

⁵ *Democrats' Prison Bill Is Poison Pill for Law-Abiding Californians to Swallow: ABX3 14 Would Allow Ex-Felon to Sit on Public Safety Commission*, OFFICE OF SENATOR GEORGE RUNNER, 17TH CONG. DIST. OF CAL., Aug. 19, 2009, <http://cssrc.us/web/17/news.aspx?id=6654> [hereinafter *Poison Pill for Law-Abiding Californians*] (on file with author).

⁶ Jonathan Turley, *An "Old" Prison Solution*, L.A. TIMES, Oct. 7, 2006, pt. B (Metro), at 17.

California to save money on medical and security costs while more efficiently managing its elderly inmate population.

Finally, while cost and efficiency are persuasive reasons to release and create alternative custody for elderly inmates, there are policy justifications for these measures as well. Offenders should be punished, but it is important to investigate how the traditional purposes of punishment apply to an elderly offender. For example, under a theory of retribution, offenders pay their debts to society through incarceration. When the cost of incarceration is exorbitantly high, however, it may be society that pays. In addition, traditional rehabilitation is not always a realistic or appropriate goal for offenders who commit their first crime at the age of sixty. Rehabilitation efforts that are less focused on recidivism and vocational training could incite meaningful change in elderly offenders.

This Note will examine the incarceration of elderly inmates in California in three parts. Part II will examine the status of California prisons and the significant problems the system faces in effectively incarcerating elderly inmates. Part III will investigate how a release and risk-based classification system could be implemented as a solution to the problems discussed in Part II. Finally, Part IV will explain policy justifications for separate treatment of elderly inmates, past reluctance on the part of legislators, and constitutional claims of inmates.

II. THE PROBLEM

A. CALIFORNIA'S PRISONS FACE AN OVERCROWDING CRISIS

In order for a prison to be effective, it must be able to provide for the needs of inmates. Unfortunately, California has too many inmates and not enough space or resources to provide for them. In a decision by a three-judge panel at the district court level, overcrowding in California's prisons was determined as the primary cause for constitutionally inadequate "delivery of medical and mental health care to California inmates."⁷ The only measure in the court's power to remedy these constitutional violations was to issue a "prison release order"—as defined under the Prison Litigation Reform Act ("PLRA")—requiring the State to reduce the number of inmates within its custody.⁸ Under the court order, California must restore its prisons to 137.5 percent of their total design capacity within two years.⁹ The State, however, has license to design its own release plan and to determine which inmates to release so that neither public safety nor the criminal justice system is compromised.¹⁰

"A prison system's capacity is not defined by square footage alone; it is also defined by the system's resources and its ability to provide inmates with essential services such as food, air, and temperature and noise

⁷ *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2010 U.S. Dist. LEXIS 2711, at *30 (N.D. Cal. Jan. 12, 2010), *appeal filed, sub nom. Schwarzenegger v. Plata*, 130 S. Ct. 3413 (2010).

⁸ *Id.*

⁹ *Id.* at *31.

¹⁰ *Id.* at *32.

control.”¹¹ When a prison is above its design capacity to such extent that it is overcrowded, the well-being of inmates is at risk because the prison is unable to provide humane conditions.¹² Overcrowding prevents the prison from controlling violence and providing adequate programming to inmates, such as self-help, recreation, and education.¹³ Prisons that are overcapacity are often forced to house more inmates to a cell and to create spaces for beds in areas that were once used for recreation or communal use. Thus, rates of violence and stress on inmates are increased as a result of overcrowding.¹⁴ Without self-help programs to address issues of inmate substance abuse or job programs to teach inmates valuable skills so that released inmates can gain employment, rehabilitation is nearly impossible. If inmates are not provided with education or self-help while in prison, rates of recidivism will not decrease upon release.

California has some of the worst overcrowding rates in the nation, with a third of its thirty-three prisons at nearly twice their designed capacity.¹⁵ In order to comply with the court’s mandate, California must eliminate almost forty thousand inmates from its facilities, which currently house almost 170,000 inmates.¹⁶ The California Legislature has also approved an unallocated \$1.2 billion-cut from the California Department of Corrections and Rehabilitation (“CDCR”) budget. Exactly how the cut will occur, however, in terms of budget and inmates, is still under dispute by the Legislature.¹⁷

While the federal court that issued the prison release order left the terms of release in the hands of the State, the court did recommend that the State either release elderly and infirm inmates into community correctional facilities or allow them to finish their sentences under house arrest.¹⁸ Proposals to release elderly inmates make sense; elderly inmates are usually the most expensive to incarcerate, and they have the lowest rates of recidivism upon release.

Such proposals, however, are consistently met with resistance from legislators. In 2009, the California Senate approved a bill by a small margin that would account for the entire inmate and budget cut. When the bill came to the California Assembly, certain portions were removed, including a provision that would have resulted in \$120 million in savings and a reduction of 6300 inmates—alternative custody for aged and infirm

¹¹ *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 67943, at *140 (E.D. Cal. Aug. 4, 2009), *appeal dismissed, sub nom.* *Schwarzenegger v. Plata*, 130 S. Ct. 1140 (2010).

¹² *Id.* at *141.

¹³ *See id.*

¹⁴ Jason S. Ornduff, Note, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 *ELDER L.J.* 173, 179 (1996).

¹⁵ *California’s Aging Prisoners: Demographics, Costs, and Recommendations: Hearing Before the Subcomm. on Aging and Long Term Care & Senate Select Comm. on Cal. Correctional System & Senate Public Safety Comm.*, 14 (Feb. 25, 2003) [hereinafter *Hearing on Aging and Long Term Care*] available at http://www.senate.ca.gov/ftp/SEN/COMMITTEE/SUB/HHS_AGE/home/ (download *Aging Prisoners: A Call for Reform: 2-25-03*, Transcript) (statement of Jonathan Turley).

¹⁶ Zachary Stahl, *Assembly Stalls Prison Plan*, *MONTEREY CNTY WKLY.*, Aug. 20, 2009.

¹⁷ *Id.*

¹⁸ *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 67943, *341–42 (E.D. Cal. Aug. 4, 2009), *appeal dismissed, sub nom.* *Schwarzenegger v. Plata*, 130 S. Ct. 1140 (2010).

inmates.¹⁹ Members of the California Legislature have consistently opposed the release of elderly inmates, arguing that giving elderly inmates a “get out free card” simply because they are in the evenings of their lives is unfair and even dangerous to the community.²⁰ Others are less concerned with the seeming injustice and more concerned with public safety, arguing that the release of elderly offenders will inevitably lead to increases in local crime rates.²¹

Republicans appealed the court’s prison release order to the United States Supreme Court, but the Court denied their petition for want of jurisdiction.²² Thus, California has been pushed by a federal court into a corner; it must abide by the prison release order if it is to eliminate violations of its inmates’ constitutional rights. Even though there has been opposition to separating the elderly out of the prison system’s general population, doing so remains a viable option for the State to reduce overcrowding and spending. The federal court also stated that by diverting certain offenders, such as the elderly and infirm, from state prison into alternative placements, California could effectively reduce the prison population in a way that would meet the terms of the prison release order.²³

B. THE NUMBER OF CALIFORNIA’S ELDERLY INMATES HAS INCREASED

California has one of the largest correctional systems in the country. California currently spends \$10.6 billion on corrections, which is 11 percent of its total budget.²⁴ By comparison, only 7.5 percent of the budget is dedicated to higher education.²⁵ California’s thirty-three prisons are currently home to roughly 170,000 inmates,²⁶ and the composition of these inmates is changing. In the period between 1984 and 2007, the average age of female inmates increased six years, from thirty-one to thirty-seven years old; the average age of male inmates also increased six years, from thirty to thirty-six years old.²⁷ The increase in the average age is a result of an increase in populations of older inmates. In 1980, the United States imprisoned about 9500 inmates over the age of fifty-five; as of 2008, that number had increased ten-fold to 94,800.²⁸ By 2030, experts predict that one-third of state prisoners will be over the age of fifty.²⁹

¹⁹ *Assembly Revises and Approves New Prison Reform Package: Plans Announced to Appeal Prison Population Ruling*, LEAGUE OF CAL. CITIES: CITY ADVOC. WKLY., Sept. 4, 2009, at 4, http://www.cacities.org/resource_files/28290.Sept4.pdf.

²⁰ *Poison Pill for Law-Abiding Californians*, *supra* note 5.

²¹ Stahl, *supra* note 16.

²² *Assembly Revises and Approves New Prison Reform Package: Plans Announced to Appeal Prison Population Ruling*, *supra* note 19. See *Schwarzenegger v. Plata*, 130 S. Ct. 1140 (2010).

²³ *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 67943, *341 (E.D. Cal. Aug. 4, 2009) *appeal dismissed, sub nom. Schwarzenegger v. Plata*, 130 S. Ct. 1140 (2010).

²⁴ Jennifer Steinhauer, *Schwarzenegger Seeks Shift from Prisons to Schools*, N.Y. TIMES, Jan. 6, 2010, at A21.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 239 (2008).

²⁸ David Fathi, *Who's Afraid of Elderly Prisoners?: Their Number Is Climbing. With State Budgets in the Red, Paroling Inmates Over 50 Should Be a Priority*, L.A. TIMES, Dec. 24, 2009, at A17.

²⁹ *Rx for Old Cons: Reform*, ORLANDO SENTINEL, Aug. 17, 2009, at A14.

While fifty years old may not seem elderly, studies have found that a person who is incarcerated often equates to being ten years older than someone who has never been incarcerated.³⁰ In addition, fifty is generally considered elderly due to the inmates' risky lifestyles, poor access to suitable health care, and history of substance abuse that are common in inmate populations.³¹ Inmates are also defined as elderly at fifty years of age because it is the ideal time to begin methods of preventive care to reduce the long term costs of older inmates.³²

The increase in elderly inmates can be largely accounted for by California's recent adoption of policies that require inmates to serve longer sentences and a greater proportion of their sentence. In 1994, California enacted the three-strikes law, which requires "a minimum sentence of twenty-five years to life for three-time offenders with multiple prior serious or violent felony offenses."³³ The law dramatically increases the amount of time that repeat offenders spend in prison. For example, someone with two previous serious offenses, subsequently convicted of a non-violent, non-serious felony, such as receiving stolen property, would have received a two-year sentence for the property offense before three-strikes, but now, that same offender will be sentenced to life in prison.³⁴ The law has led to extreme cases, such as that of Leandro Andrade, a father of three who received a sentence of fifty years after his third strike, shoplifting videotapes from K-Mart. Nevertheless, the Supreme Court did not find that the law violated the Eighth Amendment standard against cruel and unusual punishment.³⁵

Since 1994, more than eighty thousand second-strikers and 7500 third-strikers have been sent to prison.³⁶ As of 2004, about 26 percent of current California inmates are serving under the three-strikes law.³⁷ In addition, because the sentence for third-strikers is an indeterminate sentence, not one third-striker has been released—except for those released because of reduced sentences—since the law was enacted in 1994;³⁸ the first date that any third-striker will be eligible for parole is in 2019.³⁹ Gregory Taylor was recently released after a Superior Court Judge reduced his sentence by eight years.⁴⁰ Taylor had already served thirteen years after receiving his third strike when he tried to steal food from a Los Angeles church kitchen.⁴¹

California's three-strikes law requires inmates to be incarcerated for longer periods of time, thus creating larger amounts of elderly inmates. The

³⁰ Petersilia, *supra* note 27, at 240.

³¹ *Id.*

³² ADAY, *supra* note 1, at 17.

³³ *A Primer: Three Strikes—The Impact After More than a Decade*, CAL. LEG. ANALYST'S OFF., 3 (Oct. 2005), http://www.lao.ca.gov/2005/3_Strikes/3_strikes_102005.pdf.

³⁴ *See id.*

³⁵ Adam Cohen, *The Supreme Court's Crusade: Fairness for the Powerful*, N.Y. TIMES, Oct. 26, 2006, at A24.

³⁶ *A Primer: Three Strikes—The Impact After More than a Decade*, *supra* note 33, at 15.

³⁷ *Id.*

³⁸ *Id.* at 20.

³⁹ *Id.*

⁴⁰ *3-Strikes Inmate Released from Prison After Serving 13 Years*, NBC (Aug. 23, 2010, 4:01 PM), <http://www.nbclausangeles.com/news/local-beat/3-Strikes-Inmate-Accused-Of-Stealing-Soup-Released-101201524.html>.

⁴¹ *Id.*

cost of care for these third-strikers increases as the population grows and ages. In addition, three-strikes laws may also have a disproportionate effect on older people because the acquisition of three-strikes may occur over several decades.

Other laws that have led to a graying of the inmate population in California are federal truth-in-sentencing laws. These laws represent a drastic change from previous trends. For example, in 1996, inmates served, on average, 44 percent of their sentences.⁴² Today, as a result of truth-in-sentencing laws, inmates are required to serve 85 percent of their court-ordered sentence.⁴³ That means that a fifteen-year sentence in 1996 would have resulted in six and one-half years of incarceration. Today, the same sentence would amount to almost thirteen years of incarceration.

In addition, truth-in-sentencing laws reduce flexibility in the administration of sentences, thereby decreasing judicial discretion.⁴⁴ These policies, which call for longer sentences and a reduction in judicial discretion, have been criticized as increasing rates of recidivism. In a recent letter to President Obama, two California State Supreme Court justices requested that Obama reform sentencing guidelines to allow judges greater discretion in sentencing and advocated for alternatives to incarceration, such as community-based drug and alcohol rehabilitation programs.⁴⁵ The judges pointed out that community-based sanctions are more cost-effective and less likely to lead to recidivism because the State would use resources that would otherwise be dedicated to incarceration to help the criminals find jobs and involve themselves in the community.⁴⁶

Changes in sentencing policies that could reduce the amount of elderly inmates in California prisons are outside the scope of this Note. This Note will address current policies as constant and investigate measures that can be taken to effectively manage the rising elderly inmate population in California.

As the average age of California's inmate population increases, the costs of caring for these inmates will also continue to increase. An analysis by the California Legislative Analyst's Office predicted that by 2022, the State will spend close to one billion dollars a year to care for elderly inmates alone.⁴⁷ California must seriously consider its treatment of its growing elderly inmate population. Currently, there are no separate institutions for inmates over the age of fifty-five in California. Elderly inmates are "mainstreamed"—kept with the general population.⁴⁸ In light of the growth of California's elderly inmate population, the effect and needs of this group within the correctional system must be addressed.

⁴² ADAY, *supra* note 1, at 10.

⁴³ *See id.*

⁴⁴ *See* Petersilia, *supra* note 27, at 239–41.

⁴⁵ Donna Walter, *Missouri Supreme Court Judge Michael A. Wolff Asks Obama to Revise Guidelines*, ST. LOUIS DAILY RECORD/ST. LOUIS COUNTIAN, Jan. 9, 2009.

⁴⁶ *Id.*

⁴⁷ Petersilia, *supra* note 27, at 239–41.

⁴⁸ *See* ADAY, *supra* note 1, at 146.

C. CURRENT EXPENSES OF ELDERLY INMATES IN THE GENERAL POPULATION

1. *High Cost of Medical Care for Elderly Inmates*

To date, the only population in the United States that has a constitutional right to medical care is prison inmates.⁴⁹ Any deliberate indifference to the serious medical condition of an inmate is tantamount to cruel and unusual punishment.⁵⁰ The three basic healthcare rights of inmates are (1) the right to access to care; (2) the right to care that is ordered; and (3) the right to professional medical judgment.⁵¹

Of the inmates that California must provide for, elderly inmates are often the most expensive. While the State does not keep statistics regarding the cost of medical care for each age group, estimates indicate that California spends approximately three times more—from \$98,000 to \$138,000 per year—to care for an inmate over the age of fifty than it spends to incarcerate the average adult inmate.⁵² The high costs of elderly inmates are due, in part, to the high incidence of chronic illness among elderly inmates. Common diseases among elderly inmates include hypertension, arthritis, and ulcers.⁵³ As most prisons are only designed to treat the acute illnesses and injuries common to younger inmates, the chronic diseases of the elderly often remain unnoticed until the diseases become very severe.⁵⁴ In addition, chronic disease can make the detection of other symptoms associated with illness or injury more difficult. For example, pain or fever that would normally be quickly associated with infection may be difficult to detect when combined with the ailments resulting from chronic disease.⁵⁵ Thus, the prevalence of chronic diseases among elderly inmates may also raise costs of treating other illnesses that are usually easily cured with early detection.

In general, incarcerated elderly persons are less healthy and more likely to suffer from chronic illness than their non-incarcerated counterparts.⁵⁶ In fact, institutionalized elderly men are more prone not only to suffer from chronic illness, but also to spend more time in bed recovering from an injury or sickness than men of the same age “on the outside.”⁵⁷ According to the Journal of the American Medical Association, the average inmate over fifty-five has three chronic conditions and close to 20 percent of inmates over fifty-five experience mental illness.⁵⁸ This increased rate of

⁴⁹ *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976) (“[T]he government[] [has an] obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.”).

⁵⁰ ADAY, *supra* note 1, at 88.

⁵¹ *Id.* (citing D. Specter, *Cruel and Unusual Punishment of the Mentally Ill in California Prisons: A Case Study of a Class Action Suit*, 21 SOC. JUST., at 109–18 (1994)).

⁵² Solomon Moore, *Study Finds Record Number of Inmates Serving Life*, N.Y. TIMES, July 23, 2009, at A24.

⁵³ ADAY, *supra* note 1, at 94.

⁵⁴ E.A. FATTAH & V.F. SACCO, CRIME AND VICTIMIZATION OF THE ELDERLY 99 (1989).

⁵⁵ Dorothy E. Booth, *Health Status of the Incarcerated Elderly: Issues and Concerns*, in OLDER OFFENDERS: CURRENT TRENDS 193, 198 (Sol Chaneles & Cathleen Burnett eds., 1989).

⁵⁶ Timothy Curtin, Note, *The Continuing Problem of America's Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15 Elder L.J. 473, 481 (2007).

⁵⁷ *Id.*

⁵⁸ *Id.*

illness and disease as inmates age results in an increased demand for walkers, wheelchairs, hearing and breathing aids, and prescription medication that must be funded by taxpayers.⁵⁹ In addition, once inside the prison walls, inmates are not eligible for federally-funded programs such as Social Security and Medicare, so the medical expenses of these elderly inmates must be shouldered entirely by California.⁶⁰

The cost of prison medical care is also elevated as a result of the location of prisons. Prisons are often placed in rural areas due to cost and safety concerns, but these secluded locales pose problems when it comes to the medical treatment of inmates. For example, inmates who need emergency treatment are often treated by an on-site doctor or a local doctor, so the inmate is unlikely to receive the quality of treatment that would be available at a major hospital.⁶¹ On the other hand, if the inmate needs to see a specialist, the inmate must be taken to the specialist and not the other way around.⁶² Even when the inmate is an elderly, arthritic woman, she must be accompanied by two correctional officers if she is coming from a maximum security facility.⁶³ Each time an inmate is taken to an outside hospital it costs upwards of \$200.⁶⁴ California prisons takes inmates to outside hospitals for a total of about 350 times.⁶⁵ Thus, in fees for gas and guards alone, California spends more than seventy thousand dollars per year just to transport sick inmates to hospitals.

Trips to outside hospitals are not only expensive, but also humiliating. When traveling on the outside, inmates are subject to a complete strip search before leaving the prison and once again before returning.⁶⁶ In addition, the entire time these inmates are outside prison walls they are handcuffed with two sets of heavy handcuffs, which make it impossible to even scratch their noses.⁶⁷ Many women find the experience so embarrassing that they are willing to go to an outside hospital only as a last resort.⁶⁸ When inmates attempt to avoid medical care, conditions worsen and the cost of treating diseases is much higher than if it had been quickly addressed.

Moreover, reluctance to seek medical care among inmates is increased by measures passed in California that attempt to reduce the demand for medical care. For example, in November 1994, California legislators passed a law permitting the CDCR to charge a five-dollar co-pay for each medical visit.⁶⁹ This serves as a strong disincentive to inmates seeking medical care who make fifteen cents an hour at their jobs—if they are able

⁵⁹ *Id.*

⁶⁰ *Health Woes Rising in Graying Prisons*, NEWSDAY (New York), Oct. 3, 2007, at A26.

⁶¹ Ornduff, *supra* note 14, at 178.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Hearing on Aging and Long Term Care*, *supra* note 15, at 5.

⁶⁵ *Hearing on Aging and Long Term Care*, *supra* note 15, at 5.

⁶⁶ AZRINI WAHIDIN, OLDER WOMEN IN THE CRIMINAL JUSTICE SYSTEM: RUNNING OUT OF TIME 132 (2004).

⁶⁷ *Id.*

⁶⁸ *Id.* at 133.

⁶⁹ Amy Petre Hill, *Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California's Substandard Prison Health Care System*, 13 HASTINGS WOMEN'S L.J. 223, 229 (2002).

to work at all—which many elderly inmates are not. In addition, inmates must use their small amount of wages to pay for all of their living costs, including purchasing hygiene or food items from the commissary store.⁷⁰ When inmates are forced to choose between seeking help for a medical problem or having shampoo and toothpaste, most will select the hygiene items. The system may even discourage inmates from seeking help during the early stages of an illness, leading to more serious complications. Paying for medical care also puts an increased strain on women who are already paying increased prices for hygiene products, including sanitary napkins.⁷¹ This five dollar co-pay raises costs of treating diseases by encouraging inmates to wait to seek medical attention. Moreover, California auditors recommended the removal of the co-pay system because it costs \$3.2 million to implement, and only earns \$654,000 in revenue for the State.⁷²

The State has adopted other measures to ensure that inmates pay for their own medical care. Under the policy of “restitution,” California prisons take 40 percent out of each prison worker’s wages in order to pay for devices such as wheelchairs, glasses, and dental implants, until the device is fully paid.⁷³ When inmates are only left with 60 percent of their salary and when they are required to pay a five-dollar co-pay, they have even less incentive to seek medical treatment. Due to the fact that restitution policies are more likely to affect elderly inmates who need wheelchairs and glasses, elderly inmates will likely attempt to reduce the need to see a doctor when medical issues arise. By adopting policies that encourage inmates to avoid medical treatment, California ultimately raises medical costs because inmates will only bring their diseases or illnesses to a doctor at a more critical stage.

The medical system in most California prisons is also subject to considerable delay. Most inmates report that there is a three to five week wait to see a doctor.⁷⁴ California has attempted to solve the problem of delay with respect to those inmates with chronic illnesses. In the Chronic Care Program (“CCP”), inmates have a scheduled appointment every ninety days with a doctor in order to check-up on the status of their illness.⁷⁵ While this system certainly has a positive effect on elderly inmates that are more susceptible to chronic illness, CCP patients are only allowed to discuss problems related to their one chronic illness, and it is almost impossible to see the doctor if the inmate needs a change in medication during the ninety day period.⁷⁶

Many of the medical expenses discussed above are a direct result of the age of the inmates. The cost of elderly inmates, however, is also directly increased through the incarceration of elderly inmates in facilities that were originally designed for young, able-bodied men.

⁷⁰ Heidi Strupp & Donna Willmott, *Dignity Denied: The Price of Imprisoning Older Women in California*, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, 29 (Dec. 2005), <http://www.prisonerswithchildren.org/pubs/dignity.pdf>.

⁷¹ Hill, *supra* note 69, at 229.

⁷² Strupp & Willmott, *supra* note 70, at 30.

⁷³ *Id.* at 29–30.

⁷⁴ *Id.* at 30.

⁷⁵ *Id.*

⁷⁶ *Id.* at 30–31.

2. *Costs Are Increased by Housing Elderly Inmates in General Population Facilities*

Prison is an environment that caters to the abilities and behaviors of younger inmates.⁷⁷ This means long walks to cafeterias and jobs and lack of handrails or other safety devices in cells and common areas. Elderly inmates also face difficulty in adjusting to the noise, fast pace, and highly regimented nature of activities inside the prison.⁷⁸ In most prisons, elderly inmates are treated in the ways as their younger counterparts. Unless elderly inmates are infirm, they are given the same schedules, work assignments, and cells as younger inmates.⁷⁹ While California does not have any correctional institutions dedicated solely to elderly inmates, at least one other state has chosen to separate elderly inmates from the general population.⁸⁰ Advantages to separating elderly inmates from the general population include: enhancement of self-respect for older inmates, stimulation of interaction among elderly inmates, and the creation of activities or groups particularly oriented toward this older age group.⁸¹ On the other hand, reasons not to separate elderly inmates from the general population include: exclusion of the elderly from certain groups or work assignments and increased feelings of loneliness or depression for those elderly inmates who do not associate or identify with their age group.⁸²

When prisons fail to recognize and cater to the needs of elderly inmates, inmates often fall victim to depression or isolation.⁸³ Nationwide, suicide rates increase with inmate age: the highest rates of suicide are among the oldest prisoners, age fifty-five and above.⁸⁴ Many older inmates feel vulnerable to younger, predatory inmates.⁸⁵ Those inmates who are provided with walkers and canes can find these instruments used as weapons against them.⁸⁶ While these devices were originally banned because of the tendency of younger inmates to steal them and use them as weapons, most prisons had to eventually permit their use as a result of the increasing age of inmates.⁸⁷

Victimization by younger inmates is a serious problem. When younger inmates harass and injure elderly inmates, the medical costs of these victimized elderly inmates likely increase. In addition, elderly inmates may be forced to lead more sedentary lifestyles as a result of younger inmates. Due to an elderly inmate's vulnerability when walking across the yard or to the cafeteria, elderly inmates may simply choose not to leave their cells if

⁷⁷ Nadine Curran, Note, *Blue Hairs in the Bighouse: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225, 246 (2000).

⁷⁸ Kelly Porcella, Note, *The Past Coming Back To Haunt Them: The Prosecution and Sentencing of Once Deadly But Now Elderly Criminals*, 81 ST. JOHN'S L. REV. 369, 387 (2007).

⁷⁹ Ornduff, *supra* note 14, at 183.

⁸⁰ *Bail Request Denied; Demastry to Remain Behind Bars, Judge Rules*, COLUMBUS DISPATCH, Feb. 8, 2002, at 7D.

⁸¹ Ornduff, *supra* note 14, at 183.

⁸² *Id.* at 184.

⁸³ Curran, *supra* note 77, at 246.

⁸⁴ Petersilia, *supra* note 27, at 229.

⁸⁵ Curtin, *supra* note 56, at 483.

⁸⁶ *Id.*

⁸⁷ *Id.*

their activity is located a long distance away. This reduction in physical activity can cause further emotional and physical problems.⁸⁸

Not only are elderly inmates confined to their cells out of fear of being victimized, but they may also remain cell-bound due to a lack of available programming. In most prisons, rehabilitation efforts are focused on younger inmates. Younger inmates are given higher priority to participate in opportunities to vocations, or acquire higher education.⁸⁹ These programs also often fail to recognize the needs and abilities of elderly inmates who may be subject to a handicap or have little desire to continue an education that ended decades ago. With common areas often fitted to serve as additional sleeping rooms in overcrowded prisons, there are no longer areas for elderly to congregate or socialize.⁹⁰ Some of the most common activities for the elderly inmates include reading magazines, books, newspapers, and watching TV.⁹¹ This isolated and sedentary lifestyle may be harmful to elderly inmates who should remain active to maintain good health.

For some inmates, the mere length of their stay in prison can lead to emotional and psychiatric problems. In a condition referred to as “institutional dependency,” elderly inmates become terrified of leaving prison.⁹² In prison, inmates are told what to do, what to wear, and where to go. This can result in a “depersonalization”—a loss of self—that makes the inmate’s reasons for living and self-identity unclear.⁹³ In addition, loss of contact with friends and families can lead inmates to forget who they once were. This loss of identity and fear of the unknown can lead inmates to reject parole and choose to remain incarcerated. For example, Paul Geidel, sentenced to life in prison for second-degree murder in 1911, was offered parole and turned it down in 1974, stating “Why should I leave? There is nothing for me outside. I would be completely lost in strange surroundings.”⁹⁴

In addition to failing to provide programming or exercise options for elderly inmates, California prisons do not address any of the unique needs of elderly inmates. For example, the dietary needs of elderly inmates are not considered. Elderly inmates may need food that is easier to chew and digest. They may also need longer periods to eat. These needs are not addressed by prisons, which give the same meal to all inmates and often give them only fifteen minutes to eat.⁹⁵ Elderly inmates complain that they are not provided with enough fruits and vegetables or nutritious options, leading to increased health problems.⁹⁶

Finally, many elderly inmates argue that the routines of prison life can grow more dangerous as they grow older. In “get down” drills, inmates are

⁸⁸ FATTAH & SACCO, *supra* note 54, at 95.

⁸⁹ *Id.* at 97.

⁹⁰ These conditions, for example, are apparent at the California Institute for Women in Chino, California.

⁹¹ FATTAH & SACCO, *supra* note 54, at 97.

⁹² ADAY, *supra* note 1, at 120–21

⁹³ *Id.* at 122.

⁹⁴ FATTAH & SACCO, *supra* note 54, at 93.

⁹⁵ Strupp & Willmott, *supra* note 70, at 33.

⁹⁶ *Id.*

forced to drop to the ground in the event of an emergency situation.⁹⁷ One female elderly inmate was removed from her wheelchair so that she could get down.⁹⁸ These procedures can last up to forty-five minutes and often occur two or three times a day.⁹⁹ Other prison protocols, such as standing in line for extended periods of time, carrying laundry, and getting in and out of top bunks, can be nearly impossible for frail elderly inmates.¹⁰⁰ In a recent study, over half of elderly female inmates reported that they have fallen in the past year, and two-in-five female inmates responded that they had been injured while performing a daily prison routine.¹⁰¹

California must recognize that elderly inmates have unique needs and interests. California should release those elderly inmates that are low- or medium-risk, for whom incarceration is no longer appropriate. For those inmates that are found to represent a high-risk if released, California must either adapt its facilities for elderly use or separate elderly inmates into their own distinct institutions in order to provide appropriate care.

D. THE COST OF INCARCERATION IS TOO HIGH WHEN THE ELDERLY ARE THE LEAST LIKELY TO RE-OFFEND

With the high cost of incarcerating elderly inmates, the risk presented to the community upon their release should also be high. Research shows, however, that the inverse is true. As the age of an inmate increases, the rate of recidivism decreases.¹⁰² “Twenty-two percent of all criminals between the ages of eighteen and twenty-two will return to prison one year after release”¹⁰³ There is, however, only a 2 percent chance that an inmate forty-five years or older will return.¹⁰⁴ Elderly inmates, both those convicted at young ages that become elderly while incarcerated and those who are convicted later in life, have recidivism rates close to zero.¹⁰⁵ A warden of Louisiana’s Angola Prison coined the phrase “criminal menopause” to describe the way older offenders lose their tendency to commit violent acts.¹⁰⁶

In light of the connection between age and the likelihood of recidivism, age is a valuable factor to take into account when examining whether an inmate should be released. Under the California Code of Regulations, age is a factor that tends to show suitability for a lifer’s parole because “the prisoner’s present age reduces the probability of recidivism.”¹⁰⁷ Unfortunately, age is only one of nine factors tending to show suitability and there is an additional set of factors tending to show unsuitability.¹⁰⁸

⁹⁷ *Id.* at 20.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 17–18.

¹⁰¹ *Id.* at 16–17.

¹⁰² Curtin, *supra* note 56, at 477.

¹⁰³ Ornduff, *supra* note 14, at 199.

¹⁰⁴ *Id.*

¹⁰⁵ Curtin, *supra* note 56, at 489.

¹⁰⁶ *Id.*

¹⁰⁷ CAL. CODE REGS. tit. 15, § 2281(d)(7) (2010).

¹⁰⁸ *Id.*

Other private programs, however, have chosen to place a greater emphasis on age when considering the parole of elderly inmates. The Project for Older Prisoners (“POPS”) is a clinic at George Washington University Law School in which students conduct extensive background reports on inmates over fifty-five years of age with upcoming parole hearings.¹⁰⁹ If the student finds that the inmate has a low risk of recidivism, the student will look for housing for the inmate and represent the inmate in the parole hearing.¹¹⁰ POPS seeks to expand this program to law schools nationwide so that students can identify and evaluate low-risk elderly inmates for alternative custody, such as supervised parole or electronic monitoring.¹¹¹ POPS is very discriminating when it comes to selecting members for the program and will only take cases where the inmates are “at least fifty-five, have already served the average time for their offense, and have been evaluated as unlikely to commit further crimes in the future,” and the victim or the victim’s family has agreed to the elderly inmate’s release.¹¹² In addition, POPS helps elderly inmates find employment once they are released to ensure that the inmates can earn a living.¹¹³ Thus far, none of the inmates released through the POPS program have been returned to custody for committing another crime.¹¹⁴

Even taking into account the low recidivism rates of the elderly, California has some of the highest rates of recidivism in the country. While inmates over sixty usually have a rate of recidivism of 3 percent, in California, the rate for that age group has been as high as 45 percent.¹¹⁵ According to Jonathan Turley, the founder of the POPs program, this is due to California’s failure to fully rehabilitate and provide for inmates upon release. In Turley’s opinion, inmates must be given a “soft landing”—employment, a place to live, and a regiment to follow.¹¹⁶ If a regimen is set up for a released elderly inmate, the inmate will stick to it.¹¹⁷ While there is an expense to providing greater support upon release to inmates, California will ultimately save money if that released inmate does not return to prison.

III. PROPOSED SOLUTION

California must find more cost-effective ways to manage its prisons. By treating different inmates differently, California could improve the efficiency of its corrections system. California should release those elderly offenders who are a low-risk to society and find less expensive means to incarcerate those who remain high-risk but are unsuited to traditional incarceration. By transferring elderly inmates out of general population institutions, California would save costs on guards, reduce violence resulting from overcrowding, and be able to dedicate more money to

¹⁰⁹ *The Project for Older Prisoners*, GEO. WASH. U. L. SCH., <http://www.law.gwu.edu/Academics/EL/clinics/Pages/POPS.aspx> (last visited Oct. 18, 2010).

¹¹⁰ *Id.*

¹¹¹ Curtin, *supra* note 56, at 497.

¹¹² Ornduff, *supra* note 14, at 195.

¹¹³ *Id.* at 195–96.

¹¹⁴ *Id.* at 195.

¹¹⁵ *Hearing on Aging and Long Term Care*, *supra* note 15, at 31, 46.

¹¹⁶ *Hearing on Aging and Long Term Care*, *supra* note 15, at 29.

¹¹⁷ *Hearing on Aging and Long Term Care*, *supra* note 15, at 29.

rehabilitation. In addition, by placing these elderly inmates in small, specialized facilities near urban areas, California would reduce its corrections costs and improve elderly inmate care.

A. CREATE A SYSTEM OF CLASSIFICATION FOR ELDERLY INMATES

The first step in implementing a system that treats elderly inmates differently is to create a system through which elderly inmates can be classified according to the level of risk they present to the community upon release. First, when male inmates turn fifty-five or female inmates turn fifty,¹¹⁸ they would become eligible for a review.¹¹⁹ This review could be completed on an individualized basis by a board, similar to the Board of Parole Hearings (“BPH”). The board would use a set of identifiable risk characteristics, including prior disciplinary violations, rehabilitation efforts, and history of substance abuse. Some of the Title 15 standards of suitability used for lifers could be applicable to determinations of elderly inmate risk.¹²⁰ Instead of merely finding an inmate suitable or not suitable for parole based on these Title 15 factors, however, the board would classify the inmate as high-risk, medium-risk, or low-risk.

¹¹⁸ *Hearing on Aging and Long Term Care*, *supra* note 15, at 55 (statement of Gloria Killian) (explaining that age of females should be lower because released females have lower rates of recidivism).

¹¹⁹ *Hearing on Aging and Long Term Care*, *supra* note 15, at 35 (statement of Sen. Robert Presley).

¹²⁰ CAL. CODE REGS. Tit. 15, § 2281 (2010) (“Determination of Suitability: (c) Circumstances Tending to Show Unsuitability. The following circumstances each tend to indicate unsuitability for release. These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate unsuitability include: (1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include: (A) Multiple victims were attacked, injured or killed in the same or separate incidents. (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. (C) The victim was abused, defiled or mutilated during or after the offense. (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. (E) The motive for the crime is inexplicable or very trivial in relation to the offense. (2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age. (3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others. (4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim. (5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense. (6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail. (d) Circumstances Tending to Show Suitability. The following circumstances each tend to show that the prisoner is suitable for release. The circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate suitability include: (1) No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims. (2) Stable Social History. The prisoner has experienced reasonably stable relationships with others. (3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or the prisoner has given indications that he understands the nature and magnitude of the offense. (4) Motivation for Crime. The prisoner committed his crime as the result of significant stress in his life, especially if the stress had built over a long period of time. (5) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome, as defined in section 2000(b), and it appears the criminal behavior was the result of that victimization. (6) Lack of Criminal History. The prisoner lacks any significant history of violent crime. (7) Age. The prisoner's present age reduces the probability of recidivism. (8) Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release. (9) Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release.”).

The board's classification would also need to be subject to appeal through a court process, similar to petitions for writ of habeas corpus, which are filed by inmates in petition of the BPH's decisions regarding parole. The effect of the board's decision, however, would be immediate. Low-risk inmates would be released with parole supervision and would be required to participate in community programming. Those inmates identified as medium-risk would be released on the condition that the inmates wear GPS monitoring bracelets and participate in community programming. Finally, those inmates identified as high-risk would be sent to facilities that would exclusively house elderly inmates, separated from the general population.¹²¹

1. *Release Low-Risk Inmates*

California should release those inmates who are found to be low-risk. By releasing as few as 500 elderly inmates, the State would save as much as fifteen to twenty million dollars in one year.¹²² Some of the money that would be saved by releasing inmates, however, would have to be reinvested in post-release community programs.¹²³ These programs would insure that elderly inmates have a place to live and even a place to work, if they are able. Ideally, community programming would help to provide for the practical and emotional needs of the elderly parolee. Thus, access to support groups, such as grief or substance abuse counseling, could help parolees who are overwhelmed or depressed. If elderly inmates are released and then are arrested months later because they have started shoplifting, the system will have failed. In order for California to save money on released inmates, it must devote resources to find a place for those parolees in the community and keep them from returning to prison.

In addition, many elderly inmates may have families who want to support them or children who may need their aging, incarcerated parents to care for their grandchildren. In considering the classification of an inmate as low- or medium-risk, the board could take into account the strength of the elderly inmate's connections to stable family members or other support in the community. If there are family members or even close friends who are willing to take responsibility for the inmate, the board could consider this as a positive indicator for release.

2. *Implement GPS Monitoring for Medium-Risk Inmates*

Those inmates classified as medium-risk by the board would still be released, but under additional constraints. While it costs anywhere from sixty dollars to seventy dollars per day to incarcerate an elderly inmate, it only costs eight dollars to provide an inmate with a GPS bracelet.¹²⁴ In addition, the inmate would no longer be in custody and can operate as a functioning member of society. The released inmate would also become eligible for federal benefits whereas the incarcerated inmate must rely

¹²¹ *Hearing on Aging and Long Term Care*, *supra* note 15, at 28–30. The risk classification system is modeled after a proposal of Professor Jonathan Turley. (Is there a citation for this?)

¹²² *Hearing on Aging and Long Term Care*, *supra* note 15, at 28.

¹²³ *Hearing on Aging and Long Term Care*, *supra* note 15, at 28.

¹²⁴ *Hearing on Aging and Long Term Care*, *supra* note 15, at 30.

solely on state resources. Thus, not only would some of the medical costs of the elderly inmate be shifted from the state to the federal system but costs of the inmate would also be further reduced through family support and any work that the inmate could secure within the community.

The Title 15 corrections regulations already contain provisions for this type of custody in California, just not specifically for elderly inmates.¹²⁵ Using a GPS monitoring system, a parole agent has access to the parolee's whereabouts; if the parolee is not at a job or scheduled activity, the parole agent has the ability to investigate any suspicious behavior.¹²⁶ By adopting this policy, the State would merely be expanding a system that is already being used to monitor medium-risk elderly inmates. Finally, the State would need to re-invest money saved through GPS bracelet monitoring into community programs to insure the elderly inmate is successfully re-integrated. This would include helping to find employment for those released inmates who are able to work and providing access to drug or alcohol abuse counseling to ensure that the inmate does not return to prison.

3. *Create Geriatric Facilities for High-Risk Inmates*

Currently there are no prison facilities in California that are reserved exclusively for elderly inmates. While the construction of these facilities would be an investment for California, the facilities would ultimately allow the State to save on the costs of elderly inmate mental and medical healthcare. By separating elderly inmates from the general population, California would reduce the amount spent on medical costs and guards, and inmates would be better prepared for release. Benefits of separate custody would include healthier elderly inmates, greater connection to the community, and lower rates of recidivism. These elderly facilities should be small, close to urban areas, and scattered throughout the state. California could start with one or two for the entire state and could adapt existing facilities for elderly use. The following sections will discuss the savings separate facilities for elderly inmates would engender.

a. *Medical Costs Would be Reduced*

California would save on the medical costs of elderly inmates by creating facilities catered specifically to elderly inmates. These facilities would be staffed exclusively with nurses and staff that are trained to work with elderly people. By tending to elderly inmates with specialized staff, physical and mental illness would be caught at earlier stages, and elderly inmates would be treated more quickly and efficiently. Unlike younger inmates, who may notice new pain, swelling, or redness quickly, elderly inmates may be less likely to detect these symptoms,¹²⁷ not only because the inmate may be afraid or unwilling to seek help, but also because the symptoms may be confused with a chronic illness already possessed by the elderly inmate.¹²⁸ Elderly inmates also have a tendency to display more

¹²⁵ See CAL. CODE REGS. tit. 15, § 3560 (2010).

¹²⁶ *Id.*

¹²⁷ Booth, *supra* note 55, at 198.

¹²⁸ ADAY, *supra* note 1, at 105.

non-verbal signs of pain, such as withdrawal or reduced activity, which only a trained professional would recognize.¹²⁹ Finally, specialized staff would be prepared to help in the treatment of chronic diseases, allowing for elderly inmates to receive treatment on-site rather than being transported to a specialist at a nearby hospital.

California would also save money on trips to the hospital. By creating numerous facilities that are close to urban areas, California could reduce the seventy thousand dollars it currently spends just to take inmates to hospitals (this is the transportation cost alone and does not include the extra pay for guards that stay around the clock with the inmate—costs which are likely exorbitant).¹³⁰ Unlike traditional prisons, these elderly facilities would pose a smaller risk to the outside community and thus could be placed closer to urban areas. In addition, California currently requires inmates to be escorted by two armed guards when going to the hospital. Policies could be changed to allow for a single armed guard to escort each elderly inmate, lowering costs of hospital visits.

Elderly inmates would also be safer and less prone to injury at special facilities. Prisons are designed for the young adult inmate. At a facility designed specifically for elderly inmates, the needs of elderly inmates would be considered. For example, elderly inmates are often more susceptible to chronic joint pain, which can be irritated by stairs or walking.¹³¹ Thus, facilities would be one story to allow for ease in daily use and in emergencies.¹³² Facilities would also be smaller in order to allow inmates to walk easily from one side of the facility to another. Handrails, including rails in showers, would be installed throughout cells to limit injury. In addition, elderly inmates have poor sight and contrasting colors are less apparent to them.¹³³ In order to prevent falls, facilities would avoid high wax floors and have different-colored edges on stairs, doors and counters.¹³⁴

There are other measures that may be less directly related to reduction of inmate injury but which would still improve the well-being of the elderly inmates and, therefore, have an indirect effect on subsequent medical and mental care costs. For example, elderly inmates often tend to be more concerned with privacy, and so facilities should have doors on the cells.¹³⁵ Studies also show that elderly inmates spend more time outside than their younger counterparts, and that elderly men have a special affinity for gardening.¹³⁶ The fruits or vegetables from the prison gardens that the elderly inmates have tilled could be used or even sold to increase savings. Elderly facilities should have ample space outdoors, including gardens, where the inmates could relax or even work. Inmates themselves have indicated that they feel happier and safer when placed in a separate facility:

¹²⁹ Booth, *supra* note 55, at 198.

¹³⁰ *Hearing on Aging and Long Term Care*, *supra* note 15, at 5.

¹³¹ Ernest O. Moore, *Prison Environments and Their Impact on Older Citizens*, in *OLDER OFFENDERS: CURRENT TRENDS*, *supra* note 55, at 175, 190.

¹³² *Id.*

¹³³ Booth, *supra* note 55, at 201.

¹³⁴ *Id.*

¹³⁵ Moore, *supra* note 131, at 175, 190.

¹³⁶ *Id.* at 190–91.

one study that looked at elderly men who had been placed in a specialized facility found that the men liked living with men of similar age; they felt less hassled, more safe, and preferred the quieter environment.¹³⁷

Elderly inmates would be healthier and less prone to disease if their unique needs are considered by their prison facility, and this would translate to savings on medical and mental care costs. For example, elderly people often eat less at meals due to a deteriorating appetite, so their eating must be monitored to ensure no unhealthy weight loss occurs.¹³⁸ Elderly inmates may need smaller meals and more snacks to ensure they are satisfied throughout the day. In addition, as discussed above, elderly people often require a special diet, including foods that are easy to chew and digest. Elderly people often develop sleep apnea—a condition common for elderly and especially for elderly overweight individuals that causes them to stop breathing and not wake up from sleep.¹³⁹ Elderly inmates with sleeping disorders may need to take naps during the day to make up for the sleep lost during the night.¹⁴⁰ If elderly inmates are treated differently from other members of the general population, these special needs would be met, and the health of elderly inmates would improve, lowering medical costs.

b. *California Would Save on Security Personnel Costs*

Through the separation of elderly inmates, California would save costs on security personnel in several ways. By removing elderly inmates through general release and alternative custody programs, the number of inmates in the general population of high security prisons would be reduced and fewer guards would be needed at general population prisons. Also, this movement of inmates out of general population prisons would lessen overcrowding, which is often a source of stress and violence among inmates. If there are fewer incidents of violence that need to be handled by guards, California could afford to hire fewer security personnel. Finally, at those facilities designated solely for custody of elderly inmates, there would be a reduced risk of violence or escape. Thus, fewer guards would be necessary to maintain the security of elderly inmate facilities.

While reducing the number of prison guards may seem insignificant, the California Correctional Peace Officers Association (“CCPOA”) has one of the strongest unions in the State. As of 2006, the average California correctional officer earned \$73,248 a year, compared to the average \$60,000 earned by an assistant professor with a Ph.D. at the University of California.¹⁴¹ While there are reasons to be concerned regarding the power of this organization, its high salaries keep officers from leaving and thus reduces training costs and increases the number of experienced officers at California prisons.¹⁴² Better staff retention certainly decreases escapes,

¹³⁷ *Id.* at 189.

¹³⁸ Booth, *supra* note 55, at 199.

¹³⁹ *Id.* at 202.

¹⁴⁰ *Id.*

¹⁴¹ Petersilia, *supra* note 27, at 225.

¹⁴² *Id.* at 227.

suicide attempts, and incidents of gang violence.¹⁴³ Thus, savings on security, in addition to medical costs, are important when considering the benefits of alternative custody for elderly inmates.

c. *Inmates Would be Better Prepared for Release*

One of the most significant problems in the release of elderly inmates is a fear of the outside. As discussed above, after spending years within the highly regimented prison environment, released inmates are often ill-equipped to handle independence. Sometimes this fear can result in institutional dependence, where the inmate has become so dependent on the prison that they refuse to leave.¹⁴⁴ Other times, fear of the outside can materialize as a fear of being sent back to prison. In some cases, elderly inmates who are released to nursing homes are so afraid of returning to prison that they refuse to leave their rooms.¹⁴⁵

Small, more urban prison facilities would allow inmates to see the elderly facility as a place of transition, rather than a permanent residence. The location also would allow for increased community contact and would help inmates to understand and prepare for their lives upon release. Also, the facilities would be more conveniently located for visits by family members, which is an important contact for elderly inmates to have in order to avoid feelings of depression and isolation. A recent study found that 13 percent of inmates had not received a visit in the last five years.¹⁴⁶ Yet, the impact of family contact is especially significant in elderly inmates: those who had contact with family were less likely to commit disciplinary violations and more likely to have positive morale.¹⁴⁷ This family connection may also help the inmate to establish stable plans for release because family members could offer their homes or help to find a nursing home placement for their elderly inmate relative.

Finally, rehabilitation and other programs in general population institutions are generally focused on the needs of the younger inmate who plans to work upon release. Most elderly inmates, however, will not work once they are released from prison and do not wish to spend time or energy learning a new vocation or receiving a higher education. Thus, programming at a facility for elderly inmates would focus on teaching inmates skills they can use in their daily lives, such as applying for federal medical benefits, cooking, and gardening. In addition, these inmates should be encouraged to engage in specialized fitness programs and self-help groups. All of these programs would help elderly inmates adjust to society because the inmates would have hobbies and skills to interest them and would keep them from committing crimes or falling victim to depression.

d. *An Alternative or Interim Solution: Separation Without Separate Facilities*

¹⁴³ *Id.*

¹⁴⁴ See *supra* text accompanying note 94.

¹⁴⁵ *Hearing on Aging and Long Term Care*, *supra* note 15, at 29.

¹⁴⁶ Strupp & Willmott, *supra* note 70, at 41.

¹⁴⁷ Michael J. Sabath & Ernest L. Cowles, *Factors Affecting the Adjustment of Elderly Inmates to Prison*, in *OLDER OFFENDERS: PERSPECTIVES IN CRIMINOLOGY AND CRIMINAL JUSTICE* 178, 195 (Belinda McCarthy & Robert Langworthy eds. 1988).

Although California does not currently have special institutions for elderly inmates, there are many states across the United States that have designed institutions specifically for elderly inmates. In North Carolina, the McCain Correctional Hospital was licensed as a hospital-based skilled nursing facility.¹⁴⁸ The institution was a physical therapy department, and recreational personnel provided a geriatric walking program and other low-impact sports activities.¹⁴⁹ The elderly inmates frequently interacted with the outside community, attending baseball games, movies, and social meetings with a local senior citizens group.¹⁵⁰ Finally, social workers helped the inmates find and maintain contact with family members.¹⁵¹ The McCain Correctional Hospital served as an excellent example of what an elderly inmate facility in California could accomplish.

There is, however, another option that would allow California to separate inmates without providing separate facilities, but some of the proposed benefits would be lost. Some states have chosen to keep elderly inmates as part of the general population prison but give them special status or house them in separate cell blocks. In Ohio, the aging and infirm are permitted to complete fitness and recreational activities with their own age groups in order to discourage ridicule or teasing from younger inmates.¹⁵² Some prisoner advocacy groups in California have advocated for a system that does not involve separate elderly inmate facilities because they fear that the elders would be abused in light of California's shortfalls in providing constitutionally adequate care to inmates. While such concerns are valid, without separate facilities, elderly inmates will continue to be victimized by younger inmates and will remain isolated from families, communities, and hospitals, and, unless new wings are built onto the prisons, overcrowding will not be reduced because inmates are merely moved around. Thus, small separate facilities are preferable to mere separation within a general institution population.

There is also the option of placing inmates in specialized facilities only after they have been diagnosed with serious chronic illness or are unable to perform functions of daily living without constant care. In Pennsylvania, inmates need to be over fifty-five and suffering from a condition or illness that requires "active care" in order to move into the SCI Laurel Highlands Long-Term Care Unit.¹⁵³ The problem with separation based on an existing need for care is that it does not account for benefits that facilities for elderly inmates can have on inmate physical and mental health and also on rehabilitation efforts.

California could begin with separation of elderly inmates within general population institutions, which would not require new institutions. For example, once an inmate is fifty-five, they would receive a status

¹⁴⁸ ADAY, *supra* note 1, at 160. The hospital, however, closed in 2010. Florence Gilkeson, *McCain Correctional Shuts Its Doors*, THE PILOT, Apr. 13, 2010, available at <http://www.thepilot.com/news/2010/apr/13/mccain-correctional-shuts-its-doors/>.

¹⁴⁹ ADAY, *supra* note 1, at 160.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 162.

¹⁵³ *Id.* at 161.

within the general population that would allow them to have different meals, sleep only on bottom bunks, and work part-time or not at all. This treatment would recognize some of the unique needs of elderly inmates without the expense of separate facilities. Many of the benefits discussed above, however, would be lost. Separate elderly institutions should be smaller, more urban institutions, which would create greater family and community contact, lower transportation costs to hospitals, and reductions in guards. The State would need to balance the benefits of separate care and ultimate savings against the costs of creating or retrofitting new facilities for the elderly.

B. PROVIDING COMMUNITY RE-ENTRY FOR ALL RELEASED ELDERLY INMATES

In order to provide for effective release, California must acknowledge that many elderly inmates will not have a place to go upon release. Thus, a step must be established between incarceration and release. Halfway houses—places where inmates can be monitored and helped to find jobs—are an excellent method to reduce the cost of incarcerating elderly inmates and prepare inmates for release.

Unfortunately, the idea of ex-criminals living in a space near schools and businesses often causes unease within communities. In a recent town meeting in Glendale, Arizona, 250 people came to express their opposition to the proposed halfway house.¹⁵⁴ The offenders were not convicted of violent or sexual crimes, but residents still believed that the residential re-entry center (“RRC”)—as they are commonly called in other cities—would drive down property values and increase the risk for crime.¹⁵⁵ In light of a huge corrections budget and a system that has some of the highest rates of recidivism in the country, however, California must use current economic conditions to push for new, previous controversial methods of corrections.

In spite of community opposition to RRCs, such programs are essential to the success of released inmates in reentering society. Without support, about two-thirds of men and women released from prison will be rearrested and back in jail within three years.¹⁵⁶ These programs help the released inmates find full-time employment by establishing contacts with businesses that agree to hire residents of the RRC. In addition, the residents are expected to establish an approved residence upon release and to find a positive network of family and friends.¹⁵⁷ Finally, residents are enrolled in classes such as anger management, parenting, addiction and recovery, and general life skills.¹⁵⁸ While these programs do rely on state and federal resources, the cost of providing and maintaining such programs is less than the cost of incarceration, and the reduction of re-arrest rates should further

¹⁵⁴ Rebekah Sanders, *Halfway House Fuels Fight in Glendale*, THE ARIZ. REPUBLIC, Jan. 9, 2010, at B3.

¹⁵⁵ *Id.*

¹⁵⁶ Tommy Adkisson, *Viewpoint: San Antonio City Council Shines Forth in Crosspoint Issue*, SAN ANTONIO EXPRESS-NEWS, Sept. 24, 2009, at 4SR.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

incentivizes the State to work on integrating released inmates into their communities.¹⁵⁹

C. RESPONSES TO ARGUMENTS AGAINST ELDERLY INMATE RELEASE AND SEPARATE FACILITIES

In light of the high cost to incarcerate elderly inmates and the low risk that most of them present, it seems logical to advocate for release and separate facilities. This position, however, is often one of contention. In a recent California Assembly bill proposing measures to reduce California's prison population by seventeen thousand, the section that included the release of elderly inmates to home detention or community monitoring with GPS devices was removed because it was too controversial.¹⁶⁰ Those opposed to alternative custody for elderly inmates argue that even if elderly inmates are released, the State will not stop caring for them. Instead of elderly people being in prisons, they will be an unemployed, uninsured burden on California's budget.¹⁶¹ While it is true that California would need to spend taxpayer dollars to care for these inmates, the assumption that the cost to the State is equal whether inmates are incarcerated or not is false. Many of the elderly inmates may have been trained in several vocations while incarcerated and would be able to find a job on the outside. In addition, many of these inmates may have family members who are looking to help and provide for the inmate upon release. Finally, released inmates may be eligible to receive aid from federal programs, reducing the State's burden to care for these inmates.¹⁶²

In addition, some oppose the release of elderly inmates because of the past, violent histories of elderly, infirm inmates. In some cases, a released elderly inmate can still pose a threat to society. For example, in Michigan, a sixty-five-year-old double-amputee was released under compassionate release.¹⁶³ Three weeks later, confined to his wheelchair and carrying a shotgun, he robbed a bank alongside two accomplices.¹⁶⁴ While this case is certainly extraordinary, it still resonates with those who fear that programs of early release for the elderly may lead to an increase in violent crime. Rare cases, however, cannot define the majority, and statistics show that less than 2 percent of inmates over forty-five who are released commit another crime.¹⁶⁵

Finally, some argue that elderly inmates have a stabilizing influence on younger members of the prison population and, therefore, should not be removed.¹⁶⁶ After the age of sixty-five, however, any influence these inmates have is likely to deteriorate as they become frail members of the

¹⁵⁹ See Petersilia, *supra* note 27, at 272.

¹⁶⁰ Matthew Yi, *Assembly Passes Stripped-Down Bill*, S.F. CHRON., Sept. 1, 2009, at A1 (discussing S.B. 18 2009-10 3rd Extraordinary Sess. (Cal. 2009)).

¹⁶¹ Curtin, *supra* note 56, at 477.

¹⁶² *Health Woes Rising in Graying Prisons*, *supra* note 60.

¹⁶³ Curtin, *supra* note 56, at 499.

¹⁶⁴ *Id.*

¹⁶⁵ Ornduff, *supra* note 14, at 99.

¹⁶⁶ FATTAH & SACCO, *supra* note 54, at 101.

prison community.¹⁶⁷ In addition, the benefit of older inmates to younger ones is certainly outweighed by the harassment and violence elderly inmates are exposed to when placed in the general population.

D. OTHER PROGRAMS HAVE BEEN INEFFECTIVE IN MEETING
ELDERLY INMATE NEEDS

1. *Compassionate Release*

Prison inmates have almost no control over the circumstances of their death. They cannot decide who will be present, and the family and friends of dying inmates are often kept outside of prison walls. The fear of dying in prison is very real for elderly inmates. There is currently no constitutional right to parole for a dying inmate, or even the right to motion for parole under circumstances of impending death.¹⁶⁸ Many states, however, have recognized that inmates deserve to die in peace with their families and thus have created statutory provisions that allow for “compassionate release.”¹⁶⁹ Compassionate release statutes serve important functions: prisons save on funerary expense, gain inmate space more quickly, and inmates are allowed to spend their last days with their families at little or no risk to the public.

In November 1997, California passed a compassionate release law that permitted inmates or their families to seek early release if a prison doctor certified that the inmate would die within six months of an incapacitating illness that does not pose a threat to society.¹⁷⁰ The Board of Prison Terms (“BPT”) has to make a recommendation within ten days of the request, which is ultimately decided on by the courts.¹⁷¹ In many cases, it is difficult to obtain compassionate release. The original sentencing court only has discretion to resentence or recall a sentence after a recommendation has been made by the BPT.¹⁷² Even when the BPT does make such a recommendation, the court is not obliged to follow it. In addition, an inmate may only be eligible for compassionate release upon a showing that a physician has concluded that the inmate will die of an incurable disease or illness within six months or the inmate is permanently incapacitated and requires twenty-four-hour care, and the inmate poses no threat to public safety if released.¹⁷³ All other remedies must be exhausted before compassionate release can be considered by the court.¹⁷⁴

In most states, a parole board must find that the inmate is too ill to pose any threat to society in order to receive compassionate release. This release can also be revoked if it is determined that the paroled inmate’s condition

¹⁶⁷ Elmer H. Johnson, *Care for Elderly Inmates: Conflicting Concerns and Purposes in Prisons*, in *OLDER OFFENDERS: PERSPECTIVES IN CRIMINOLOGY AND CRIMINAL JUSTICE*, *supra* note 147, at 157, 163.

¹⁶⁸ Ornduff, *supra* note 14, at 192.

¹⁶⁹ *Id.*

¹⁷⁰ *California Approves Inmate Compassionate Release Bill*, 3 *CORRECTIONS PROF.*, no. 6 (Nov. 21, 1997).

¹⁷¹ *Id.*

¹⁷² *Atkins v. Davison*, 687 F. Supp. 2d 864, 970 n.3 (C.D. Cal. 2009).

¹⁷³ *Id.*

¹⁷⁴ *United States v. Jackson*, NO. CR 00-20138 JF, 2009 U.S. Dist. LEXIS 26336, *3-5 (N.D. Cal. Mar. 13, 2009).

has improved and the inmate may be dangerous again.¹⁷⁵ The inmate's proposed residence once released, must be approved and predetermined by the parole board.

Compassionate release is not without controversy. While some believe it is unjust to let an inmate, who has not been given a death sentence, die in prison, others are often outraged when compassion is shown to those who commit horrific crimes. The visceral reactions to compassionate release were demonstrated on an international scale this past fall when the Lockerbie bomber, who killed 270 people when he bombed a Pan-American aircraft, was released after serving eight years of his sentence.¹⁷⁶ Even though the bomber, Abdel Basset Ali al-Megrahi, was given three months or less to live due to prostate cancer, many were still extremely uncomfortable with his release. Thus, the case demonstrates one problem with compassionate release, which is the fact that the sole determination is on the amount left a person has to live, and not on the length of time spent in prison. In this respect, punishment for some criminals, such as al-Megrahi, may fall short of appropriate retribution.

While compassionate release allows prison medical staff to focus resources away from dying inmates toward those with more routine needs, this measure can only be taken at the very end of an elderly inmate's life, and thus, the amount saved is not likely to be high.¹⁷⁷ In addition, it is extremely rare that an inmate will have a condition that a doctor can conclusively determine will terminate the inmate's life in six months. Also, the request for compassionate release often requires the completion of large amounts of paperwork and delays.¹⁷⁸ Last year in California, only three inmates were released on compassionate release.¹⁷⁹ Compassionate release is an inappropriate measure to address the elderly inmate's fear of dying in prison or to provide any kind of systematic release for the old and sickly.

2. *Project for Older Prisoners ("POPS")*

As discussed above, POPS was started by Jonathan Turley in 1989.¹⁸⁰ While the POPS program is very successful,¹⁸¹ there are a few problems with its operation. First, the amount of inmates seeking representation in parole hearings will always greatly outweigh the number of law students willing and able to work for free. In addition, when the inmate goes before the parole board, there are only two findings the board can make: suitable or unsuitable. Even if an inmate is not low-risk, the State would increase efficiency and lower costs simply by treating elderly inmates differently. Finally, a program like POPS is so narrowly tailored in order to ensure zero

¹⁷⁵ Ornduff, *supra* note 14, 193.

¹⁷⁶ Debra J. Saunders, *Scots Outraged Over Bomber's Release*, S.F. CHRON., Nov. 15, 2009, at E5.

¹⁷⁷ See Ornduff, *supra* note 14, at 194.

¹⁷⁸ ADAY, *supra* note 1, at 27.

¹⁷⁹ Cara Buckley, *Law Has Little Effect on Early Release for Inmates*, N.Y. TIMES, Jan. 30, 2010, at A17 (quoting Robert Gangi, executive director of the Correctional Association of New York).

¹⁸⁰ *Testimony on Prisoner Reform and Older Prisoners Before the House Judiciary Committee*, 110th Cong. 1, 4 (2007) (statement of Jonathan Turley, J.B. & Maurice Shapiro Professor of Public Interest Law, George Washington University Law School), available at <http://jonathanturley.org/2007/12/06/testimony-on-prisoner-reform-and-older-prisoners-before-the-house-judiciary-committee>.

¹⁸¹ See *supra* text accompanying notes 111–115.

recidivism that the number of inmates it could affect is small. Unfortunately, California is in crisis and needs to undertake more drastic measures.

3. *Hospice Programs Within General Population Prisons*

California is home to some of the seventy-five prisons across the United States that provide hospice care within their general population prisons.¹⁸² Prisons provide hospice care by allowing other inmates to volunteer to sit with the sick and dying inmates. While some groups advocate for this approach, arguing that inmates feel safer with other inmates and that it is more cost-effective than having nursing staff in a separate facility, there are significant problems.¹⁸³ Elderly inmates are highly susceptible to victimization and abuse, and studies have reported that medications of elderly inmates are sometimes stolen or diverted to younger inmates who can use or sell them.¹⁸⁴ In addition, these inmates are not trained specialists and, therefore, do not have a statutory or fiduciary duty to the elderly inmates they treat.

IV. POLICY RATIONALES AND IMPLEMENTATION

A. THE PURPOSES OF PUNISHMENT APPLY DIFFERENTLY TO ELDERLY OFFENDERS

Incarceration of offenders is about more than cost and efficiency. Offenders must be incarcerated to serve the purposes of punishment, including: incapacitation, retribution, and rehabilitation. These purposes of punishment, however, do not seem to apply equally to inmates who have served decades beyond their minimum sentence or inmates who are old and frail.

1. *Elderly Inmate Incarceration is Rarely Justified by Theory of Incapacitation*

Under the theory of incapacitation, dangerous offenders must be placed in prison so that they will not be able to commit more crimes and hurt more people.¹⁸⁵ While this theory of punishment clearly applies to a young, strong offender who would re-offend if placed back on the street, it does not apply to the sixty-five-year-old man in a wheelchair who suffers from Alzheimer's disease. For this reason, low-risk and medium-risk elderly offenders should be released. There is little danger to society if these elderly inmates are placed back into communities, particularly when the inmates are required to attend community programming and to wear GPS monitoring bracelets.

This theory of punishment would continue to apply to high-risk offenders who would be incarcerated in elderly inmate facilities. Those

¹⁸² John Leland, *Fellow Inmates Ease Pain of Dying in Jail, and Glimpse New Life*, N.Y. TIMES, Oct. 18, 2009, at A1.

¹⁸³ See Strupp & Willmott, *supra* note 70, at 63.

¹⁸⁴ Leland, *supra* note 182.

¹⁸⁵ See FATTAH & SACCO, *supra* note 54, at 121.

elderly who are high-risk might not represent a risk of violence toward the general public because they are weak and frail, but they may still represent a risk to children. These inmates may also have the propensity to steal or commit other non-violent crimes and, for that reason, should continue to be incarcerated.

2. *The Cost of Retribution Is Too High When Applied to the Elderly*

The theory of retribution asserts that offenders are placed in prison in order to pay their debt to society for their crime.¹⁸⁶ It is difficult to equate, however, the amount the inmate must pay through deprivation of liberty in order to make up for the pain caused to the victim and society.¹⁸⁷ In the case of elderly inmates, the cost of depriving inmates of their liberty is expensive to taxpayers and prevents corrections dollars from being spent on younger inmates who will pose a danger to society if released.

As an inmate ages and grows ill, liberty becomes less useful to the inmate and their payment to society may lose effect. Also, incarcerating an inmate for the first time as an elderly person may cost too much; their debt to society may be less than the cost of incarcerating them, and the inmate may have to pay too much when they must serve time without much time left to live. The current system of punishment does not take these individual differences into account. Thus, while retribution is a valid purpose of punishment, it loses relevance as an inmate becomes elderly, frail, and ill.

3. *Rehabilitation Is an Important Concern for Elderly Offenders*

With the enactment of laws that mandate longer sentences, rehabilitation seems to have lost favor as a purpose of punishment. Rehabilitation should, however, be an important consideration for elderly inmates. For those elderly inmates who were incarcerated as a result of an offense committed at a young age or because of substance abuse or emotional trauma, rehabilitation can serve as a treatment for substance abuse or a way to learn about the emotional triggers that led to their behavior, or it may provide the inmate with a vocation that will allow the inmate to earn money at a stable job instead of through criminal pursuits. Thus, the elderly inmate may be rehabilitated after receiving the needed treatment while in prison.

Rehabilitation in some cases may be further advanced as a result of biological aging. If an elderly inmate has changed their behavior, and, in addition, as a result of health defects and advanced age is no longer dangerous, they should be released. Only about 1 percent of released elderly inmates ever commit another crime, and the sickly elderly inmate is even less likely to engage in a criminal act once released.¹⁸⁸

California must also address those inmates that commit crimes after the age of fifty-five. While a sixty-year-old man may be seen as set in his ways, there are still ways to rehabilitate an elderly offender. Instead of an

¹⁸⁶ *Id.* at 119.

¹⁸⁷ *Id.*

¹⁸⁸ Porcella, *supra* note 78, at 381.

emphasis on teaching the inmate a vocation or providing further education, the inmate may need to be enrolled in substance abuse or self-help programs. Thus, for inmates entering prison late in life, there should be less of an emphasis on recidivism and a greater focus on improving the elderly inmates' life skills and reducing their personal suffering.¹⁸⁹

Finally, it is not only the rehabilitation of released elderly inmates that is at stake. By reducing the overcrowding in California's prisons, authorities can dedicate more resources to rehabilitating younger inmates while they are incarcerated. Self-help programs that have been victim to budget cuts could be reinstated to insure that inmates grow and develop while in custody. All inmates are more likely to have a successful rehabilitation if resources are dedicated to integrating them into their communities, such as helping them to find jobs rather than simply prolonging their incarceration.

B. PAST RELUCTANCE OF LEGISLATORS AND POTENTIAL CONSTITUTIONAL CLAIMS

Despite widespread awareness regarding the shortcomings in the prison system to accommodate the needs of elderly inmates since the late 1980s, little has been done to remedy the foreseen problems.¹⁹⁰ In 1999, the CDCR published an internal report detailing the needs of elderly inmates and recommended programs that would train guards to deal with inmates affected by Alzheimer's disease and provide elderly inmates with different nutrition programs.¹⁹¹ According to CDCR, however, the programs were never implemented due to budget cuts.

Legislators have also been reluctant to enact laws that would provide elderly inmates with release or special housing or programming. In 2003, Senators John Vasconcellos, Gloria Romero and Bruce McPherson held a hearing titled "Aging Prisoners: A Call for Reform," at which the issues regarding California's elderly inmate population were discussed at length and experts presented on the medical costs and recidivism rates of elderly inmates.¹⁹² While Senate Bill 549, which provided for CDCR to contract with private entities to establish skilled nursing homes, was subsequently passed into law, California has yet to enter into any such contracts.¹⁹³

The recent decision of the federal court, however, has given legislators no choice but to act. California must reduce its prisons to 137.5 percent capacity, which means releasing forty thousand inmates. While legislators in the past have been hesitant to support measures for elderly release for fear of being "soft on crime,"¹⁹⁴ the financial constraints of the budget crisis combined with the court's finding that current care for inmates is

¹⁸⁹ See FATTAH & SACCO, *supra* note 54, at 120.

¹⁹⁰ See generally *id.*; Booth, *supra* note 55; Johnson, *supra* note 167, at 157; Moore, *supra* note 131, at 175. All of these sources were published from 1988–89.

¹⁹¹ See generally Strupp & Willmott, *supra* note 70, at 50.

¹⁹² Strupp & Willmott, *supra* note 70, at 50. See generally *Hearing on Aging and Long Term Care*, *supra* note 15.

¹⁹³ Strupp & Willmott, *supra* note 70, at 51.

¹⁹⁴ Buckley, *supra* note 179.

constitutionally inadequate should result in a consideration of previously controversial policies.

Elderly inmates could file a class action claiming that California's current care is a violation of their constitutional rights. A group of elderly inmates would have to show that inadequacy of care in California prisons has amounted to cruel and unusual punishment—a violation of the Eighth Amendment.¹⁹⁵ In order to prevail on a claim of inadequate medical care under the Eighth Amendment, the plaintiffs would need to show that there was a serious medical need, one diagnosed by a physician as mandating treatment or a condition that even a layperson would recognize needed medical treatment, and that the defendant was deliberately indifferent to the medical need.¹⁹⁶ In the case of California's elderly inmates, the fact is that inmates are usually treated but often not sufficiently or quickly. Unless the defendant has subjective knowledge of the plaintiff's condition and deliberately ignores it, the plaintiff's Eighth Amendment claim cannot succeed.¹⁹⁷ While it may be difficult for elderly inmates to prove a constitutional violation, the threat of such litigation should serve as further incentive for California lawmakers to more effectively manage California's elderly inmate population.

V. CONCLUSION

Current incarceration of elderly inmates in California is expensive, ineffective, and inhumane. Gerontological studies show that elderly inmates have unique needs, including medical and mental health care needs, which must be provided for by the State. To continue to incarcerate elderly offenders in overcrowded general population prisons is not only expensive—as much as \$138,000 per year—but it also fails to take into account the unique medical and mental needs of elderly inmates. By releasing those elderly inmates who are low-risk and monitoring those who need more supervision with GPS bracelets, California would save hundreds of millions of dollars. The money saved could be invested in community re-entry programs, which would further reduce costs because those inmates who are released would be taught to become contributing members of society, rather than a burden on the State behind bars.

Under the proposed program, those inmates who represent a greater risk will remain in prison but in prisons that are designed and equipped with their needs in mind. Elderly inmates would be able to seek medical treatment more easily, and the facilities and routines of these institutions would give them more time to eat, rest, participate in the community, and remain active. Many of the benefits of elderly institutions, however, will not be immediate. While a reduction in injuries from slip and falls would be

¹⁹⁵ U.S. CONST. amend. VIII.

¹⁹⁶ *Flynn v. Doyle*, 672 F. Supp. 2d 858, 876 (E.D. Wis. 2009).

¹⁹⁷ *Britt v. Prison Health Servs.*, NO 6:06-cv-599-Orl-19DAB, 2007 U.S. Dist. LEXIS 52908, at *9–11 (M.D. Fla. July, 22, 2007).

readily apparent, other benefits, such as lower medical costs resulting from reduced depression and victimization, would take time to develop.

At some point, therefore, a change in the treatment of elderly inmates has to be about more than costs. Should a seventy-year-old inmate be pushed out of a wheelchair to participate in a get-down drill? Should an old woman be prevented from attending church service because the walk is too far? These elderly inmates have offended society's morals, but society's incarceration of them should still be humane. Too many elderly inmates are falling behind in a system that is overcrowded, underfunded, and poorly organized. A society that imprisons its people must be willing to invest in the rehabilitation of those offenders, and even those who may never change deserve to be treated in accordance with what should be their fundamental constitutional rights.

California has the opportunity to change its methods of corrections, and with the current economic recession and budget crisis, legislators and citizens are more willing to listen and accept proposals that were previously contentious. California could save money and improve its prison system by adopting a risk classification system for elderly inmates. A federal court has presented California with a mandate to release forty thousand inmates and reinvigorated the debate over elderly inmates; the time for action is now.