

5-1-2014

# Graying Bars

Ryan Kevin Gallagher

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## Recommended Citation

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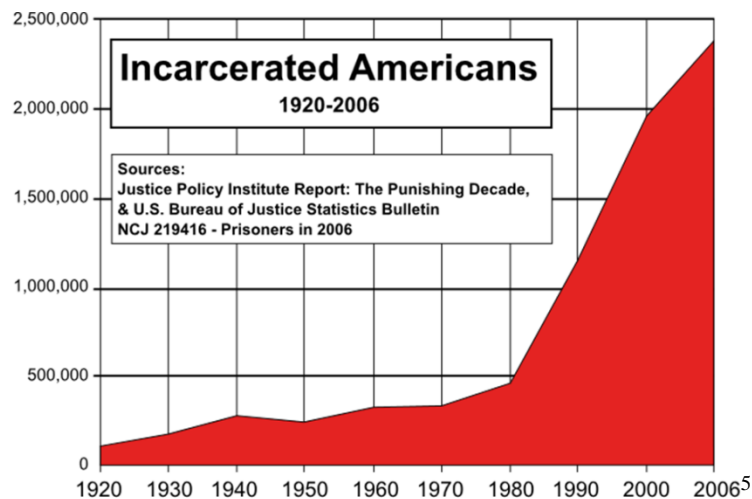
# Graying Bars

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Ryan Gallagher

4/30/2013

In 2011, there were a total of 6,977,700 adults under the supervision of the adult correctional systems of the United States<sup>1</sup>. Of the total correctional population, 2,239,800 adults were incarcerated.<sup>2</sup> Given this inmate population of 2.2 million, the United States has more people incarcerated than any other nation in the world. Aside from the human rights issues that come with cramming millions of men and women into overcrowded, understaffed, underfunded cells<sup>3</sup> there are also economic concerns. On average it costs states \$31,286 annually per inmate to keep inmates jailed which, in 2010, cost U.S. tax payers \$38,903,304,000.<sup>4</sup>



The prison population of the United States has not always been so large or such a burden. Over the past few decades the population of both Federal and State Prisons has dramatically increased. One reason for this increase is the campaign strategy of political parties to appear to be “tough on crime”. This attitude has produced policies, meant to deter crime rates, such as the

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<sup>1</sup> Lauren E. Glaze & Erika Parks, *Correctional Populations in the United States, 2011*. U.S. Bureau of Just. Stat., 1 (November 2012), <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>.

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Brown v. Plata*, 131 S. Ct. 1910 (2011) Supreme Court ruled that California had violated of the Eighth Amendment rights of its prisoners by allowing overcrowding of the correctional systems.

<sup>4</sup> Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Tax Payers*, 10 (February 29, 2012), <http://www.vera.org/pubs/price-prisons-what-incarceration-costs-taxpayers>.

<sup>5</sup> Michael Froomkin, *US Incarceration Rates Are Out of Control*, (January 17, 2013), <http://economistsview.typepad.com/economistsview/2013/01/us-incarceration-rates-are-out-of-control.html>.

“three strikes” policy. This policy imposes a mandatory life sentence on anyone who has been convicted of three felonies, regardless of whether they were non-violent offenses. For some, this policy means spending the majority of their life behind bars. In 2008 California had 301 teenagers sentenced to life without parole.<sup>6</sup> The estimated cost to California of keeping them incarcerated for the rest of their lives was estimated to be 663 million dollars.<sup>7</sup> Considering that in 2008 the number of U.S. teenagers who were sentenced with life without parole in the U.S. was 2,570<sup>8</sup> it is easy to see how this policy only adds fiscal burdens to the system.

At the same time that politicians have become hard on crime, Americans have been getting older. Largely thanks to advances in medicine, the percentage of Americans age 65 or older grew from 4% in 1900 to 13% by 2000.<sup>9</sup> Draconian policies applied to an aging population have caused the graying of the US prison system. There is a clear moral dilemma in having a growing number of people spend their dying days behind bars. Moreover, even for those untroubled by retribution unto death, an elderly prison population may be an untenable (and unnecessary) financial burden.

This is because of the Supreme Court case of *Estelle vs. Gamble*, which established that a prisons deliberate indifference to the serious medical needs of a prisoner is a violation of that prisoner’s Eighth Amendment right.<sup>10</sup> This interpretation has resulted in prisoners being the only United States Citizens with a constitutional right to healthcare. As a result, in the years that come

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<sup>6</sup> Human Rights Watch, *When I Die...They'll Send Me Home: Youth Sentenced to Life in Prison without Parole in California, An Update*, 2 (March 1, 2012), <http://www.hrw.org/reports/2012/03/01/when-i-die-they-ll-send-me-home-0>.

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

<sup>8</sup> *Id.*

<sup>9</sup> R.V. Rikard & Ed Rosenberg, *Aging Inmates: A Convergence of Trends in the American Criminal Justice System*, 13 J. Correctional Health Care 151, 152 (2007)

<sup>10</sup> *Estelle vs. Gamble*, 249 U.S. 97, 104 (1976).

prison and therefore taxpayers will be responsible for paying for the medical needs of the rising elderly prison population.

This paper will address perhaps the most costly aspect of keeping people jailed for their life; providing inmates with healthcare. Specifically, this paper will address the cost of providing healthcare to the growing elderly population behind bars. First this paper will show the rapid increase of the incarcerated population in the United States and compare it to the growth of the prison system's elderly. Next, the paper will discuss the average cost of healthcare per inmate and focus on the cost of providing healthcare to the elderly. Finally, this paper will show that more must be done than simply increase the funding of the current system because what is in place is inadequate. States must take action and implement early parole release for sick and elderly inmates or, if they already exist, to measures to effectively implement such laws.

**A. The growth of inmate population, specifically the elderly inmate population, is looming fiscal, human rights and health problem.**

**I. Increasing prison population, increasing elderly population.**

In 2011 there were 1,598,780 people incarcerated in State and Federal Prisons and another 735,601 in local jails for a total inmate population of 2,239,751.<sup>11</sup> This is an increase of 302,300 adult inmates since 2001<sup>12</sup>, 989,859 inmates since 1991<sup>13</sup>, and an increase of 1,869,821 inmates

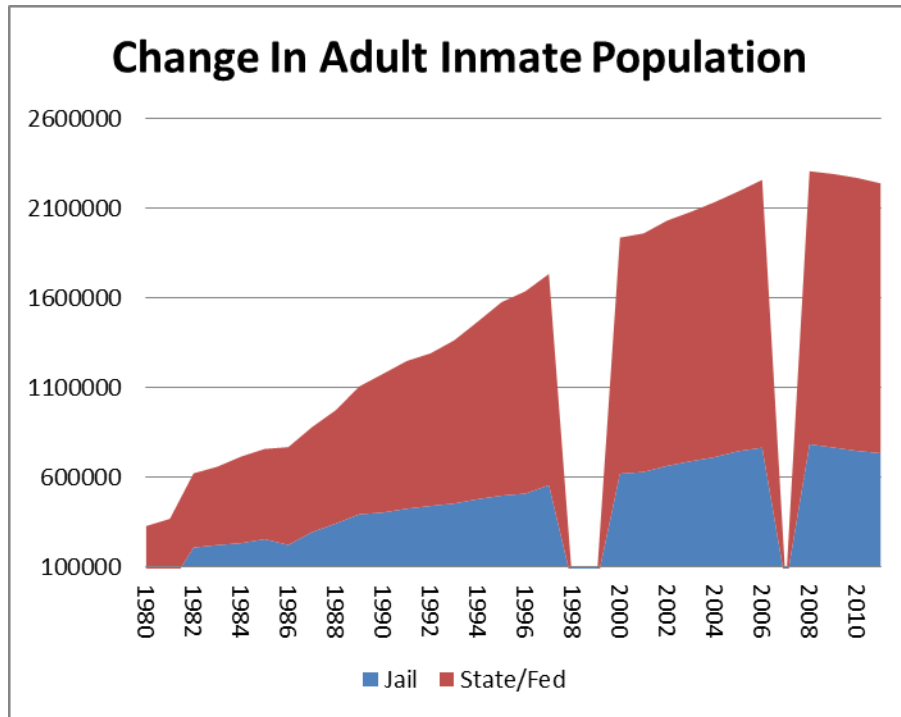
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<sup>11</sup> See Glaze & Parks, *supra* note **Error! Reference source not found.**, at 3.

<sup>12</sup> *Id.*

<sup>13</sup> Calculated from Total Jail and State and Federal Prison Populations Reported in Tracy L. Snell, *Correctional Populations in the United States, 1991*, U.S. Bureau of Just. Stat., 5-6 (August 1993), <http://www.bjs.gov/content/pub/pdf/cpus91.pdf>.

since 1981<sup>14</sup>. Narrowing the focus to only State and Federal adult prison populations, the inmate population increased 306.04% since 1981.



Data tracking the population of specific age groups is not as extensive as it is for the prison population over all. The most recent census, in 2011, shows that 121,800 people the age of 55 and above had been sentenced to one year or more of imprisonment.<sup>15</sup>

Fifty-five is an important age within prison statistics because it is widely used as the marker of the “elderly” population. Although fifty-five may seem like a young age to demarcate the beginning of the “elderly,” it is appropriate for the inmate population, which often suffers from accelerated aging due to long histories of alcohol and drug abuse, insufficient diet, stress, and

<sup>14</sup> *Id.* This difference may be off by 10,000-20,000 due to the fact that number of adults imprisoned in the year 1981 are not available. However, even if the numbers were available the results would still show the dramatic rise in inmate population.

<sup>15</sup> E. Ann Carson and William J. Sabol, *Prisoners in 2011*. U.S. Bureau of Just. Stat., 26 (December 2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf>.

lack of medical care.<sup>16</sup> These factors combined with the physical and mental stress of prison have a negative aging effect on inmates.<sup>17</sup> According to the Journal of American Medical Association a prisoner at the age of 50 is often considered to have a physiological age that is 10 to 15 years older.<sup>18</sup> As a result most researchers denote 50 as the beginning of the “elderly” prison population.<sup>19</sup>

When placed next to the larger prison population the amount of inmates over the age of 55 appears to be small. However, when comparing the relative growth rates of the general population of State and Federal prisons to the elderly prison population the data shows that the latter is dramatically out pacing the former. From 2001 to 2011 the total amount of people sentenced to one year or more to State and Federal Prisons increased 14.3%.<sup>20</sup> During that same time period the elderly population of the State and Federal Prison system increased 203%.<sup>21</sup> If the time frame is extended to 1990 the numbers are even more telling. The general population increased 107.8% while the change for the elderly increased 521.1%.

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<sup>16</sup> See Rikard & Rosenberg, *supra* note 9, at 151.

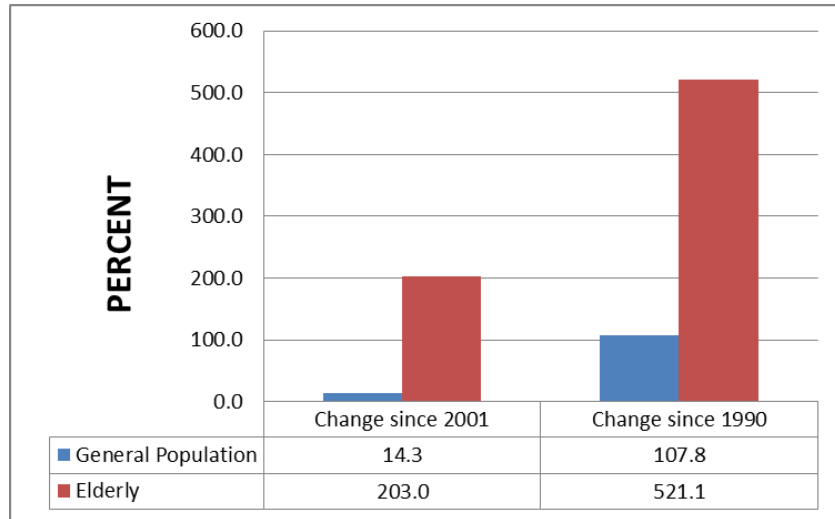
<sup>17</sup> *Id.*

<sup>18</sup> Mike Mitka, *Aging Prisoners Stressing Health Care System*, 292 JAMA 423, 423 (2004), available at <http://jama.jamanetwork.com/article.aspx?articleid=199158>.

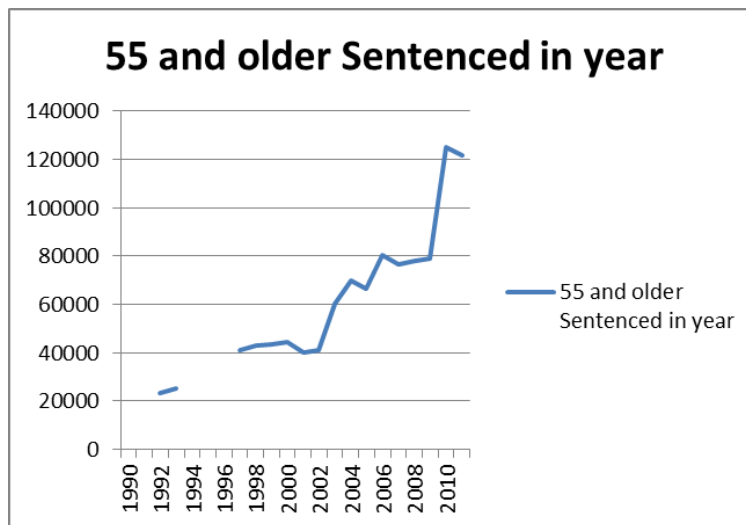
<sup>19</sup> *Id.*

<sup>20</sup> Calculated from, U.S. Bureau of Justice Statistics, *Prisoners Under State Or Federal Jurisdiction Sentenced To More Than One Year 1977-2004*, (December 6, 2005), <http://bjs.gov/index.cfm?ty=pbdetail&iid=2061>.

<sup>21</sup> Calculation based on, Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*, Table 1 (January 2012), [http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf) and Rikard & Rosenberg, *supra* note 9, at 151.



One of the reasons given for the explosion of elderly prisoners is Americans are living longer than they used to. An additional concern is the ever aging group of 80 million baby boomers.<sup>22</sup> In the year 2010 only half the population baby boomers had reached the age of 55. The data on those aged 55 and up being sentenced to one or more year in State or Federal Prison shows an increase in numbers shortly after the baby boomer generation reached the age of 55. Likewise in 2010, the year that denotes the half-way point of the generation, the number of people 55 and up being sentenced to a year or more was at its highest.



<sup>22</sup> Those born between 1946 and 1964. See Rikard & Rosenberg, *supra* note 9.



As more baby boomers reach 55 and if the current sentencing trends continue jails will continue to see a rise in elderly prison populations.

Admittedly a 55 year old only receiving a sentence of a few years or less may be a justifiable burden on the correctional system. However, the justice system has been filling the correctional system with inmates facing longer and longer sentences. In 2009 alone there were 15,050 people, in only 24 States, who had entered prison age 55 or above with sentences 10 years or longer.<sup>23</sup> A glimmer of hope can be seen in the fact that in 2009 only 3,276 people had entered the system at the age of 55 or above to serve a life sentence.<sup>24</sup> Although, this fact is quickly diminished when it is pointed out that 69,643 people had started serving life at a younger age.<sup>25</sup>

Together the facts presented above undeniably show that the correctional system currently in place must prepare itself for a population that will only continue to grow if not checked in some way.

**I. Why a growing elderly prison population should also be a growing concern.**

Some may see the bulging population as nothing more than the system correctly isolating menacing individuals, whatever their age. As a result they may not be concerned with the growing elderly inmate population. However, the cost of caring for the prison population demands more creative responses tailored to the special needs of the inmate population. As mentioned, because of *Estelle vs. Gamble*, prisoners are the only United States citizens with the right to be provided healthcare by the government. This means that it will be up to the American taxpayers to provide the funds to support care for the growing prison population.

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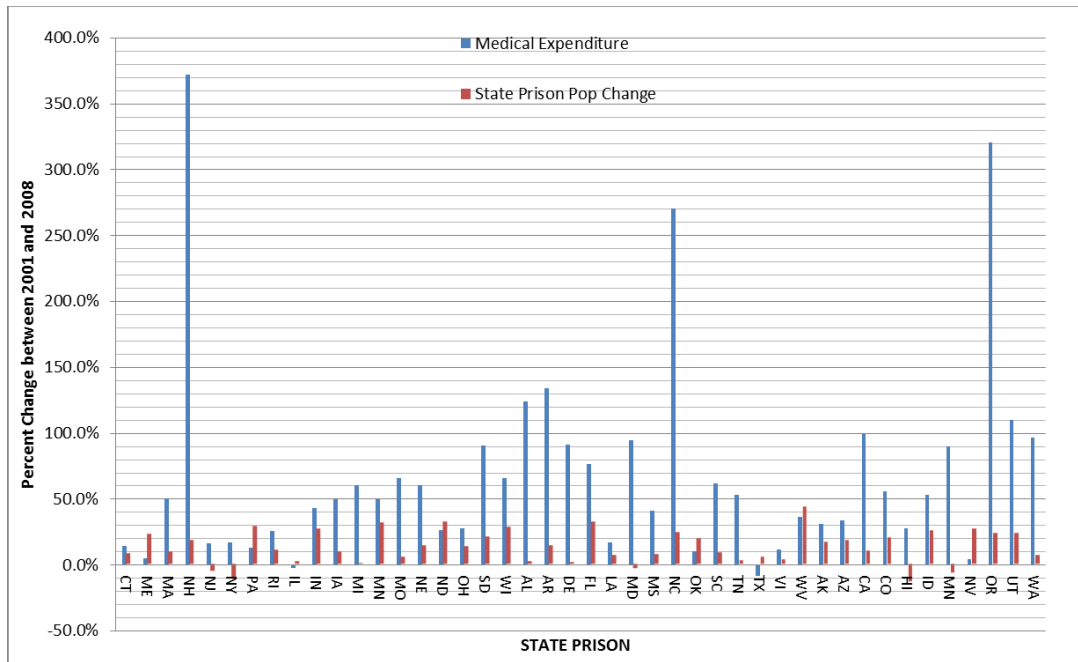
<sup>23</sup> Calculation based on Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*, Table 4 (January 2012), [http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf).

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* As this is only data from 24 states true amount of those serving life sentences was likely much higher.

It is no secret that in the past few decades the cost of healthcare has been on the rise. The percent of the Gross Domestic Product that National Healthcare took up rose from 9.20% in 1980 to 17.90% in 2011, a change of \$74,900,000,000 to \$2,700,700,000,000.<sup>26</sup> It follows that as the cost of healthcare rises for the nation costs will rise for prisoners.

From 2001 to 2008 the growth in the amount states spent on prison medical expenses far outstripped the change in their prison population. While state inmate populations rose on average 13.5% medical expenditures increased 68%.<sup>27</sup> Only two states spent less in 2008 than they had in 2001 on medical needs of their inmates, Illinois (-1.9%) and Texas (-8.1%), every other state increase its medical spending.<sup>28</sup> Oregon and New Hampshire lead the nation in increasing their medical expenditure with changes of 320.4% and 372.3% respectively.<sup>29</sup>



<sup>26</sup> Centers for Medicare & Medicaid Services, *National Health Expenditure tables*, Table 1, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/tables.pdf>. (last visited April 29, 2013)

<sup>27</sup> Calculated from, Tracey Kyckelhahn, *State Correction Expenditures, FY 1982 – 2010*, U.S. Bureau of Just. Stat., Table 4 (December 2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/scefy8210.pdf>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

In dollars, these numbers translate into an average state expenditure of \$96,193,409.09 (median of \$46,633,500) in 2001 to an average spending of \$149,146,704.55 (median of \$76,503,000) in 2008.<sup>30</sup> These figures varied dramatically between the states. For example, California led the nation in prison medical expenditures overall spending \$2,014,515,000 while North Dakota spent the least at \$5,146,000 in 2008.<sup>31</sup> If divided evenly per inmate these figures mean California spent \$11,986 and North Dakota spent \$3,731 per inmate.<sup>32</sup> However, the point remains that states' increase in spending is quickly out pacing the growing population of their prisons.

From 1992 to 2000 the average daily cost per inmate for health care alone, not accounting for age, rose 31.5% from \$5.62 to \$7.39.<sup>33</sup> In 1990 the annual average cost of health care and maintenance of prisoners over the age of 50 was \$60,000 whereas the annual cost of younger inmates was estimated at \$21,000.<sup>34</sup> By 2004 the average cost for health care for the general population rose to \$27,000 while for those 55 and older cost reached an average of \$70,000.<sup>35</sup>

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

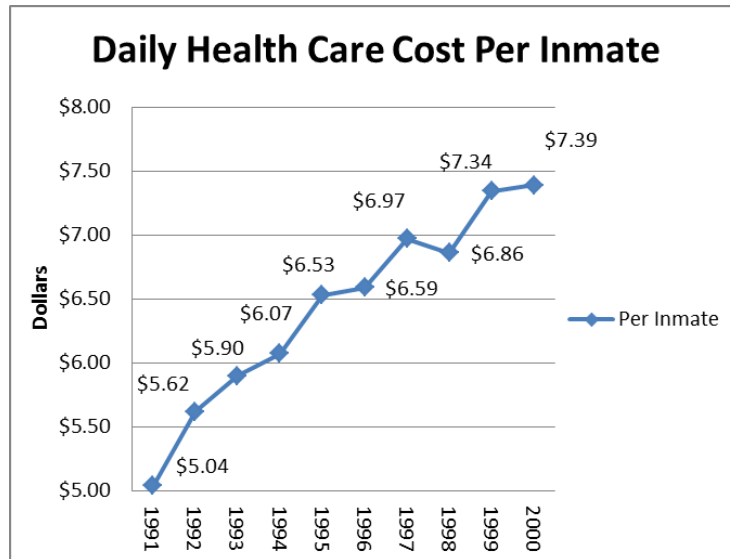
<sup>31</sup> *Id.*

<sup>32</sup> Calculated from Tracey Kyckelhahn, *State Correction Expenditures, FY 1982 – 2010*, U.S. Bureau of Just. Stat., Table 4 (December 2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/scefy8210.pdf> This calculation is not reflective of what was actually spent on each inmate as some may require more or less care than other inmates, especially elderly inmates.

<sup>33</sup> B. Jaye Anno et al., *Criminal Justice Inst., Inc., Correctional Health care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*, 11 (February 2004), <http://static.nicic.gov/Library/018735.pdf>.

<sup>34</sup> Glenda Reimer, *The Graying of the U.S. Prisoners Population*, 14 *J. Correctional Health Care* 206 (2008)

<sup>35</sup> See B. Jaye Anno et al., *supra* note 33.



In 1997 the total cost of inmate health care was \$2,747,843,808.<sup>36</sup> In 2001 the amount states spent on their inmates alone cost \$4,232,510,000.<sup>37</sup> In 2008 states spent \$6,562,455,000 on the medical expenses of their inmates.<sup>38</sup> If this same calculation is applied to the elderly population of the 2011 it cost an estimated \$8,526,000,000 to care for those 55 and above. If this is true it means that although those 55 and above make up roughly 7.92% of the total population in 2011 they accounted for 14.10% of its health care costs.

The reason that elderly inmates cost a disproportionate amount to care for in prison is the same reason it costs more to care for the elderly of the general public. On average the elderly suffer from more illnesses and require more expensive care. Of inmates age 55 and older, 20% of have some type of mental illness.<sup>39</sup> An estimated 85% of older inmates have two or more major illnesses.<sup>40</sup> The most common health conditions reported are cardiovascular problems, arthritis,

<sup>36</sup> *Id.*

<sup>37</sup> Calculated from Tracey Kyckelhahn, *State Correction Expenditures, FY 1982 – 2010*, U.S. Bureau of Just. Stat., Table 4 (December 2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/scefy8210.pdf>.

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

<sup>39</sup> See Mike Mitka, *supra* note 18.

<sup>40</sup> Susan J. Loeb & Darrel Steffensmeier, *Older Male Prisoners: Health Status, Self-Efficacy Beliefs, and Health-Promoting Behaviors*, 12 J. Correctional Health Care 270, 271 (2006)

substance abuse, respiratory diseases, endocrine disorders, and sensory deficits.<sup>41</sup> Additionally, the effects of age combined with illness require that aids such as walkers, wheelchairs, hearing aids, and breathing aids be supplied to many elderly inmates.<sup>42</sup>

Caring for elderly inmates also means caring for people who have, in most cases, been living in a diseased community, prison, for large portions of their lives. Furthermore, part of the reason that the age limit of the elderly population in prison is lower than the public is because of physical effects of their environments and that fact that most inmates in prison had a history of substance abuse prior to being incarcerated.<sup>43</sup> The rates of alcohol or drug abuse and dependence are high in all correctional settings, 76% in local jails, 74% of inmates in State Prisons, and 64% of inmates in federal prisons.<sup>44</sup> Drug abuse brings the possible health complications of liver disease, renal failure, and greater susceptibility to strokes and heart attacks.<sup>45</sup>

Adding to the problem is the fact that about 90% of the inmate population is male and men are generally less likely to engage in health-seeking activities.<sup>46</sup> This is a particular problem because most prisons' medical facilities operate on a military sick-call system.<sup>47</sup> This means that it is up to the prisoner to file health complaints and inform an authority that they want to visit the infirmary.<sup>48</sup> This system might work for younger inmates, who's illness often only require a single treatment, but it is ill-suited for caring for the elderly.<sup>49</sup> Older individuals suffer from

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

<sup>42</sup> Timothy Curtin, *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)

<sup>43</sup> See Rikard & Rosenburg, *supra* note 9.

<sup>44</sup> Natash H. Williams, *Prison Health and the Health of the Public: Ties That Bind*, 13 *J. Correctional Health Care*, 86 (2007)

<sup>45</sup> *Id.* at 87.

<sup>46</sup> See Loeb & Steffensmeier, *supra* note 40.

<sup>47</sup> See Curtin, *supra* note 42, at 486.

<sup>48</sup> *Id.*

<sup>49</sup> Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*, 50 (January 2012), [http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf).

chronic and progressive diseases that require multiple treatments and observation.<sup>50</sup> One study conducted in Connecticut shows that among inmates age 60 or over, 50.7% needed predictable access to nursing care 16 hours a day, seven days a week.<sup>51</sup>

If these trends continue state budgets will be stretched even more. Prisoners are not eligible for federal social programs such as Medicare and Medicaid.<sup>52</sup> (Medicaid can be used to cover inmates if they are required to stay in a hospital for 24 hours or more because then they are no longer considered prison inmates.<sup>53</sup>) Leaving the cost of providing medical, mental and dental needs entirely too each state.

Outside the prison system the government has responded to the rapidly rising cost of healthcare by the creating and adopting the Patient Protection and Affordable Care Act (PPACA) and it may also potentially help fight the rising cost of prisoner healthcare. Under the PPACA anyone with an income below 133% of the federal poverty line will be eligible for Medicaid.<sup>54</sup> However, even with the reimbursement from the federal government correctional facilities will need to change its current system because it is not adequately treating inmates.

Despite the disproportionate amount of money that elderly inmates receive compared to the general prison population the elderly are not receiving adequate treatment. In examining the deaths in prison caused by illness younger inmates fair better than both their elderly counter parts and youth outside of prison. However, elderly inmates die more often from health complications in jail then do people the same age out of prison.

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<sup>50</sup> *Id.*

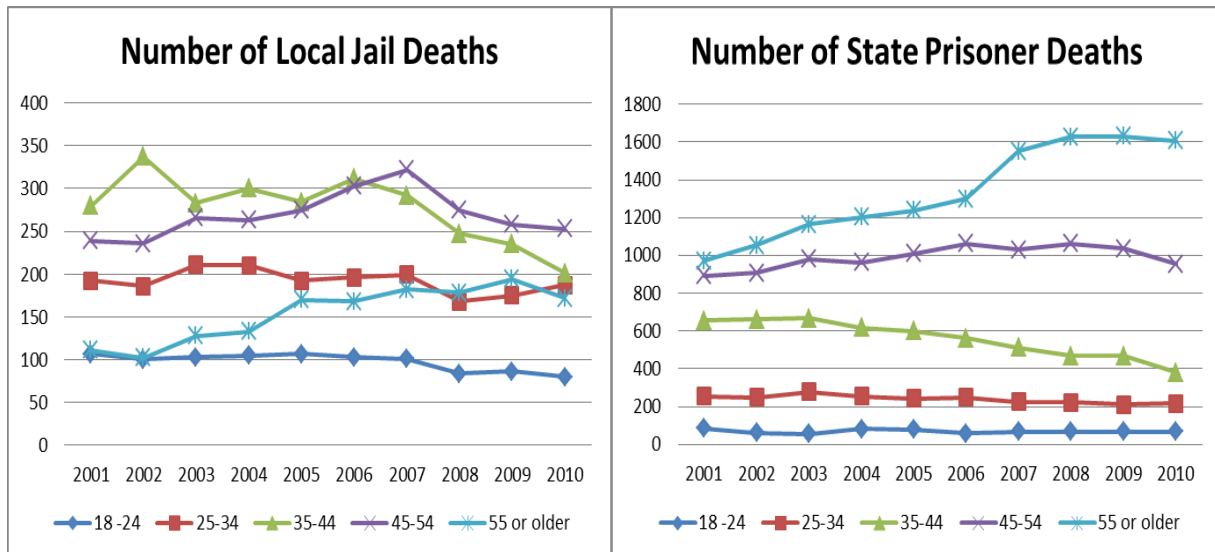
<sup>51</sup> *Id.*

<sup>52</sup> 42 U.S.C. § 1396d (2013)

<sup>53</sup> 42 CFR 435.1010 (2013)

<sup>54</sup> Patient Protection and Affordable Care Act of 2010 (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010)

From 2001 to 2010 the death rates of those 55 or above increased in both local jails and state prisons while the death rates of all other age groups either remained stable or decreased. In 2001, for those 55 or above, there were 111 recorded deaths in local jails and 971 in State Prisons.<sup>55</sup> By 2010 the amount of deaths increased to 172 in local jails and 1,607 in State Prisons.<sup>56</sup>

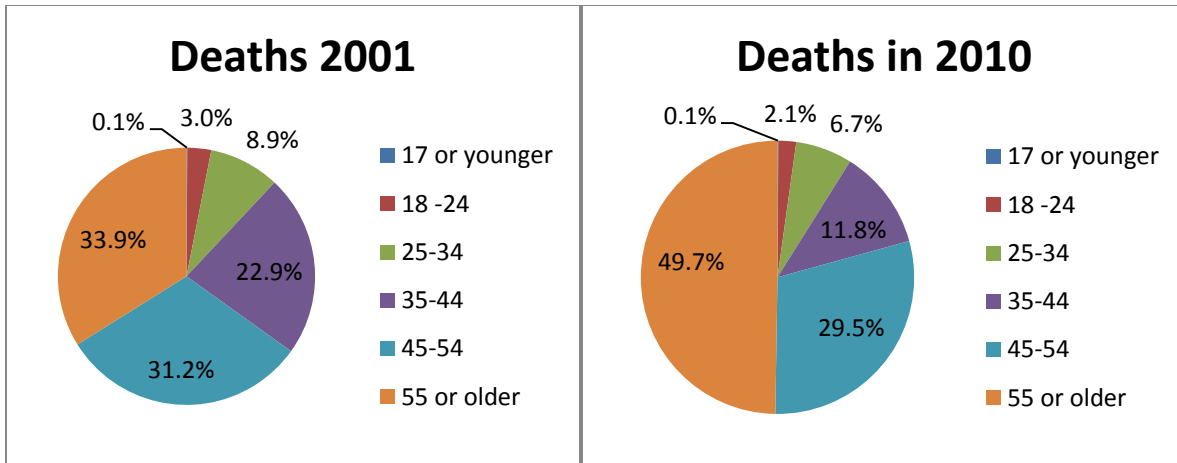


These trends in inmate deaths have meant that those 55 or older have increasingly accounted for a higher percentage of prison deaths. From 2001 to 2010 the age group 55 or above increased from 33.9% of all deaths in State Prisons to 49.7% of all deaths.<sup>57</sup>

<sup>55</sup> Margaret Noonan, *Mortality in Local Jails and State Prisons, 2000 – 2010 Statistical Tables*, U.S. Bureau of Just. Stat., Table 5 and 15 (December 2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/mljsp0010st.pdf>.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at Table 15.



It is important to note that between 2001 and 2010 only 51 of the reported deaths for the age group 55 or above were the result of homicide and that these deaths accounted for only 9.9% of all homicides.<sup>58</sup> The other cited causes of death in order of least to most deaths were: drugs/alcohol intoxication<sup>59</sup>, accidents, suicide, AIDS, liver disease, respiratory diseases, other illness, cancer, and heart disease.<sup>60</sup> Subtracting homicide related deaths, between the years 2001 and 2010, illness related deaths of those 55 and above accounted for 41.68% of all the deaths that occurred in State Prisons.<sup>61</sup> Together, heart disease and cancer deaths of those 55 or older accounted for more than a quarter (26.86%) of all deaths between the years 2001 and 2010.<sup>62</sup> These numbers show that there are a growing number of elderly prisoners dying from illness. One might dismiss the significance of these facts by saying that an increase in elderly deaths is an obvious result of an increase in an elderly population. However, these numbers reveal that not only are there a growing number of dying elderly inmates but there are a growing number of ill elderly inmates. This means that there are a growing number of individuals that states are

<sup>58</sup> *Id.* at Table 21 and Table 22

<sup>59</sup> While drugs are smuggled into prison, alcohol is made while incarcerated sometimes with deadly results. See Scott Hensley, *Botulism From 'Pruno' Hits Arizona Prison*, N.P.R., February 7, 2013, available at <http://www.npr.org/blogs/health/2013/02/07/171385104/botulism-from-pruno-hits-arizona-prison>.

<sup>60</sup> *Supra* note 57.

<sup>61</sup> See Noonan, *supra* note 55, at Table 21.

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



responsible for taking care of. Not everyone who is suffering from a disease will be killed by it in a given year. As mentioned cancer related deaths accounted for a quarter of all deaths between 2000 and 2010 (half of which were elderly inmates) with 15,658 deaths.<sup>63</sup> Using cancer treatment as an example we can see how medical treatment is so costly. Between 2000 and 2010 the median price of drugs for cancer treatment rose from \$4,500 to \$10,000 a month.<sup>64</sup> If we use a median of these two prices of \$7,250 and apply it to only those 55 and older who had died from cancer, one month of treatment for the inmates cost the states \$30,899,500. This figure is staggering when it is considered that inmates with cancer are treated more than one month and there are inmates in prison who have cancer and have not been killed by it.

Looking at these figures it is easy to understand that states are facing a dire problem when it comes to the growing population of elderly inmates.

## **II. What Should Be Done?**

When addressing the problem of housing and caring for the growing elderly population of the correctional system one solution seems to be particularly contentious: commuting the sentences of the elderly. The argument for releasing the elderly earlier is that those within the elderly sub population either are wiser or simply do not have the same drive or ability as their younger counterparts to commit further crimes. Therefore, society would receive a greater benefit by releasing them into the public and using the funds which would have been spent on rehabilitating younger prisoners.

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

<sup>64</sup> Peter b. Bach, Leonard B Saltz & Robert e. Wittes. *In Cancer Care, Cost Matters*, N.Y. Times, October 14, 2012, available at [http://www.nytimes.com/2012/10/15/opinion/a-hospital-says-no-to-an-11000-a-month-cancer-drug.html?\\_r=0](http://www.nytimes.com/2012/10/15/opinion/a-hospital-says-no-to-an-11000-a-month-cancer-drug.html?_r=0).

However, critics worry about the truth of this assertion. After all, people who are in prison, generally, are there for doing something wrong and if they could violate the law once what is to stop them from doing it again?

The most recent data available from the Bureau of Justice Statistics on recidivism rates show that 27% of prisoners aged 40 and above were re-incarcerated in a jail or a prison within three years of being released.<sup>65</sup> This is far below the averages of the other age groups especially those 21 and younger who had a recidivist rate of 50.8% within three years of being released.<sup>66</sup> These statistics would suggest that if released a majority of elderly prisoners (73%) would conduct themselves in a way which would not place them back in the hands of the correctional system. This number would therefore, support the proposition that the public would benefit more from releasing the elderly than keeping them locked away.

Another way to examine the dangerousness of releasing elderly inmates into the public is to examine how well people in the age group obey their parole. An examination of the data produced by the National Correction Reporting Program shows that those aged 55 or older constitute a small percentage of those who violate their parole. From 1999 to 2009 those who were 55 or older composed between 1.61% to 3.80% of all people who were accused of violating their parole.<sup>67</sup> The major offenders of their parole were those who were between the ages of 35 and 44.<sup>68</sup>

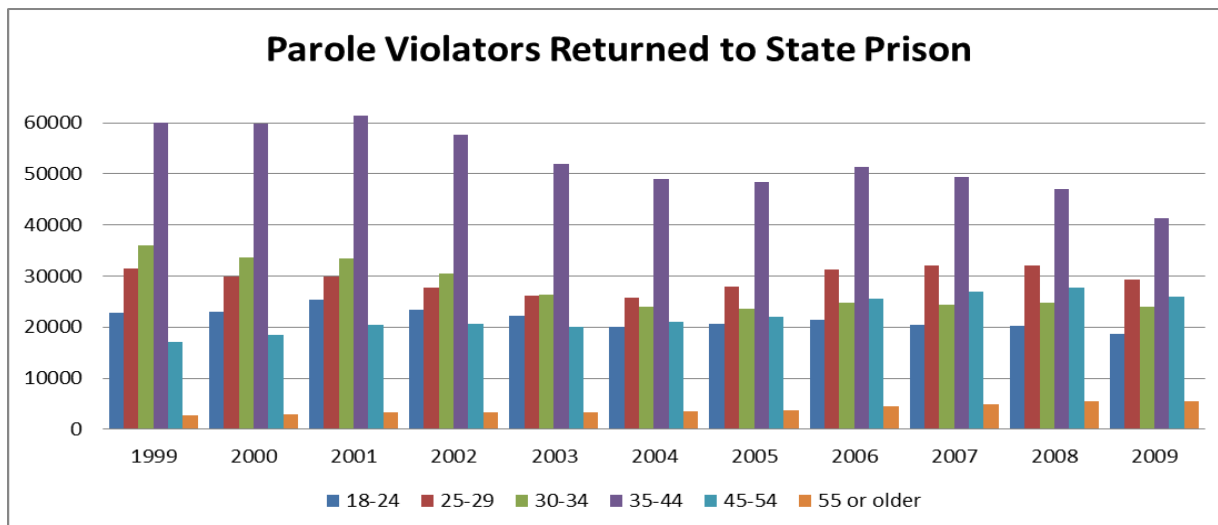
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<sup>65</sup> Collected from <http://bjs.gov/index.cfm?ty=datool&surl=/recidivism/index.cfm#> (last visited April 29, 2013)

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

<sup>67</sup> Calculated from Thomas P. Bonczar, *National Corrections Reporting Program: Most Serious Offense Of State Prisoners, By Offense, Admission Type, Age, Sex, Race, And Hispanic Origin. Parole Violators Returned to State Prison: Offense, By Age At Admission. 1993-2009*, (April 29, 2013), <http://bjs.gov/index.cfm?ty=pbdetail&iid=2065>.

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



The data does reveal a slight increase in the amount of those 55 or older violating their parole. However, this might be explained by the giant increase in the amount of inmates of that age group who have been put into the correctional system during the past two decades.

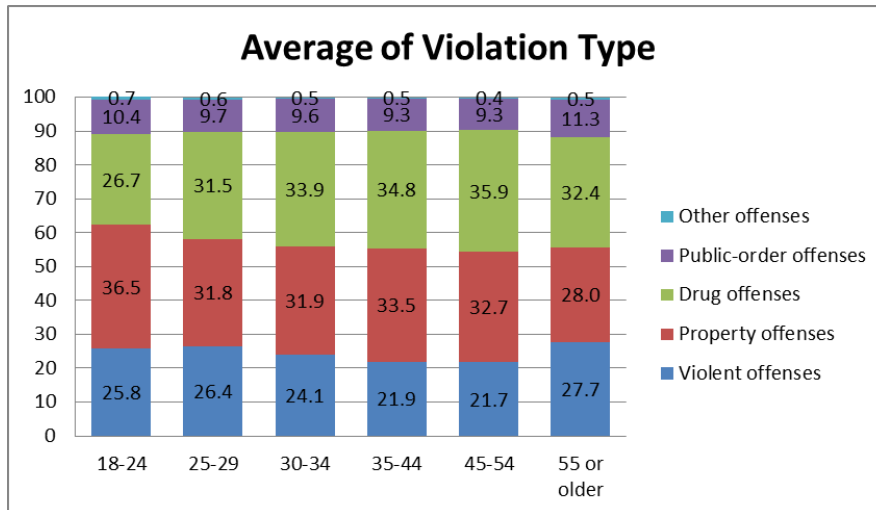
Knowing what percentage of recidivists those 55 and older constitute is only one factor to address. Another, and from a public policy perspective, more important factor is the reason that they are returning to prison. Those in favor of releasing elderly inmates into the public say that violent crime by older former prisoners is relatively rare.<sup>69</sup> However, of those 55 and above that do violate their parole are more likely than their younger counterparts to commit a violent offense.<sup>70</sup> Violent offenses include homicide, kidnaping, rape, sexual assault, robbery, assault, and non-specified violent acts.<sup>71</sup> For those 55 or older committing a violent offense was the cause of violation for 27.7% of the time between 1999 and 2009.<sup>72</sup>

<sup>69</sup> See Human Rights Watch, *supra* note 49, at 54.

<sup>70</sup> *Supra* note 67

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*



What is particularly concerning is that type of violent crime that was committed by those 55 or older. Rape and other sexual assaults were the most frequent violent offense committed by those 55 or older. Between 1999 and 2009, rape constituted an average of 2.21% of the violent offenses committed by those 55 or older compared to averages of 0.61%, 0.69%, 0.84%, 1.05%, and 1.41% for the other age groups (in order of youngest to oldest).<sup>73</sup> Likewise, sexual assault constituted an average of 7.73% of the violent offenses committed by those 55 or older compared to averages of 2.22%, 2.66%, 2.37%, 2.65%, and 3.62% (in order of youngest to oldest).<sup>74</sup> This means that those 55 or older who had violated the terms of their parole were re-incarcerated for committing an average of 4,310 violent sexual acts over a period stretching ten years.

Although these figures would seem to contradict the idea that the elderly are less violent than their younger counterparts the numbers must be kept in context. First, as stated, the incidents of violent sexual acts quoted spanned a ten year period. Second, only 27% of all elderly inmates released from prison end up being re-incarcerated after 3 years of being free. Furthermore, this 27% includes those who violated their parole. If the public is still concerned by

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

the potential for violence that released elderly prisoners could commit there are a few ways to potentially limit this already small threat.

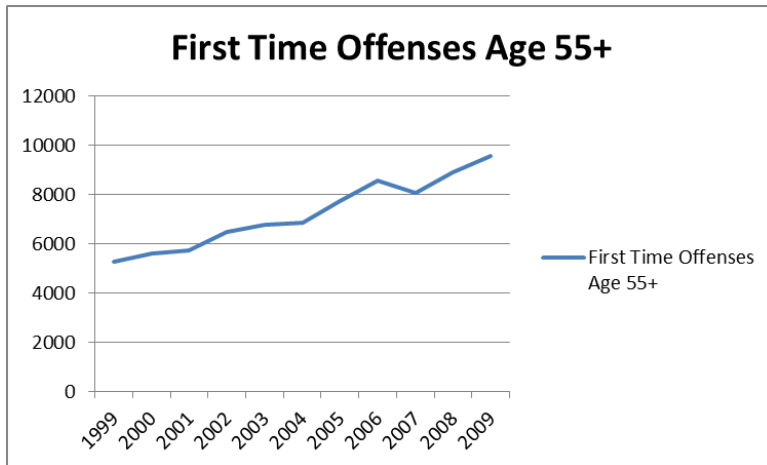
One way to curb the public's fear of releasing elderly offenders could be to exclude from release anyone who has been convicted of a violent sexual act, as this group would be the most likely to commit another violent sexual act upon release. Another possibility would be to create new institutions that would exclusively monitor prisoners who had their sentences commuted because of their age. This would need to be done carefully, as not to create a merely separate elderly only prison. If not, states would still have the responsibility of supplying expensive medical care to these adults.

There is one subset of the elderly population that might need to be treated differently. This group would be those 55 or older who were first time offenders when they committed their crime. This group is distinct because the rationalization for releasing the elderly rest largely on the idea that they have "paid" for their crime and as a result are unlikely to commit another. However, this sub group cannot be ignored for long. While the amount of first time offenders aged 55 or older is comparatively small, only 3.43% in 2009, it is a growing group.<sup>75</sup> Between 1999 and 2009 the amount of first time elderly offenders per year grew by 81%.<sup>76</sup>

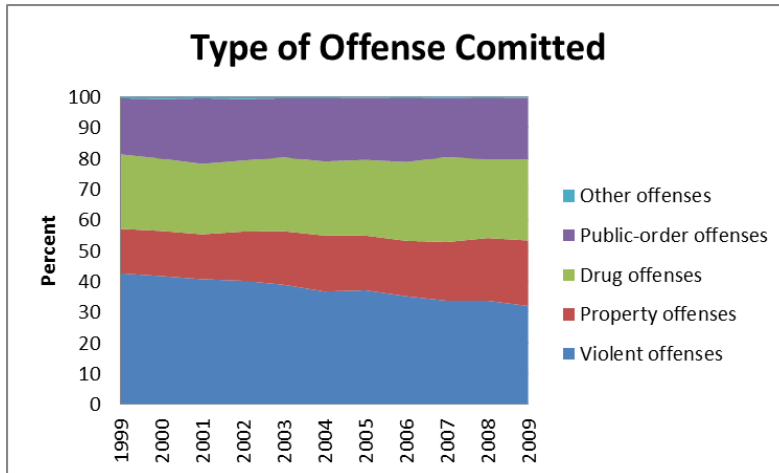
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<sup>75</sup> *Supra* note 67

<sup>76</sup> *Id.*



Likewise elderly first time offenders are more likely to have committed a violent offense as their way into the correctional system. However, during the period between 1999 and 2009 the proportion of violent acts declined from 42.7% to 32.1%.<sup>77</sup> What took its place were property offenses, such as burglary and theft, rising from 14.5% to 21.3% of all offenses committed by the group.<sup>78</sup>



Based on the data showing the type of offenses committed, it is unlikely that the public will be willing to extend their sympathy to a large portion of first time elderly offenders. However, recent changes in some states' laws may show a change in public opinion towards certain types

<sup>77</sup> *Id.*

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

of crime, such as drug offenses. In November 2012, Washington and Oregon adopted laws that legalized the use and sale of marijuana in those states.<sup>79</sup> If the public could come to an agreement on treating elderly drug offenders in a different way it would prevent on average a quarter of all first time elderly offenders from entering the system.<sup>80</sup>

Another possible solution to the growing elderly population may be compassionate release. These programs have been created by state governments as a way to release inmates which are critically or terminally ill. In 2010, 39 states had such programs.<sup>81</sup> However, because of the language of the statutes that form these programs, they are often not implemented at an effective level. For example, in 2009 California released only three people through its compassionate release program and Alabama only four.<sup>82</sup> From 2001 to 2008 Colorado released only 3 inmates and as of 2012 Maryland and Oklahoma hadn't paroled anyone under their programs.<sup>83</sup> Part of the reason these programs fail work as effectively as intended is due to the discretionary power instilled in the release review boards.

New York's statute, similar to most other states, declares that the medical parole board may release prisoners whose disease is so debilitating that there is no "reasonable probability that he or she is physically or cognitively incapable of presenting any danger to society".<sup>84</sup> Ideally, discretionary language such as this should aid the boards in allowing release. However, because of the contention surrounding prisoners and the subsequent public pressure boards are more likely to not grant release than grant it. Exemplifying this is a decision by the New York board in

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<sup>79</sup>Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. Times, November 7, 2012, available at <http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html>.

<sup>80</sup> *Supra* note 67.

<sup>81</sup> Cara Buckley, *Law Has Little Effect on Early Release for Inmates*, N.Y. Times, January 29, 2010, available at <http://www.nytimes.com/2010/01/30/nyregion/30parole.html>

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

<sup>83</sup> Tina Maschi, *The State of Aging: Prisoners and Compassionate Release Programs*, The Huffington Post, August 23, 2012, available at [http://www.huffingtonpost.com/tina-maschi/the-state-of-aging-prisoners\\_b\\_1825811.html](http://www.huffingtonpost.com/tina-maschi/the-state-of-aging-prisoners_b_1825811.html).

<sup>84</sup> NY CLS Exec § 259-r (2013)

refusing release to a quadriplegic because he did not seem remorseful enough.<sup>85</sup> Since New York's adoption of a compassionate release program in 1992 only 364 have been granted approval.<sup>86</sup>

Some states have attempted to combat these problems by creating new medical parole programs. In 2010 California passed a new medical parole statute and released 29 inmates under it.<sup>87</sup> The program transferred these inmates to nursing homes throughout the state and was estimated that it would save the state \$19 million in 2010 alone.<sup>88</sup>

Given that states are currently unlikely to release prisoners who are terminally ill or completely physically incapacitated it's hard to imagine that extending these law to take age into consideration will provide much relief.<sup>89</sup> The American Civil Liberties Union suggests two changes that states should implement in order to ensure that compassionate release laws work properly. First, is that states should create guidelines and require parole boards to issue written decisions so that the boards reasoning can more easily be known.<sup>90</sup> Second, states should open their parole decisions to the public to unless sensitive information is to be discussed.<sup>91</sup> However, New York already requires its medical parole board to write its decisions and it seems to have little positive effect due to public pressure to keep inmates in jail.

Others have attempted to create programs specifically aimed at elderly inmates.

One state pushing for the adoption of such a program is Oklahoma. In March 2013 the Oklahoma

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<sup>85</sup> See Buckley, *supra* note 81.

<sup>86</sup> *Id.*

<sup>87</sup> Katharine Mieszkowski, *When the Nursing Home Resident in the Next Room is a Convicted Criminal*, N.Y. Times, January 19, 2012, available at <http://www.nytimes.com/2012/01/20/us/prisoners-on-medical-parole-housed-in-california-nursing-homes.html?pagewanted=all>

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

<sup>89</sup> Some states already to extend compassionate release to the elderly. One such state is Missouri which allows referrals to the board for prisoners "advanced in age to the extent that the offender is in need of long-term nursing home care" § 217.250 R.S.Mo. (2013)

<sup>90</sup> American Civil Liberties Union, *At America's Expense: The Mass Incarceration of the Elderly*, 78 (June 2012), [http://www.aclu.org/files/assets/elderlyprisonreport\\_20120613\\_1.pdf](http://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf)

<sup>91</sup> *Id.*



House of Representative passed the “Parole and Aging Prisoners Act”. The stated purpose for the act is to “reduce unnecessary costs to state taxpayers” by allowing the states parole boards to release certain elderly prisoners.<sup>92</sup> The act will empower the Pardon and Parole board to parole prisoners that are 65 or older, have served the lesser of 10 years or one third of the total term, pose a minimal public safety risk, are not incarcerated for crimes that fall under 21 Okl. St. §13.1<sup>93</sup>, and are not registered sex offenders.<sup>94</sup> The Parole Board is charged to find by a preponderance of the evidence that the prisoner, if released, can live without posing a substantial risk to the public.<sup>95</sup> This language unfortunately bares resemblance the discretionary power granted to the failing compassionate parole boards of other states. However, §4(B)(2) of the Bill does state that the parole board “shall use the selected evidence-base risk assessment instrument to make” their determination.<sup>96</sup> What exactly this instrument consists of goes answered but may leave room in the future for congressional specified criteria. Finally, although the Bill does not mandate that the findings of the board be made public §4(B)(3) states that the board must provide the prisoner with the option of having counsel present at the hearing.<sup>97</sup> The bill intended to go into effect in November 2013, however only if it is approved by Oklahoma’s Senate.

Illinois attempted to pass a similar bill titled The Elderly Sentence Adjustment Act<sup>98</sup> in 2007. This bill was, arguably, stricter than the one being debated in Oklahoma. The Illinois bill only applied to those “who is a[t] least 50 years of age and who has served at least 25 consecutive years of imprisonment”.<sup>99</sup> Notably, rather than leaving the decision to a parole board

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<sup>92</sup> H.R. 1056, 54<sup>th</sup> Leg., 1<sup>st</sup> Sess. (Okla. 2013)

<sup>93</sup> 21 Okl. St. §13.1 (2013). These are generally first degree violent and property crimes

<sup>94</sup> H.R. 1056, 54<sup>th</sup> Leg., 1<sup>st</sup> Sess. (Okla. 2013)

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Later changed to The Elderly Rehabilitated Prisoner Program

<sup>99</sup> H.R. 4154, 95<sup>th</sup> Ge. Assemb., Reg. Sess. (Ill. 2007)

the decision to adjust the prisoner's sentence would have been left with the District Courts of the state.<sup>100</sup> Unfortunately, this bill never made it past the Illinois House of Representatives. Part of the reason the bill was lost was due to pressure from the public. In an interview Senator Patrick Verschoore stated that he voted against the bill because he didn't care how much it would save if it posed a risk to just one life.<sup>101</sup>

Hopefully, the Oklahoma Senate will not repeat the actions of Illinois, however public opinion will undoubtedly be a hurdle to overcome. In the not-so-distant future, technology may offer hope of swaying public opinion to allow legislators to pass measures that effectively release prisoners. Using a combination of social network technology, g.p.s. tracking, and smart phones, new ideas for keeping a close watch on parolees are currently being developed and implemented.

In 2008 electronic monitoring costs from \$15 to \$25 compared to the average daily incarceration cost of \$78.95.<sup>102</sup> Because of this economic advantage many states have pushed for their use. However, due to public fears of criminals being out in the public with little oversight electronic monitoring has not developed into a wide program despite the fact that electronic monitoring has traditionally been used for non-violent offenders. Now, new technology offers a potential way to calm the fears the public may harbor over releasing non-threatening inmates. This technology couples traditional ankle electronic monitoring with smartphones. As has been done in the past, the ankle tracks the movements of paroled inmates and sends a signal to the parolee's case worker if they enter into a restricted zone. What is new is that case workers are updated in real time and are able to call the parolee via smartphone and speak with them about

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

<sup>101</sup> Kim Johnson, *Elderly Inmates with WQAD's Kim Johnson*, (December 15, 2011), [https://www.youtube.com/watch?v=seHSB\\_sKyIg](https://www.youtube.com/watch?v=seHSB_sKyIg)

<sup>102</sup> Alan Holden & Kara Shuler, *Beyond the Bars: A New Model of "virtual incarceration" for low-risk offenders*, (March 4, 2013) available at <http://dupress.com/articles/beyond-the-bars>.

what they are doing wrong. To ensure that the parolee always has the phone on their person the two devices are set to alarm if they are ever more than seven feet apart. Additionally, applications such as FaceTime allow the case work to see the parolee and ensure they devices have not been handed off to another person.

This technology also offers new ways for case workers to help parolees keep in line with the terms of their parole. This can be done by sending automatic reminders of appointments, sending automatic reminders that they should be leaving their house to get to their appointments on time. Some have suggested implementing game theory to encourage parolees to conduct good lifestyle choices by using apps similar to FourSquare to check into approved locations. Of course these applications might not be as utilized by infirm and physically disabled parolees but they might dissuade inexplicable public fears of the infirm elderly criminals.

There are also possible potential health care aspects to such technology. Although not developed there are other potentials for these technologies in a healthcare context. They could be implemented to ensure medical parolees partake in exercise programs, or at the very least try walking. As the technology is used to remind parolees of appointments programs could be used to remind medical parolees to take their medication. Such programs might help cut medical costs for inmates and the federal government.

Whatever the solution, something will need to be done. The population of elderly offenders is clearly growing and they are placing a burden on a system which is already stretched to its limits.

## **CONCLUSION**

As has been shown the correctional system of the United States has seen a spike in its inmate population during the past few decades. What is especially concerning is that while the

general population has rapidly increased the population of those 55 and older has comparatively seen an explosion in population.

In addition to the growing correctional population, during the past few decades the United States has experienced a spike in the cost of medical care. As a result of *Estelle v. Gamble*, the growing inmate population and growing medical expenses translate into a growing bill for prisons to cover. Despite increases in medical expenditures in the majority of prison those 55 and older are disproportionately accounting for deaths in prison as a result of illness.

In addressing these problems Americans will have to make some hard choices. Current laws and policies of many states are causing the cells in the correctional system to swell. Since the elderly make up a relatively small portion of the entire correctional system and are generally less violent the straight forward solution to the problem would be to commute their sentences. However, due to public concern of releasing convicted criminals this choice seems unlikely to succeed. The ineffectiveness of current laws which attempt to release infirm and elderly inmates shows that more than just new laws are needed. It would appear that a solution lies in distilling public fears of returning inmates to their communities. New technology offers the best path to achieving a public relations shift by allowing the correctional system to be more hands off while at the same time keeping a close eye on the released prisoners.

Whether by choice or by force the issue will come to the forefront of politics. Hopefully in the coming years, state and federal governments will take proactive steps to correct the growing elderly prison population and not wait until the dam breaks.