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SENIORITIS: WHY ELDERLY FEDERAL INMATES ARE LITERALLY DYING TO GET OUT OF PRISON

Patricia S. Corwin*

INTRODUCTION

The number of elderly inmates in the federal prison system is on the rise. In 1998, 13,673 inmates over fifty years of age entered the federal prison system. By 2005, the Federal Bureau of Prisons (BOP) predicts that this population of elderly inmates will increase by sixteen percent. This population can be broken down into two categories: Elderly criminals and criminals who will become elderly during their sentence. Both categories of inmates have a remarkably low recidivism rate; ninety-

* J.D., The Catholic University of America, Columbus School of Law; M.A., Emerson College; B.A., The State University of New York at Binghamton. This article would not have been substantively possible without the help of Barry Holman and Michael Horowitz. More importantly, this paper would not have been possible at all without the support of my parents, Tim and Sue Corwin, and the classes I took with Professor William Wagner at Catholic University and Dr. Howard Brown at SUNY Binghamton.

1. See Joann B. Morton, U.S. Dep't of Justice, An Administrative Overview of the Older Inmate 1, 4 (1992); Herbert J. Hoelter & Barry Holman, National Center on Institutions and Alternatives, Alexandria, VA, Imprisoning Elderly Offenders: Medical Care and Physical Environments Are of Special Concern (Dec. 1998) (stating that presently there are over 49,000 inmates over the age of fifty-five, which is more than double the amount in 1990).

2. See Morton, supra note 1, at 4. While age fifty seems closer to middle age than to elderly, the socioeconomic status, lack of access to medical care, and lifestyle of older criminals may create a ten year differential between the health of inmates in the Bureau of Prisons and the general population. Id.; Joanne O'Bryant, Prisons: Policy Options for Congress, Cong. Res. Service, Aug. 1999, Summary.

3. O'Bryant, supra note 2, at 7.


5. U.S. Dep't of Justice, Probation and Parole Violators in State Prison, Aug. 1995 (noting that the recidivism rate for older parolees and probationers, the rate of reincarceration, is 1.4%, while 51.4% of parolees and
nine percent are never convicted of another crime upon release.\(^6\) The average annual cost of confining an elderly prisoner is $69,000.\(^7\) This is more than three times the cost expended to incarcerate younger inmates, and more than twice the average annual cost for a full service nursing home.\(^8\) One reason for this cost is exemplified by a study of 1,051 federal elderly inmates which found that each inmate averaged twenty-four medical encounters a year.\(^9\) In the year 2000, the national cost for housing and caring for the elderly reached over $2.8 billion.\(^10\)

The disparity in caring for elderly prisoners is attributable to their unique and costly health problems.\(^11\) The most adverse effect of medical needs for elderly prisoners is the collateral cost associated with obtaining medical treatment.\(^12\) Although governments may have to pay for elder probationers returned to prison were between the ages of eighteen to twenty-nine); see also Mary Foster, *Prisons Costly Dilemma: Caring for Elderly Prisoners: Younger More Dangerous Men are Released While Aging Inmates Sentenced to Life Without Parole Cost the System Millions*, L.A. TIMES, May 6, 1990, at A2. It has been argued that age is the most reliable indicator in predicting recidivism; reports show recidivism rates of twenty-two percent for inmates aged eighteen to twenty-four within a year of release compared to rates of two percent for inmates over forty-five. *Id.; American Bar Association, Report on the Elder Resolution (2000)* [hereinafter Elder Resolution]. A New York prison study revealed recidivism rates of over seventy percent within three years of release for inmates between the ages of sixteen and eighteen and a rate of 7.4% for inmates over the age of sixty-five. *Id.*


7. Barry Holman, *Old Men Behind Bars*, WASH. POST, July 25, 1999, at B8, reprinted in *Coalition for Federal Sentencing Reform, Washington, D.C., Nursing Homes Behind Bars: The Elderly in Prison 5* (Fall 1998) [hereinafter Nursing Homes Behind Bars]; Elder Resolution, supra note 5. The BOP recognizes the cost of housing elderly inmates and estimates that by the year 2005, its cost of treating the most common cardiac and hypertensive disorders in prisoners aged fifty and over will reach $94 million, a fourteen-fold increase over the 1988 total. Additionally, the BOP spends over $409 million of a $3.2 billion budget to confine elderly inmates. Elder Resolution, supra note 5, at 2.

8. Nursing Homes Behind Bars, supra note 7, at 2. The annual cost of incarcerating younger inmates is $22,000; the annual cost for a full service nursing home is $32,000. *Id.*

9. Elder Resolution, supra note 5, at 1. Of these visits, 53.9% were for hypertension, 7.9% for chronic obstructive pulmonary disease, and 10.3% for insulin dependent diabetes. *Id.*


11. *See infra* notes 89-94 (discussing the special needs of elderly inmates).

inmates’ medical needs regardless of whether they are incarcerated, transactional costs of providing health care in the prison system compound state and federal expenditures.\textsuperscript{13}

States are making significant progress by dealing with their elderly prison population in a variety of ways.\textsuperscript{14} Conversely, the federal government offers no special programs, policies or treatment for reducing the costs of caring for elderly prisoners.\textsuperscript{15} Despite the need to alleviate many of the problems associated with elderly inmates, the federal government has made little movement towards mitigating these problems.\textsuperscript{16} Factors such as the federal sentencing guidelines,\textsuperscript{17} the abolition of parole,\textsuperscript{18} truth-in-sentencing statutes,\textsuperscript{19} mandatory minimums\textsuperscript{20} and the growing number of baby boomers entering their fifth decade,\textsuperscript{21} all

\begin{quote}
\textit{Overcrowding, 4 Elder L.J.} 173, 186-87 (1996). For example, in 1992, the state of Louisiana drove William Hawkins, a sixty-two year old convicted murderer, to Baton Rouge three times a week for treatment with a dialysis machine. Hawkins logged more than 23,000 hours on dialysis, costing Louisiana taxpayers around $39,000 annually in medical care. \textit{Id.}

\textsuperscript{13} \textit{Id.}

\textsuperscript{14} See infra notes 95-119 (how states are developing innovative ways to deal with the growing number of elderly prisoners in the state system).

\textsuperscript{15} H\textsc{oelter} & H\textsc{olman}, \textit{supra} note 1; Peter Kratcoski & George Pownall, \textit{Programming for Older Inmates}, FED. PROB., June 1989 (discussing the BOP's preference to house elderly inmates with the general population, based on the security needs and regional considerations).


\textsuperscript{18} \textit{Id.}

\textsuperscript{19} "Violent Crime Control and Law Enforcement Act," 42 U.S.C. § 13701 (1994) (offering grants to states who have sentencing law which require certain offenders to serve eighty-five percent of their prison sentence); T\textsc{enn. C}ode Ann. § 40-35-401 (1995) (requiring people convicted of a violent crime to serve eighty-five percent of their prison term before being eligible for parole. It also requires those convicted of non-violent crimes to serve fifty percent of their sentence before being considered for parole).

\textsuperscript{20} 18 U.S.C. § 3553 (1994) (explaining the factors to be considered in imposing a criminal sentence).

\textsuperscript{21} See Meghan Fay, \textit{Special Population Prisons: Are They Here to Stay?}, THE
account for the increase in the number of elderly prisoners in the federal system.

The cost of elderly prisoner care becomes especially acute when juxtaposed against recent United States Supreme Court decisions. In 1976, the Court acknowledged prisoner complaints under the Eighth Amendment's prohibition of "cruel and unusual" punishment.\(^2\) Two decades later, the Court ordered prisons to adapt to the different physical needs of prisoners.\(^3\) In sum, the holdings of these cases require complete renovation of prisons to meet the needs of elderly inmates.

This Comment will first discuss whether there is a duty to alleviate the problems posed by elderly inmates through an analysis of the Eighth Amendment's prohibition of "cruel and unusual" punishment. Second, the Comment will discuss how the states are dealing effectively with their elderly inmate population. Third, the Comment will explore how the federal government's only provision designed especially for elderly inmates, the "Geriatric Parole," does not provide adequate relief. Finally, this Comment will conclude that until the BOP follows the states and develops specific programs to meet the needs of elderly inmates, Assistant United States Attorneys (AUSAs) must sentence elderly offenders differently. In addition, since few elderly defendants are violent, the federal government should expand the use of "Geriatric Parole" to cover all inmates.

I. THE CONSTITUTIONAL RIGHT TO CERTAIN PRISON CONDITIONS

The Eighth Amendment to the United States Constitution prohibits the government from imposing punishments that are "cruel and unusual."\(^4\)


\(^3\) Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998) (ruling that state prisons fall squarely within Title II's statutory definition of "public entity" and cannot discriminate against a "qualified individual with a disability"). But see S. 33, 106\(^{th}\) Cong. (1999) (excluding prisoners from the American with Disabilities Act).

\(^4\) U.S. CONST. AMEND. VIII. The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Id.
Eighth Amendment claims by prisoners generally deal with alleged deficiencies in medical care when corrections officials fail to provide prisoners access to necessary medical care. As the United States Supreme Court has recognized, the failure to provide inmates with certain types of care may result in the “unnecessary and wanton infliction of pain,” thereby violating the Eighth Amendment. However, negligence alone will not sustain an Eighth Amendment claim. The claimant must prove that the official acted with “deliberate indifference” to establish that a government official’s action or inaction toward a prisoner’s medical needs constitutes an Eighth Amendment violation.

A. Estelle v. Gamble: Establishing Deliberate Indifference

In Estelle v. Gamble, Gamble, an inmate of the Texas Department of Corrections, filed a civil rights action under 42 U.S.C. Section 1983 (2001) claiming inadequate treatment for his back injury. Despite seventeen visits by three different doctors and a medical assistant over a three-month period, Gamble claimed that his back pain persisted and that the

25. See Gamble, 429 U.S. 97 (holding that a prison official’s “deliberate indifference” to a substantial risk of serious harm to an inmate violates the Eighth Amendment). Eighth Amendment claims arise due to a myriad of allegations. See e.g., Whitley v. Albers, 475 U.S. 312 (1986) (requiring a claimant with an Eighth Amendment charge of excessive force by a corrections office to show that officials applied force maliciously and sadistically for the purpose of causing harm); Rhodes v. Chapman, 452 U.S. 377 (1981) (explaining how harsh conditions of confinement may constitute cruel and unusual punishment unless such conditions are generally part of the penalty that criminal offenders pay for their offenses against society).


27. Whitley, 475 U.S. at 105; see Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) (holding that an accident, although it may produce added anguish, is not alone enough to qualify as wanton infliction of unnecessary pain).

28. Whitley, 475 U.S. at 104.

29. 429 U.S. 97 (1976). Accord Wilkerson v. Utah, 99 U.S. 130 (1879) (applying for the first time the Eighth Amendment by comparing challenged methods of execution to inhuman techniques of punishment); In re Kemmler, 136 U.S. 436 (1890) (ruling that punishments are cruel when they involve torture or a lingering death). But see Resweber, 329 U.S. at 459 (concluding that no constitutional violation occurred when prison officials forced a prisoner to undergo a second effort to electrocute him after a mechanical malfunction had thwarted the first attempt).

30. 429 U.S. at 98.

31. Id. at 99.
prison officials' failure to diagnose and adequately treat his pain constituted "cruel and unusual punishment." Specifically, he claimed that the doctors erred by failing to order an X-ray of his back.

The Court first considered the history of the constitutional prohibition on cruel and unusual punishment. The Court noted that the drafters were primarily concerned with eliminating the government's use of "torture[]" and other "barbar[ous]" methods of punishment. Over time, the Amendment's definition expanded to encompass "broad and idealistic concepts of dignity, civilized standards, humanity, and decency." Thus, the prohibition on "cruel and unusual punishment" includes the government's obligation to provide medical care for prisoners because they cannot take care of themselves.

Despite this ruling, the Court held that Gamble failed to state a cognizable claim under Section 1983. The Court determined that medical and diagnostic decisions were a matter of medical judgment, and while such actions could possibly constitute medical malpractice, the Eighth Amendment provided no redress. However, the Court did leave open the possibility that "deliberate indifference" to a prisoner's serious

32. Id. at 101.
33. Id. at 107.
34. Id. at 102.
35. Id.
36. Gamble, 429 U.S. at 102 (quoting Jackson v. Bishop, 404 F. 2d 571, 579 (1968)). "Our more recent cases, however, have held that the Amendment prescribes more than physically barbarous punishments." Id. See e.g., Weems v. United States, 217 U.S. 349 (1910); Trop v. Dulles, 356 U.S. 86 (1958); Gregg v. Georgia, 428 U.S. 153 (1976).
37. Gamble, 429 U.S. at 103. Cf Gregg, 428 U.S. at 182-83. See Spicer v. Williamson, 191 N.C. 487, 490 (1926) (explaining the common law view of the government's duty to care for inmates derived from "the prisoner, who cannot by reason of the deprivation of his liberty, care for himself").
38. Gamble, 429 U.S. at 106.
39. Id. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner . . . a prisoner must allege acts or omissions sufficiently harmful or evidence of deliberate indifference to serious medical needs." Id. But see, Bass v. Wallenstein, 769 F.2d 1173 (7th Cir. 1985) (sick-call procedures failed to ensure prompt access to medical care); Wellman v. Faulkner, 715 F.2d 269 (7th Cir. 1983) (two of three prison doctors could barely speak English; failure to stock necessary medical supplies, such as colostomy bags, met the deliberate indifference standard); Williams v. Vincent, 508 F.2d 541 (2nd Cir. 1974) (doctor's choosing to throwing away the prisoner's ear and stitching the stump could qualify as deliberate indifference rather than a reasonable professional judgment).
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medical needs could constitute “cruel and unusual punishment” under the Eighth Amendment. A prison doctor who did not respond to a prisoner’s medical needs or prison guards who intentionally denied or delayed a prisoner’s access to medical care could manifest “deliberate indifference,” but Gamble’s lack of care did not rise to this level.

B. Farmer v. Brennan: Establishing Standards

The Supreme Court’s decision in Gamble permitted prisoners to make an Eighth Amendment claim if they suffered a medical problem to which prison officials were deliberately indifferent. In Farmer v. Brennan, the Supreme Court articulated three requirements that must be met before a corrections official is deemed to have acted with “deliberate indifference.” First, the official must have been aware of the fact that an inmate faced a substantial risk of serious harm. Second, the official must have actually deduced from the facts that the inmate faced a significant risk of being seriously harmed. Finally, the official must have failed to take reasonable steps to prevent such harm from occurring. Essentially, an official cannot escape liability by showing that he knew of the risk, but did not think that the complainant was especially likely to be affected by the threat of harm.

40. Gamble, 429 U.S. at 106.
41. Id. However, even if correctional officials act with deliberate indifference to an inmate’s medical needs, no violation of the Eighth Amendment results unless the inmate’s medical need is “serious.” Id. See, e.g., Gaudreault v. Municipality of Salem, Massachusetts, 923 F.2d 203 (1st Cir. 1990) (holding that a medical need should not be considered serious if either a doctor has determined that medical treatment is required or the need for treatment is so obvious that even a layperson would recognize the need for treatment); Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977) (applying a three-part test that must be met in order for a psychological problem to rise to the level of a “serious” medical need).
42. Gamble, 429 U.S. at 106.
44. Id. at 835-37.
45. Id. at 834. Whether an official had the requisite knowledge is a question of fact subject to demonstration in the usual ways, and a factfinder may conclude that the official knew of a substantial risk from the very fact that it was obvious. Id.
46. Id. at 844.
47. Id.
48. Id. at 841-844. It does not matter whether the risk came from a particular source or whether a prisoner faced the risk for reasons personal to him or because all prisoners in his situation faced the risk. Id. at 843.
Farmer's complaint did not satisfy these requirements.49 Before being convicted of credit card fraud, Farmer underwent surgery for silicone breast implants and testicle removal.50 Prison officials segregated Farmer from the general male population.51 They feared that his transsexual appearance would make him a target among aggressive male convicts.52 However, when Farmer proved to be a discipline problem, officials transferred him to the U. S. Penitentiary in Terre Haute, Indiana.53 There he was placed among the general prison population.54 According to Farmer, within two weeks he was raped and beaten by another inmate.55 Subsequently, Farmer filed a complaint56 alleging a violation of the Eighth Amendment.57

The Court did not agree. "The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments'."58 In so ruling, the Court rejected Farmer's contention that the test for deliberate indifference is subjective on both the actual conditions and the prison official's cognizance.

C. Pennsylvania Department of Corrections v. Yeskey: Applying the ADA to Prisons

While the objective rule in Farmer may have limited some prisoner
complaints, the passage of the Americans with Disabilities Act (ADA) legitimized complaints where objective harm could not be proven. The ADA prohibits state and local governments and other public entities from discriminating against any "qualified individual with a disability" and from excluding individuals from programs, services or activities because of their disability. The Supreme Court held in Pennsylvania Department of Corrections v. Yeskey that state prisons must comply with the ADA by defining state prisons as public entities.

Yeskey filed suit against the Department of Corrections asserting an ADA violation, when corrections officials did not let him participate in the prison's Motivational Boot Camp because his medical history included hypertension. The State demurred, claiming that the boot camp was not the type of "benefit" the ADA intended to cover. They stated that the phrase "benefits of the services, programs, or activities of a public entity," creates an ambiguity because state prisons do not provide prisoners with "benefits" of "programs, services, or activities" as those terms are ordinarily understood.

The Court disagreed with the State. It first determined that the ADA plainly covers state institutions without any exception, making state prisons a "public entity." Thus, any beneficial programs provided by

60. See id. at §§ 12131(2), 12132 (a "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services or the participation in programs or activities provided by a public entity").
61. Id.
63. Id. at 210.
64. PA. STAT. ANN., tit. 61 § 1121 et seq. (West 1998).
65. Yeskey, 524 U.S. at 208. The sentencing court recommended Yeskey, sentenced to serve eighteen to thirty-six months, be placed in the Boot Camp for first time offenders, successful completion of which would have led to his release on parole in just six months. Id.
66. Id. at 210.
67. Id.
68. Id. Title II of the ADA provides that "subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such an entity." 42 U.S.C. § 12132 (2000); see also 42 U.S.C. § 12131(1)(B) (2000) (defining "public entity" as including "any department,
prisons must be accessible to all prisoners, regardless of their mental or physical capabilities.\(^6\) Secondly, the Court refused to interpret "benefits" narrowly.\(^7\) The statute establishing the Motivational Boot Camp at issue in \(\text{Yeskey}\) refers to the camp as a "program."\(^8\) Consequently, the Court held that the Department of Corrections violated the ADA by not allowing Yeskey to participate.\(^9\)

II. GETTING IT DONE: INNOVATIVE STATE SOLUTIONS

A. The Expense of Conforming

The explosion in elderly prison population is not confined to the federal system.\(^10\) States have responded to the rulings in \(\text{Gamble}\) and \(\text{Yeskey}\), despite the challenges of compliance. A majority of states have followed the federal government by implementing habitual offender laws.\(^11\) Generally, these laws mandate an automatic life sentence after a criminal is convicted of his third felony.\(^12\)

For example, prison experts estimate that Pennsylvania's habitual offender law\(^13\) will put 11,000 people in prison by the year 2005.\(^14\) California's statute\(^15\) is the broadest, with more than 40,000 offenders having been sentenced under its provisions since its enactment in 1994.\(^16\)

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69. \(\text{Yeskey}, 524\ \text{U.S. at 209.}\)
70. \(\text{Id. at 210.} \ "[P]risons typically provide inmates with many recreation 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners." \text{Id.}\)
71. \(\text{See PA. STAT. ANN., tit. 61 § 1123 (West 1998).}\)
72. \(\text{Yeskey, 524 U.S. at 210.} \ \text{The Court also refused to hold that the programs providing benefits to participants must be on a voluntary basis. Id. at 211.}\)
73. \(\text{See supra notes 1-3 (discussing the rise in federal elderly inmates).}\)
74. \(\text{Why "3 Strikes and You're Out" Won't Reduce Crime", THE SENTENCING PROJECT, available at http://wwww.sentencingproject.org/brief/1085.htm (last visited on Sept. 26, 1999). Thirty-four states have enacted a sentencing law imposing substantial additional prison years on second or third-time felony offenders. Id.}\)
75. \(\text{See e.g., CAL. PENAL CODE § 1170.12 (Deering 1999) (paralleling the federal law's harsh sentencing policy for third time felony offenders).}\)
76. \(\text{42 PA CONS. STAT. § 9711(d)(9) (2000).}\)
77. \(\text{NURSING HOMES BEHIND BARS, supra note 7, at 1.}\)
78. \(\text{CAL. PENAL CODE § 1170.12 (Deering 1999).}\)
79. \(\text{NURSING HOMES BEHIND BARS, supra note 7, at 1.}\)
Kansas is already preparing for the impact of its habitual offender law\textsuperscript{80} by building a new prison for 600 inmates.\textsuperscript{81} Subsequently, state correctional departments must deal with providing care for current elderly inmates as well as planning for the future growth of this population.\textsuperscript{82}

Rising costs of elderly care plague state legislatures. For example, Virginia spends more than sixty-one million dollars annually on 891 elderly inmates, representing three percent of the total state inmate population.\textsuperscript{83} In Pennsylvania, money spent for prison health services soared from about one million dollars in 1973, to over sixteen million dollars in 1986, due in part to the increase in elderly prisoners.\textsuperscript{84} The Florida Department of Corrections pays three times the amount to incarcerate an elderly person in prison than it does to incarcerate a younger person.\textsuperscript{85}

The enormous cost of caring for elderly inmates is due to their unique health problems. Geriatric specialists estimate that elderly prisoners suffer from an average of three chronic illnesses while in prison.\textsuperscript{86} Many older inmates need corrective aids and prosthetic devices including eyeglasses, dentures, hearing aids, ambulatory equipment, and orthopedic shoes.\textsuperscript{87} In addition, the psychosocial needs of elderly inmates differ from their younger counterparts. Elderly prisoners express a greater need for

\textsuperscript{80} KAN. STAT. ANN. §§21-4701 - 21-4728 (1999).
\textsuperscript{81} In the News, CORRECTIONAL NEWS, Nov.-Dec. 1999, at 1.
\textsuperscript{82} See Joanne O'Bryant, Prisons: Policy Options for Congress, CONG. RES. SERVICE, Aug. 1999, at 7. At the end of 1998, state prison systems already held 69,994 inmates over the age of fifty. Id. See Holman, supra note 7, at B8. The National Center on Institutions and Alternatives recently conducted a national survey of correctional agencies, finding nearly 50,000 inmates age 55 and older in state and Federal prisons, a 750 percent increase in the past 20 years. Id.; Herbert J. Hoelter and Barry Holman, Listen to the Voices Behind Bars, L.A. TIMES, July 28, 1999 at A23. “In 1995, for example, Ohio projected that it would need 3,000 beds for elderly inmates by 2003. It exceeded that figure in 1997.” Id.
\textsuperscript{83} See Holman, supra note 7, at B8.
\textsuperscript{84} Sol Chaneles, Growing old behind bars, PSYCHOLOGY TODAY, 50 (1987); Christopher Elser, Aging Behind Bars: Lengthy Jail Terms Have Left Pennsylvania with Costly Problems of Caring for Elderly Inmates, ALLENTOWN MORNING CALL, Aug. 9, 1998, at A4.
\textsuperscript{87} R. Wilkberg, The Longtermers, THE ANGLOLITE, 1988, at 19.
privacy,\textsuperscript{88} an inability to cope effectively with the fast pace and noise of a regular prison facility\textsuperscript{89} and a fear of being vulnerable to attack by younger inmates.\textsuperscript{90} The structure of the prison itself can also be burdensome to the elderly. Older inmates may have difficulty negotiating stairs or making the long walk to the cafeteria.\textsuperscript{91}

\section*{B. Resolutions to an Overwhelming Problem}

\subsection*{1. Policies on the Elderly In and Out of Prison}

States are dealing with their elderly prisoner populations in a variety of ways. However, few jurisdictions have specific written policies addressing aged or infirm inmates.\textsuperscript{92} Only a few states—Alaska, Florida, Illinois, Michigan, Mississippi and South Carolina—make policy decisions based solely on age.\textsuperscript{93} Minnesota, New Jersey, Rhode Island, Alaska, Mississippi and South Carolina use age unofficially as a means for making policy decisions.\textsuperscript{94} For example, Minnesota and New Jersey provide elderly inmates with separate geriatric units;\textsuperscript{95} Rhode Island gives inmates aged sixty-five and over special attention.\textsuperscript{96} Alaska occasionally provides modified sentencing for elderly inmates beset with disease.\textsuperscript{97} In Mississippi, inmates over fifty years of age are housed in geriatric units if their security classification permits.\textsuperscript{98} In South Carolina, inmates may retire from work at age sixty-five.\textsuperscript{99}


\textsuperscript{90} Ronald Aday, Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates, FED. PROB., June 1994, at 47.

\textsuperscript{91} Id.

\textsuperscript{92} Nine states currently do not provide any geriatric facilities or special programs for aging inmates. RONALD ADAY, ACADEMY OF CRIMINAL JUSTICE SCIENCES, RESPONDING TO THE GRAYING OF AMERICAN PRISONS: A NATIONAL PERSPECTIVE UPDATE (1999).

\textsuperscript{93} Id. at 6, Table 1 (1999).

\textsuperscript{94} Id. at 6.

\textsuperscript{95} Id. at Table 1.

\textsuperscript{96} Id.

\textsuperscript{97} Id. at 6.

\textsuperscript{98} Aday, supra note 92, at 6.

\textsuperscript{99} Id.
Despite the relatively small number of states that have an inmate age-based policy, the majority of states have some kind of elder inmate response. Several states offer compassionate leave for those who are terminally ill or who are not capable of physically functioning within the correctional system. Usually, an inmate must have received a prognosis of from one year to six months or less to live and must meet specific criteria with regard to custody classification and medical requirements in order to qualify for compassionate leave.

When compassionate leave is impossible due to the nature of the crime or lack of available alternatives, resourceful states have begun building comprehensive facilities to accommodate elderly inmates. In Washington, Ahtanum View is a 120 inmate minimum-security facility, which tailors its programs to the needs of elderly inmates. The state cuts costs by incarcerating all elderly inmates in one facility. Texas is developing a comprehensive system of facilities to provide a complete range of care. Texas currently operates a sixty-bed geriatric center. Finally, some states attempt to eliminate the number of elderly prisoners in their system during sentencing. Nine states' statutes provide that the defendant's age at the time a crime is committed can be a mitigating factor for sentencing.

101. Id. Twenty-three states grant compassionate leave. Id.; RONALD ADAY, supra note 92, at 7.
102. Id.
103. See HOELTER & HOLMAN, supra note 100; ADAY, supra note 92. For example, Mississippi has a geriatric unit, accommodating eighty-five offenders in an old hospital specifically designed as a nursing home in a correctional setting. Twenty-four hour nursing care is provided and sick call is available on a weekly basis. In addition, a physician checks with the unit on a daily basis. See id. at 9.
104. Id. at 8. In addition, the state staffs a regional medical facility that provides extended care with skilled nursing care services, has developed a facility specializing in providing chronic care and operates a prison hospice program that offers a full range of palliative care employing a multidisciplinary team approach. Id.
105. Id. Housing costs in Ahtanum View are estimated to be approximately $18,000 a year per inmate as compared to the $69,000 a year it costs to house elderly inmates in the state prisons. Id.
106. Id.
107. See e.g., ALA. CODE §13A-5-51(7) (1994); ARIZ. REV. STATE. ANN. §13-
2. The Privatization of Prisons

Some states are using private corporations to alleviate their elderly prison population problem. The Corrections National Corporation (CNC) plans to build a complex in Pennsylvania, with a capacity of 768, for inmates over fifty suffering from chronic health problems. The medium-security facility is set to comply with standard prison regulations, and will also serve as a nursing home/assisted living facility. "Each living unit will have a health care station with nurses and nurses' aids available twenty-four hours a day." Those jurisdictions that do not segregate their elderly inmates cite several arguments against separation from the general population. If segregated, older inmates may be unable to get appropriate work assignments or have access to important programs. Some prison officials also maintain that spreading older prisoners throughout the prison system creates a calming effect and counters the more aggressive nature among the younger inmates. However, because these states do not have separate facilities, they must send sick prisoners to community hospitals.


109. Fay, supra note 22.
110. Id.
111. Id. The program focus will be on wellness – stressing a combination of healthy diet, exercise and education about their illness. Correctional officers will monitor each living area, designed as one or two-person cells with beds that are not bunked and are situated closer to the floor. See id.
112. Id. CNC also plans to provide twenty kidney dialysis units, physical therapy rooms and a sixty-four bed skilled care unit for inmates who are bed ridden, or prisoners who are pre/post surgery. Id.
113. See Jason S. Ornduff, Releasing the Elderly Inmate: A Solution to Prison Overcrowding, 4 ELDER L.J. 173, 184 (1996). Separating elderly inmates may result in inmates not getting the appropriate work assignments or being denied access to many programs. Furthermore, segregation may be against the preferences of prisoners who do not identify with their age group. Id.
114. Id.
115. Id.
3. *Private Citizen Groups Lobby for Complete Release*

In addition to governmental attempts to deal with the growing number of elderly inmates, many private lobbying groups are spearheading reform. The National Center for Institutions and Alternatives (NCIA) advocates mandating the development of alternative programs for the elderly.\(^{117}\) The NCIA has proposed a penal and social policy to provide structured, supervised release for eligible elderly prisoners.\(^{118}\) Eligibility would be based on age, offense, portion of sentence already served and risk to the community.\(^{119}\)

NCIA was instrumental in persuading the American Bar Association (ABA) to adopt its cause.\(^{120}\) The ABA House of Delegates approved a resolution that encourages state and federal governments to formulate release policies and community corrections alternatives for elderly inmates.\(^{121}\) Once the House of Delegates adopts a resolution, the ABA will lobby the states and the Federal government to adopt their resolution through legislation.\(^{122}\)

Law schools are also devoting resources to aid the elderly inmate population. For example, Professor Jonathan Turley runs the Project for sixty-five and older in community hospitals and other off-site providers. *Id.*

117. See generally HOELTER & HOLMAN, *supra* note 100.

118. *Id.* at 7.

119. *Id.*

120. See AMERICAN BAR ASS’N, *supra* note 5. The Criminal Justice Section Council approved The Elder Resolution at its August 7, 1999 Council meeting in Atlanta, Georgia. *Id.* at 6. The ABA House of Delegates approved this resolution at the February 2000 meeting. *Id.* at 7.

121. *Id.* The resolution states:

RESOLVED, that the American Bar Association recommends that state, Federal and territorial correctional systems review sentencing and correctional policies and practices related to the growing population of elderly prisoners;

FURTHER RESOLVED, That the Federal government, the states and territories adopt institutional classification, health, and human services programs that address the special needs of the elderly;

FURTHER RESOLVED, That the Federal government, the states, and the territories adopt release procedures and community based programs with treatment, and supervision for older inmates who are appropriate to be released to the community, consistent with public policy;

FURTHER RESOLVED, That bar associations, law schools and other organizations are urged to develop alternatives to provide humanitarian residential placements for elderly offenders.

*Id.*

122. *Id.* at 7.
Older Prisoners (POPS) at the George Washington University Law School in Washington, D.C.\textsuperscript{123} This program siphons low-risk geriatrics from overcrowded prisons.\textsuperscript{124} To date, the program has released over 200 elderly inmates.\textsuperscript{125}

III. NOT GETTING IT AT ALL: THE FAILURE OF THE FEDERAL PRISON SYSTEM

The BOP is charged with managing and regulating all federal penal and correctional institutions.\textsuperscript{126} In addition, the BOP must provide suitable quarters and protection for prisoners under its care.\textsuperscript{127} Despite these statutory requirements, the BOP does not offer special programs, policies or treatment for elderly prisoners.\textsuperscript{128} The BOP follows a policy of placing inmates based on security needs and regional considerations rather than age.\textsuperscript{129} Elderly inmates are housed among the general inmate population.\textsuperscript{130} Aside from offering inmates over fifty annual physicals, the BOP makes no accommodations for an inmate's housing, work assignments or other activities.\textsuperscript{131} The federal system is focused on functionality.\textsuperscript{132}

The BOP claims that it would be impossible and impracticable to build special facilities for older inmates.\textsuperscript{133}

We want to keep [older prisoners] close to family and loved ones. If they receive visits regularly, it helps them maintain a positive attitude and, in most cases, is beneficial both psychologically and physically. Conversely, it would be counterproductive to establish facilities solely for the purpose of

\begin{itemize}
  \item \textsuperscript{123} George Will, \textit{A Jail Break for Geriatrics}, \textit{Newsweek}, July 20, 1998, at 70.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} See id. POPS never challenges an inmate's conviction, and to be eligible for POPS' help, inmates must acknowledge their guilt. These requirements have given POPS prisoners a zero recidivism rate. Id.
  \item \textsuperscript{126} 18 U.S.C. § 4042(a) (1994) (duties of Bureau of Prisons).
  \item \textsuperscript{127} 18 U.S.C. §§ 4042(a)(2), (3) (1994).
  \item \textsuperscript{128} See generally, \textit{Hoelter & Holman, supra note 100}.
  \item \textsuperscript{129} Peter Kratcoski & George Pownall, \textit{Programming for Older Inmates}, \textit{Fed. Prob.} 28, 31 (June 1989).
  \item \textsuperscript{130} Id. at 32.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Id. "If an inmate has physical restrictions, programs are individually designed to assist them to develop and maintain the ability to take care of themselves, develop a sense of self-worth and productivity." Id.
  \item \textsuperscript{133} Id.
\end{itemize}
housing older offenders if it meant separating them from their families.\footnote{134}

Despite the lack of specialized housing for elderly inmates, the BOP does have two federal medical centers\footnote{135} capable of servicing the special needs of elderly inmates requiring high security: the Federal Correctional Institution in Fort Worth, Texas\footnote{136} and the Federal Medical Center in Rochester, Minnesota.\footnote{137} However, neither institution was designed as a long-term nursing home-type facility.\footnote{138}

\section*{B. Limited Federal Procedural Relief}

\subsection*{1. The Federal Rules of Criminal Procedure}

There are two relief options available for elderly inmates in extraordinary cases. Rule 35(b) of the Federal Rules of Criminal Procedure can be used to reduce the sentence of an elderly inmate whose medical condition worsens during his sentence.\footnote{139} This motion for reduction of sentence is considered a plea for leniency and is subject to the discretion of the court.\footnote{140} Rule 35(b) operates as a final check before the sentencing judge closes the case.\footnote{141}

The rule is of limited use, however. It applies only to inmates sentenced before November 1, 1987,\footnote{142} and to those who provide substantial assistance to the federal government in other investigations

\footnote{134}{Id.}
\footnote{135}{Kratcoski & Pownall, supra note 129, at 32.}
\footnote{136}{Id. at 33. This institution only accepts inmates who are security levels one, two and three. Id.}
\footnote{137}{Id. at 34. These institutions are designed to house higher security elderly prisoners. Id.}
\footnote{138}{See Chaneles, supra note 84, at 51.}
\footnote{139}{See FED. R. CRIM. § 35(b) (2001). The provision reads as follows: Reduction of Sentence: A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or denying review of, or having the effect of upholding a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision. Id.}
\footnote{140}{United States v. Ames, 743 F.2d 46, 48 (1st Cir. 1984).}
\footnote{141}{United States v. DeCologero, 821 F.2d 39, 41 (1st Cir. 1987).}
\footnote{142}{FED. R. CRIM. § 35(b)(2001).}
and prosecutions. In addition, the court does not have to give a reason for denying a motion, thus eliminating hopes for an appeal.

2. Reduction of Sentence

The second option for elderly inmates is a judicial reduction of their sentence through 18 U.S.C. Section 3582(c). This procedure is also subject to various conditions. The most significant is a jurisdictional limitation: Section 3582(c) only applies to defendants who were sentenced on or after November 1, 1987. Therefore, young criminals proscribed to long sentences before this date cannot be considered under this provision.

A judge may reduce an inmate’s sentence under Section 3582(c) for two reasons. The first is based on “extraordinary and compelling reasons.” An example of this is a retroactive amendment, which would have reduced the length of a defendant’s original sentence. The second reason is based on a prisoner’s general mental and physical condition. An inmate is eligible for “Geriatric Parole” if he is at least seventy years old, has served at least thirty years in prison and no longer represents a threat to society. An inmate cannot petition the court on his own; only the Director of the BOP can request the court to consider a reduction of an inmate’s term. There is no remedy if the BOP refuses to file a motion.

3. Is There a Method to the Madness?

The federal government’s habitual offender law is embodied in Section 3559, the “Three Strikes” law. Congress enacted Section 3582 in

143. Id.
144. Id.
146. See United States v. Watson, 868 F.2d 157, 158 (5th Cir. 1989).
149. See, e.g., United States v. Towe, 26 F.3d 614, 616 (5th Cir. 1994) (addressing a § 3582 motion to reduce a prisoner’s sentenced based on the retroactive application of an amendment to U.S.S.G. § 2D1.1).
151. Id.
152. Fernandez v. United States, 941 F. 2d 1488, 1493 (11th Cir. 1991); see Turner v. United States Parole Comm’n, 810 F.2d 612, 618 (7th Cir. 1987).
153. See id.
conjunction with this law, suggesting that legislators were aware of the future increase in prison population and cost, and that they wanted to provide general relief for elderly inmates. However, the legislative history of Section 3582 lends no support to this theory. Congress implemented this provision to deal with individual prisoners with extraordinary circumstances, rather than to provide relief for elderly inmates in general. "The value of the forms of 'safety valves' [(c)(1)(A)(i) and (ii)] contained in this subsection [3582] lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment for 'extraordinary and compelling reasons.'"

The United States Sentencing Commission had reason to support a law based on individual prisoner relief instead of general population relief because of the Commission's underestimation of Section 3559's impact. Instead of an expected ten-percent increase, the prison population increased over 300 percent. In addition, Congress' decision to include only the most violent offenders under this provision and the seemingly arbitrary age requirement of seventy require explanation.

Regardless of the reasons for the provision, it does not curb the rising tide of litigation that has taken place as a result of Gamble and Yeskey. Gamble established that correctional systems must provide elderly prisoners with the full range of medical, dental and nutritional services; Yeskey held that the ADA covers state prisons and local jails. This case law entitles prisoners with disabilities to appropriate treatments, facilities and programs. If the law is "carried [out] to the letter . . . the Supreme Court decision mandates the total overhaul of prisons to meet the needs of the growing elderly prison population."

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157. Id.
158. See United States Sentencing Commission, An Overview of the Federal Sentencing Guidelines (2001) [hereinafter Guidelines]. "The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation . . . required the Commission to promulgate guidelines that will lead to substantial prison population increases . . . estimated at approximately ten percent over a period of ten years." Id. at 10.
160. Id.
163. Bernard Starr, supra note 116, at A21 (quoting John J. Kerbs, social
IV. THE RESPONSIBILITIES OF THE FEDERAL PROSECUTOR

The federal elderly inmate population must be reduced. If not, the United States either will face huge costs for the care of elderly inmates or the expense of overhauling the prison system to meet the constitutionally mandated requirements of Gamble and Yeskey.\textsuperscript{164} There are two categories of federal elderly inmates: Elderly criminals and criminals who will become elderly during their sentence.\textsuperscript{165} Therefore, there are two ways to reduce the number of federal elderly inmates: Sentence elderly criminals leniently and release inmates over sixty-five who are no longer a threat to society.

There is extensive statistical support for lenient sentencing and eventual release. Approximately 500,000 persons aged fifty and over are arrested on an annual basis in the United States.\textsuperscript{166} In the federal system, ninety-seven percent of elderly offenders are nonviolent.\textsuperscript{167} For example, of the 109 murderers sentenced under the Federal Sentencing Guidelines in 1998, only nine were committed by criminals over the age of fifty.\textsuperscript{168} In addition, the propensity to commit crimes declines with age.\textsuperscript{169} According to a federal study of state recidivism statistics, older parolees and

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\textsuperscript{164} Gamble, 429 U.S. 97; Yeskey, 524 U.S. 206.

\textsuperscript{165} UNITED STATES SENTENCING COMMISSION, supra note 5. Of the 50,076 federal criminals sentenced under the guidelines, 11,586 received a sentence for their primary offense of over sixty months. This number does not include additional months for secondary offenses. Id.


\textsuperscript{167} Holman, supra note 7, at B8; Nursing Homes Behind Bars, supra note 7. Elderly offenders present a minimum risk to the community. In 1997, BOP reported that ninety-seven percent of older inmates were committee for nonviolent offenses. As a result of their low-grade criminality and risk presented by this population, BOP classified forty-six percent of elderly inmates in the lowest security level category. Nursing Homes Behind Bars, supra note 7.

\textsuperscript{168} UNITED STATES SENTENCING COMMISSION, supra note 5, at Table 6. The Commission collects and analyzes data on guideline sentences to support its varied activities. Pursuant to its authority under 28 U.S.C. the Commission reports annually to Congress concerning the number of departures, appeals and average sentences for each crime. Id.

\textsuperscript{169} NURSING HOMES BEHIND BARS, supra note 7. Elderly inmates present a lower risk of offense when compared to other prisoners. Forty-five percent between the ages of eighteen and twenty-nine years returned to prison in one year while only 3.2% of the fifty-five and above age group were similarly incarcerated a second time. Id.
probationers are reincarcerated at a rate of 1.4%, while 51.4% of parolees and probationers returned to prison were between the ages of eighteen and twenty-nine. Because of the nonviolent nature of most elderly criminals, alternatives to their prison sentences would alleviate financial strain on prisons and still allow AUSAs to enforce the law.

A. Prosecutors in the Pursuit of Justice

1. Using the Sentencing Guidelines Creatively

The U.S. Attorneys Manual contains no preamble that inspires and directs prosecutors how to seek justice, nor does it define the exact role of the prosecutor. “These principles of Federal prosecution have been designed to assist in structuring the decision-making process of attorneys for the government. For the most part, they have been cast in general terms with a view to providing guidance rather than to mandating results.” However, as “member[s] of the Executive Branch, which is charged under the Constitution with ensuring that the laws of the United States be faithfully executed,” it is assumed that the way to reach “justice” is by ensuring that the laws of this country are properly executed. This suggests that “just” punishment for elderly criminals may not always lie in prison sentences.

The Federal Sentencing Guidelines offer some guidance, stating that sentencing must be done with “honesty, reasonable uniformity, and proportionality.” The Federal Sentencing Commission determined that “the ultimate aim of the law itself, and of punishment in particular, is the control of crime.” However, the Commission could not decide which philosophy of punishment should guide the sentencing ranges. Some advocated for the theory of “just desserts,” believing that “punishment should be scaled to the offender’s culpability and the resulting harms.” Others argued for the theory of “crime control,” calling “for sentences that most effectively lessen the likelihood of future crime, either by

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172. Id. at § 9-27.110.
173. GUIDELINES, supra note 158, at 2.
174. Id. at 3.
175. Id.
176. Id.

deterring others or incapacitating the defendant." Neither side could agree. In the end, the Commission decided that the choice between the two "was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results."

This left the Department of Justice (DOJ) free to adopt a "controlling crime" philosophy. When determining how best to execute the laws, federal prosecutors must "make certain that the general purpose of the criminal law - assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous offenders, and rehabilitation of offenders - are adequately met, while making certain also that the rights of individuals are scrupulously protected." When the DOJ's punishment theories are juxtaposed with the Commission's lack of a punishment theory, application of the sentencing guidelines do not always result in just punishment. This inference is supported by the Sentencing Commission's procedure for applying the Sentencing Guidelines and the DOJ's U. S. Attorney's Manual's policy on sentencing.

In general, the Sentencing Guidelines require a district court to impose a sentence of the kind and within the range established by the Sentencing Commission for the applicable category of offense and defendant, unless the court finds an aggravating or mitigating circumstance. In qualifying a circumstance, a court can only consider the Sentencing Guidelines themselves, along with its policy statements and the official commentary of the Commission. Additionally, if a court departs from the Sentencing Guidelines, it must explain the reason for the departure.

Ordinarily, age and physical condition are not relevant to the determination of whether a sentence should be outside the applicable guideline range. These factors are relevant only in exceptional cases. One such case is where "the offender is elderly and infirm and where another form of punishment . . . might be equally efficient as and less costly than incarceration."

177. Id.
178. Id.
179. GUIDELINES, supra note 158, at 4.
180. JUSTICE MANUAL, supra note 171, at § 9-27.110.
181. Id. at § 9-27.110.
185. U.S.S.G. §§ 5H1.1, 5H1.4.
186. Id.
The DOJ thus encourages alternative means of sentencing where appropriate. Prosecutors must bear in mind the potential value of imposing innovative conditions for probation if consistent with the Sentencing Guidelines. In addition, it is the duty of AUSAs to assist the court in its determining the sentence. The facts and circumstances of each case should guide the prosecutor's recommendation. While many sentencing recommendations are influenced where the defendant has offered substantial assistance in the investigation or prosecution of another, public interest may also be a reason for departing from the sentencing guidelines. For instance, "if the prosecutor has good reason to anticipate the imposition of a sanction that would be unfair to the defendant or inadequate in terms of society's needs, . . . it would be in the public interest to attempt to avert such an outcome by offering a sentencing recommendation." Clearly, a prosecutor can combine the public interest of reducing prison overcrowding and cost, the policy of the Sentencing Guideline on age and physical infirmity, and the Department's policy on sentencing to persuade a court to depart downward for elderly defendants.

A departure based on these factors will most likely be upheld. In *Koon v. United States*, the Supreme Court provided significant guidance concerning departures from the Sentencing Guidelines. *Koon* faced a sentence of seventy to eighty-seven months after being convicted of willfully permitting officers to use unreasonable force. Rather than sentence *Koon* to a term within the Sentencing Guideline range, the district court departed downward five levels based on Section 5K2.10 and three levels based on a combination of four factors ranging from "emotional outrage" to the defendant being "a likely target of abuse" in

In the case in which a sentencing recommendation would be appropriate and in which it can be anticipated that a term of probation will be imposed, the US attorney may conclude that it would be appropriate to recommend, as a specific condition of probation, that the defendant participate in community service activities, or that they desist from engaging in a particular type of business.

*Id.* at § 9-27.730.

188. *Id.* at § 9-27.710.

189. *Id.* at § 9-27.730.

190. *Id.*

191. *Id.*


193. *Id.*

194. *Id.*
prison. However, none of these factors are specifically outlined in the Sentencing Guidelines as acceptable reasons for departure.

Holding that the district court did not abuse its discretion, the Court explained that the “Commission did not adequately take into account cases that are, for one reason or another, ‘unusual.’” In fact, while the Commission does list certain factors which can never be the bases for departure, it “d[id] not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.” Essentially, the Sentencing Guidelines are a work in progress. “It is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years.”

While a court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present, “so long as the overall sentence is ‘sufficient, but not greater than necessary, to comply’ with the [] goals, the statute is satisfied.” By upholding this departure, the Court appears open to upholding such departures based on important public policy issues, such as the costs of caring for elderly defendants.

In light of this ruling, several courts have considered departures and alternative sentencing based on age and infirmity. In United States v. Baron, the defendant received a reduction in sentence from thirty-three months to six months of home detention, as well as one-year of

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195. Id. at 90. The district court granted the officers a downward departure under the Guidelines of five offense levels on the basis of finding that the suspect’s misconduct – which included driving while intoxicated, fleeing from the police, refusing to obey the officers’ commands and attempting to escape from policy custody – had provoked the officers’ offensive behavior; it granted an additional three level departure on the basis of the combination of the officer’s unusual susceptibility to abuse in prison, job loss and preclusion from law enforcement employment, burdens of successive state and federal prosecutions and low risk of recidivism. Id.

196. Id. at 101-109.
197. Id. at 93.
198. Id.
199. Id.
200. Id. at 108.
201. See supra notes 7-13 (dealing with the cost to the state and federal government in caring for elderly inmates).
Baron, a seventy-six year old man, had a life expectancy of about seven years. He also suffered from a series of pituitary tumors, prostrate cancer, coronary artery disease and hypertension. In deciding Baron's sentence, the court read the policies for age and infirmity together and determined three areas for consideration: the defendant's age, his physical infirmity, and the efficacy of home detention. The court decided that age really only became a factor when viewed together with infirmity, thus creating an inverse relationship between age and infirmity. "Conditions that may be relatively minor or not life-threatening in a younger person, become life-threatening in the older offender."

The Baron court found that the Sentencing Guidelines encourage alternate forms of punishment when "a form of punishment . . . might be equally efficient as and less costly than incarceration." Recognizing the costs of detaining an elderly infirm convict behind bars, the court ruled that home confinement would be less expensive and more efficient than incarceration.

In 1998, federal courts departed from the guidelines 6,509 times. Courts considered age a factor in seventy-five of those cases. Obviously, not all district courts are willing to expand the penumbra of

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203. Id. at 660.
204. Id. at 662.
205. Id. at 663.
206. Id. at 662.
207. Id.
208. Baron, 914 F. Supp. at 662.
209. Id. at 662.
210. Id. at 664; Molly Fairchild James, The Sentencing of Elderly Criminals, 29 AM. CRIM. L. REV. 1025, 1026 (1992) (noting that the average cost of imprisonment or elderly inmate is $60,000 annually, compared to $20,000 annually for the confinement of younger inmates).
211. Baron, 914 F. Supp. at 664; United States v. Maltese, 1993 WL 222350 (N.D. Ill. 1993) (finding that the defendant's life expectancy had been shortened due to an operation for cancer, and that the defendant's required medical treatment would be extremely expensive for the state to provide. The court held that Maltese qualified as "elderly and infirm" and that an alternative form of confinement would be "equally efficient as and less costly than incarceration."); United States v. Moy, 1995 WL 311441 (N.D. Ill. 1995) (granting a downward departure to a seventy-eight year old defendant who suffered from coronary artery disease, a recent hernia repair, and a history of depression).
212. UNITED STATES SENTENCING COMMISSION, supra note 5, at Tables 24-25.
213. Id. This made up one percent of the total reasons for departure. Id.
Although a federal prosecutor may advocate for a downward departure based on age and/or infirmity, the court does not have to comply. Some federal courts focus more on the first sentence of the Guidelines' policy on age, that it is "not ordinarily relevant in determining whether a sentence should be outside the guidelines." United States v. Carey is the leading case for this proposition.

Carey, age sixty-two, pled guilty to defrauding a bank by using a "check-kiting" scheme, which carries a sentence range of twelve to eighteen months. Since the defendant twice had tumors removed from his brain and underwent a further operation for chest cancer, the trial court sentenced Carey to one month in prison and two years of supervised release. The appeals court reversed, stating that age and physical condition are generally irrelevant except in extraordinary cases. To warrant an affirmance, the lower court's decision would have had to include the necessary particularized findings that the defendant was "elderly and infirm" and that there was an equally sufficient and less costly form of punishment.

2. Getting it Done: How the Federal Government Can Alleviate the Elderly Inmate Problem

Alternatives to incarceration must therefore be developed. AUSAs and defense attorneys need to look no further than the current United

214. See Carey, 895 F.2d at 318 (discussed infra).
216. 895 F.2d at 318.
217. Id. at 321.
218. Id.
219. Id. at 324.
220. Id.; United States v. Fischer, 1990 U.S. App. LEXIS 16972 (4th Cir. 1990) (trial court departed downward for a sixty year old man with health problems. Although the government did not appeal this downward departure, the Circuit Court indicated that it would not have affirmed this deviation for not being specific enough about the defendant's health); United States v. Cox, 1991 U.S. App. LEXIS 2015 (9th Cir. 1990) (defendant of advancing age failed to show why consideration of his age necessitated an individualized sentence); United States v. Marin-Castaneda, 134 F.3d 551 (3rd Cir. 1997) (holding that bare fact that the defendant was sixty-seven years old at the time of sentencing did not justify a downward departure); United States v. McKinney, 53 F.3d 664 (5th Cir. 1995) (ruling that a fifty-two year old defendant with heart problems and high blood pressure, and who had the full responsibility for her mother, did not justify downward departure).
States Code to find options for elderly inmates. The BOP has the authority to “designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau.” Thus, if a halfway house or home electric monitoring is suitable for elderly criminals, the BOP has the authority to deem these options legitimate.

Even on their own initiative, the BOP may alternatively house elderly prisoners. They may consider several factors in deciding where an inmate should reside, including “any pertinent policy statement issued by the Sentencing Commission.” The AUSA, defense attorney and even the judge should make a suitable record for the BOP in order to guide them in the placement of elderly criminals and, later, in the removal of young criminals with long sentences to other facilities.

The sentencing problem encompasses more than just elderly criminals. Of the 50,000 federal inmates in 1998, less than 5,000 are elderly. In addition, most elderly criminals are convicted of fraud, which only carries an average sentence of eighteen months. Therefore, improving sentencing procedures will not completely solve the problem. Another solution is to release elderly inmates who were young when sentenced.

The real answer lies with the federal government. Since most elderly defendants are not violent, the federal government should expand the use of Section 3582 to cover all criminals, not just the most violent. The arbitrary requirement of seventy years of age should also be struck. Instead, an elderly inmate could be determined eligible for release based on meeting the Sentencing Guidelines policy on age. Hypothetically, if

222. Id.
223. Id. The language specifically says that the penal or correctional facility is BOP approvable “whether maintained by the Federal Government or otherwise . . . that the Bureau determines to be appropriate and suitable[.]” Id.
224. Id.
225. Id.
226. Id. The statute provides that the BOP also consider the history and characteristics of the prisoner and any statement by the court that imposed the sentence. See id. at (b)(3)(4).
227. 18 U.S.C. 3621(b) (1995). Subsection (b) also covers transfers by the BOP. Id.
228. UNITED STATES SENTENCING COMMISSION, supra note 5, at Table 6.
229. Id.
230. See supra notes 154-60 (discussing the scope and legislative history of Sections 3559 and 3582).
an inmate would qualify for a departure, he could be eligible for release. The same factors determining sentencing departures could govern release of elderly inmates.\textsuperscript{232} Using the same procedure as provided in Section 3582(c), the Director of the BOP could petition the court for release of federal elderly criminals who meet the section's requirements.\textsuperscript{233}

\section*{Conclusion}

Although crime must not go unpunished in the United States, AUSA cannot continue to ignore the problems caused by elderly inmates in prison. By next year there will be a total of over 20,000 elderly inmates in the Federal prison system, costing nearly $2.8 billion annually.\textsuperscript{234} If elderly nonviolent offenders were released from federal and state facilities, the savings in the first year would be greater than $175 million.\textsuperscript{235} If a change in the sentencing policy is not implemented, the United States will become a bankrupt nation of prisons.

\textsuperscript{232} See \textit{supra} notes 203-214 (discussing what courts regard as important factors in departing from the Sentencing Guidelines based on age and infirmity).


\textsuperscript{234} \textit{Supra} note 10.

\textsuperscript{235} \textit{ELDER RESOLUTION, supra} note 5, at 4. If nonviolent offenders over age fifty-five were released from these facilities, the savings would be $900 million in the first year alone. \textit{See id.}