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AGING OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

Increasingly, our elders are finding their way into the criminal justice system. While in the past, we were more accustomed to seeing the elderly as victims, increasing attention is now being given to the elderly as perpetrators of crimes. In 2002, there were 533,977 reported arrests for various crimes for those age fifty and older.[1] This age group constitutes 5.5 percent of all those arrested.[2] Approximately fifteen percent of those elders arrested involve serious felonies, such as murder, sex offenses, robbery, aggravated assault, burglary, larceny, or drug trafficking.[3] Because of the violent criminal behavior of the older offender, a significant number are serving life sentences.[4] The establishment of longer mandatory sentences, the war on drugs, and the abolition of parole in some states are just some of the factors contributing to the increasing number of long-term inmates.[5]

As the baby boomers swell the ranks of those reaching older adulthood, new policies are emerging to both accommodate and

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1. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 355 (Ann L. Pastore & Kathleen Maguire eds., 2003), http://www.albany.edu/sourcebook/pdf/section4.pdf.

2. *Id.* at 347.

3. *Id.*

4. *Id.*

5. *See* RONALD H. ADAY, AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS 9-11 (2003).

manage this population of older offenders. For the first time, consideration is being given to: How do we best respond to a graying of the American prison system? Where do we safely house elderly offenders, and what is the best way to protect inmates with cognitive impairments? What must judges and lawyers know to remove barriers between the courts and elders? Although few standardized policies are based solely on age, criminal justice agencies are likely to utilize unwritten or informal policies to deal with our aging population. As a result, there is likely to be considerable variation from state to state or jurisdiction to jurisdiction. This is evident today with some states having stricter sentencing laws than others. Regardless, it is important to review some of the existing policies from the time older offenders are apprehended until they leave the system.

ELDERS AND THE POLICE

The first contact the older person accused of a given offense has with the criminal justice system occurs when the police arrive at the scene of the crime.[6] The police generally exercise a considerable amount of discretion when responding to a crime scene.[7] The police officer evaluates the seriousness of the offense, the circumstances leading up to the crime, and the degree to which the elderly offender might be criminally liable.[8] It is important to encourage officers, when responding to calls, to take into consideration any evidence of functional impairments commonly associated with old age.[9] However, few police departments undergo any significant training on how to assess the behavior and motivations of older offenders.[10]

While the criminal justice system purports to treat people

6. *See* W. Clinton Terry & Pamela Entzel, *Police and Elders*, *in* ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM 3, 3-18 (Max B. Rothman et al. eds., 2000).

7. *Id.* at 10.

8. *Id.* at 4.

9. *Id.*

10. *Id.*

equally regardless of their age, sex, race, or social class, it may be impossible for those who work in criminal justice, such as law enforcement officials, judges, and attorneys, to be totally objective and impartial in their response to the public.[11] Individuals who work in the criminal justice system are products of society and may hold certain negative or positive biases toward various groups.[12] It has also been suggested that some members of the police force might respond more harshly toward the older offender.[13] Some justice officials may be outraged at a multi-recidivist who continues to commit crimes in his later years without any remorse.[14] Others may be incensed when a respectable elder in the community, with no previous criminal record, participates in the sale of drugs or engages in sexual abuse of an unsuspecting child.[15] This raises the question of whether elderly offenders are treated differently by those in "gate-keeping" positions within the criminal justice system.

Prior research on police discretion indicates that a variety of factors, such as offender characteristics and demeanor, and incident characteristics may influence the police's decision to arrest.[16] Bachand suggests that a community's priorities and the offender's age and gender can influence a police officer's decision to apprehend a suspect.[17] He reported that elderly offenders would receive less enforcement attention as long as their criminal activity does not exceed, in either seriousness or incidence, the criminal participation of the more youthful offenders.[18] While the community is concerned about such issues as shoplifting, family violence, and drunk driving, the

11. E. A. FATTAH & V.F. SACCO, CRIME AND VICTIMIZATION OF THE ELDERLY 69 (1989).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *See* Terry & Entzel, *supra* note 6, at 10-11.

17. D. J. Bachand, The Elderly Offender: An Exploratory Study with Implications for Continuing Education of Law Enforcement Personnel (1984) (unpublished Ph.D. dissertation, University of Michigan) (on file with author).

18. *Id.*

public generally retains great sympathy for the elderly.[19] Geriatric delinquents who are vagrants, alcoholics, or simply confused are merely viewed as in need of supervision.[20] "Evidence suggests that police respond to these minor offenses committed by older people primarily in terms of their harmlessness and their need for protection."[21] While they may be considered a nuisance and an occasional inconvenience to the police, they are not normally viewed as criminals.[22] However, in the abstract, there may be public support for policy to deal forcefully with these offenders.[23] One study conducted by Langworthy and McCarthy found that older offenders were less likely to be released by the police than younger offenders.[24] Another study found that the exercise of police discretion may be influenced more by the nature of the elder's offense than by age.[25] However, additional research is necessary to gain a clear perspective on police decision making when dealing with elderly offenders.

COURTS AND SENTENCING OPTIONS

The decision to hold an older adult responsible for his actions, send him to trial, and issue him a prison sentence is neither quickly nor easily made. Should advanced age and health be used as a discriminating factor buffering the defendant from a more punitive reaction of the court? The answer to the question is not an easy one. Due to the complexity of the crimes committed and the diverse characteristics of the perpetrators, establishing any uniform policy is extremely difficult. Those

19. FATTAH & SACCO, *supra* note 11, at 71.

20. LETITIA T. ALSTON, CRIME AND OLDER AMERICANS 202 (1986).

21. *Id.*

22. *Id.*

23. *Id.*

24. Robert Langworthy & Belinda McCarthy, *Police Disposition of Arrests: An Exploratory Study of the Treatment of the Older Offender*, *in* OLDER OFFENDERS: PERSPECTIVES IN CRIMINOLOGY AND CRIMINAL JUSTICE 107, 114 (Belinda McCarthy & Robert Langworthy eds., 1998).

25. Terry & Entzel, *supra* note 6, at 10.

working in the criminal justice system have differing ideologies and life experiences.[26] Not all judges, lawyers, or members of the jury have the same attitudes, opinions, and biases towards older populations.[27] Those in favor of imposing the harshest sentences on elderly law-breakers insist that these individuals have had longer to digest the laws; as a result, they should accept the consequences of their unruly behaviors.[28] Opponents argue that the criminal justice system should reduce the sentence for older perpetrators as elderly offenders typically have more chronic health problems than their younger counterparts.[29] Thus, there are a number of differing views on whether elderly offenders are sentenced more leniently than younger offenders.[30]

Research is mixed regarding whether age plays a substantial role in sentencing; however, a number of research studies have been conducted that support the position that criminal justice decision-makers give elderly offenders sentencing breaks. Cutshall and Adams reported that prosecutors were more lenient in their treatment of older shoplifters and more willing to dismiss minor charges against them than against younger adult shoplifters.[31] They concluded that advanced age may be a "mitigating factor in the enforcement of legal norms," at least with respect to minor criminal offenses such as misdemeanant shoplifting.[32] Similarly, Feinberg and McGriff also investigated the defendant's advanced age in Dade County, Florida and found age to be one of the most significant determinants of sanctions for convicted

26. FATTAH & SACCO, *supra* note 11, at 69.

27. *Id.*

28. Fred Cohen, *Old Age as a Criminal Defense*, 21 CRIM. L. BULL. 5, 11 (1985).

29. ADAY, *supra* note 5, at 207.

30. *See* Gary Feinberg & M. David McGriff, *Defendant's Advanced Age as a Prepotent Status in Criminal Case Disposition and Sanction*, *in* OLDER OFFENDERS: CURRENT TRENDS 87, 87-119 (Sol Chaneles & Cathleen Burnett eds., 1989); Molly James, *The Sentencing of Elderly Criminals*, 29 AM. CRIM. L. REV. 1025, 1027-1028 (1997); Sanford I. Finkel & Inez. J. Macko, *Impact of the Criminal Justice Process on Older Persons*, *in* ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM 105, 105-126 (Max B. Rothman et al. eds., 2000).

31. Charles Cutshall & Kenneth Adams, *Responding to Older Offenders: Age Selectivity in the Processing of Shoplifters*, CRIM. JUST. REV. 1, 1 & 4 (Fall 1983).

32. *Id.* at 6.

misdemeanant theft defendants.[33] The elderly were more likely to be fined and were less likely than younger offenders to serve jail time because of a theft accusation.[34] Helms reviewed felony sentences in Oregon through court decisions and found that older offenders were more likely to be recipients of court lenience when compared to younger adult offenders.[35] The elderly were more likely to receive pretrial interventions, withheld adjudications, and are less likely to be convicted.[36]

On the other hand, "Bachand contends that elderly defendants are not only more likely to be convicted than comparably accused younger defendants are, but they are also more severely sanctioned than comparably accused younger defendants."[37] Feinberg and Kholsa observed that of the ninety-seven judges they surveyed: (1) almost fifty percent were not especially sympathetic toward the elderly; (2) most sanction elderly shoplifters with fines despite beliefs that their thefts are motivated by economic need; and (3) older judges are not more likely than younger colleagues to favor special treatment for elderly defendants.[38] Wilbanks reported that until the sentencing stage, courts frequently treat older offenders more severely at which point the older offender appears to benefit from lenient treatment.[39] Elderly criminals aged sixty and over were more likely than younger offenders to be incarcerated for crimes, such as aggravated assault with a weapon, negligent manslaughter with a vehicle, motor vehicle theft, dangerous drugs, molestation, disturbing the peace, and fraud.[40]

Regardless, before appearing in court, the older offender will often meet with a mental health professional, attorney, or

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33. Feinberg & McGriff, *supra* note 30, at 94-96.

34. *Id.*

35. ADAY, *supra* note 5, at 204.

36. *Id.*

37. *Id.*; *see also* Bachand, *supra* note 17.

38. Gary Feinberg & Dinesh Khosla, *Sanctioning Elderly Delinquents*, TRIAL, Sept. 1985, at 46, 47-49.

39. William Wilbanks, *Are Elderly Felons Treated More Leniently by the Criminal Justice System?*, 26 INT'L J. AGING HUM. DEV. 275, 286-287 (1988).

40. *Id.* at 281.

judge to undergo a series of interviews that measure whether he or she in fact has the psychological capacity necessary to accept responsibility for his or her actions.[41] During this intensive screening process, a professional will evaluate the extent to which this person understands the charges brought against him or her and how well the person can accurately inform others of his or her actions, motives, and feelings at the time of the offense.[42] As an individual answers each question, a professional will rate the importance of the defendant's answer, as well as how pertinent it is to the given trial.[43]

WHAT HAPPENS IN COURT?

For an older offender whose case proceeds past the initial arrest, appearing in court can be a trying experience.[44] From the time the defendant arrives at the courthouse, this person will encounter numerous hurdles, such as finding a quiet space to sit and converse with others before the proceedings.[45] Entering the courtroom will pose additional obstacles as many judges, attorneys, and other staff may be relatively inexperienced with working with older people and, thus, become rather irritated with those who do not know what is expected of them.[46] With only a brief intermission around the noon hour, older people may find themselves tired, inattentive, and with decreased memory as the day progresses.[47] For those whose trials linger for days, weeks, or even months, additional problems arise as the judge is often replaced with another who has a different personality or expectations from courtroom participants.[48]

41. *See* Ronald Roesch & Stephen L. Golding, *Who is Competent to Stand Trial?*, TRIAL, Sept. 1985, at 40, 40-42.

42. *Id.* at 42.

43. *Id.* at 43.

44. *See* Finkel & Macko, *supra* note 30, at 117.

45. William E. Adams, *Elders in the Courtroom*, *in* ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM 87, 97 (Max B. Rothman et al. eds., 2000).

46. *See* Finkel & Macko, *supra* note 30, at 114-117.

47. *Id.* 117.

48. *Id.* 116.

Occasionally, special accommodations are made to ensure that the sensory deprivations, mobility impairments, and memory losses that older defendants may encounter as a result of the aging process, do not interfere with the elderly offender's ability to take the stand, present testimony, and receive an impartial ruling.[49] The older defendant, whose sight has begun to deteriorate, benefits substantially from glare-free lighting, large-print paperwork, and a magnifying glass.[50] Similarly, the accused person who can no longer hear is frequently positioned near all parties who would be speaking during the proceedings.[51] When talking directly to an aging person, the judge and attorneys should make concerted efforts to establish and maintain eye contact with the defendant, speak clearly and slowly, and provide ample time to respond before continuing.[52] Some judges have been known to "bark" at older offenders, causing them to become unsettled and upset. [53]

Some jurisdictions have created special problem-solving centers for older offenders whose wrongdoings were caused by mental illnesses, such as dementia or alcohol or drug addictions.[54] Attorneys often refer older defendants appearing in court to social service agency personnel to ensure inmates receive the necessary evaluations, medications and hospitalization.[55]

James suggests that from a utilitarian perspective, "reduced sentences for the elderly make sense if deterrence and rehabilitation are ineffective for that population."[56] Inasmuch as punishment is not viewed as an end in itself, severe punishment should not be implemented if it serves no real societal purpose.[57] Judges may conclude that sentencing older offenders to a long

49. Adams, *supra* note 45, at 96-99.
50. *Id.* at 97.
51. *Id.*
52. *Id.*
53. Finkel & Macko, *supra* note 30, at 116.
54. Adams, *supra* note 49, at 99.
55. *Id.*
56. James, *supra* note 30, at 1041.
57. *Id.*

prison sentence is financially costly and poses special problems for the prison system to provide special diets, medications, etc.[58] Thus, if an elderly offender is not presently a threat to society, perhaps it would be better to release these relatively harmless individuals into society than to keep them in prison and have taxpayers incur costly medical expenses.[59]

TRANSITIONING INTO PRISON

Those who enter prison for the first time during later life are more than likely responsible for murder, sexual offenses, or other crimes of a serious nature.[60] For men and women who have never before had their freedoms revoked, adjusting to the losses will not occur overnight. "Prison offers a new subculture, a new set of rules and a language that can be most overwhelming for mentally fragile inmates who may not fully grasp why they are incarcerated."[61] Receiving no support from either inside or outside the walls of the institution may leave many feeling overwhelmingly guilty, depressed, and occasionally even suicidal.[62] As these people are unlikely candidates for release, with the passing years, some may learn to cope with their new surroundings.[63] For those who formerly lived in poverty and had limited access to health care, life behind bars may ultimately appear preferable to that outside the institution.[64]

When older inmates enter prison for the first time during later life, they will often find that the institution was primarily designed to accommodate younger, healthier, and more energetic populations. These offenders, who are often old, frail, and vulnerable, usually come into the prison system fearful of

58. *Id.*
59. *Id.*
60. ADAY, *supra* note 5, at 115.
61. *Id.*
62. *See id.* at 114-117.
63. *Id.* at 116.
64. *Id.* at 117.

victimization.[65] "First-timers may be particularly vulnerable to intimidation by other younger and stronger inmates."[66] Designed for the young and active inmate population, the design of the prison facilities themselves can create significant problems for older prisoners, especially those with mobility problems.[67] Although prisons built more recently may comply with the Americans with Disabilities Act, there is no automatic requirement that older prisons be retrofitted architecturally.[68] Some correctional facilities are now being specifically designed for the older offender.[69] Although the majority of inmates would prefer to reside in an age-segregated facility, this viewpoint is not necessarily representative of every man or woman who enters the system during later life.[70] For some, living in a geriatric facility would involve being deprived opportunities to participate in the vast array of programs that are available to the mainstream prison population. [71] Still others would find this placement highly undesirable as they would no longer receive the gratification of serving as role models to younger inmates who may have never had positive influences in their lives.[72] Most importantly, residing in remote locations would leave many aging prisoners far from family and friends who would otherwise visit them.[73] If uprooted from their current locations, these men and women would suddenly feel bored, apathetic, underappreciated, isolated, and lonely.[74]

Similar to the physical design of prisons, correctional

65. *Id.* at 115.

66. *Id.*

67. Cynthia M. Mara, *Expansion of Long-Term Care in the Prison System: An Aging Inmate Population Poses Policy and Programmatic Questions*, 14 J. AGING & SOC. POL'Y 43, 54-55 (2002).

68. *Id.*

69. *See* James W. Marquart, Dorothy E. Merianos & Geri Doucet, *The Health Related Concerns of Older Prisoners: Implications for Policy*, 20 AGING & SOC'Y 79 (2000).

70. *Id.* at 89.

71. *Id.* at 87-90.

72. Ronald H. Aday & P. Nation, *A Case Study of Older Female Offenders*. Nashville: Tennessee Department of Corrections (2001) (on file with author).

73. *Id.*

74. *Id.*

programs have been developed primarily for younger inmates.[75] This approach has been realistic, because most inmates are in their twenties and thirties.[76] Initial educational and vocational programs were designed to provide young inmates with opportunities to improve their educational skills or acquire some vocation that could facilitate a successful transition back to society.[77] Younger inmates generally desire more freedom, mental stimulation, and social and recreational activities, such as basketball or weightlifting.[78] Recreational programs help inmates alleviate boredom, pass the time, and work off excessive energy.[79] However, as the median age continues to rise, and as larger groups of aging inmates are housed together, it now becomes necessary to provide relevant programming for this special population.[80] "Many of the aging prisoners will never be released from prison and most do not possess the health, interest, or energy to participate in sports and recreational activities developed for their younger counterparts."[81] "Rather, their needs are directed toward more preventive care, orderly conditions, safety, and emotional feedback and support from prison staff."[82]

PRISON HEALTH MANDATES

The mission of imprisonment is generally considered to be punishing the guilty for his or her wrongdoings.[83] These men and women have caused some harm to another; and as a result, they must lose certain privileges.[84] The freedoms lost are typically in direct relation to the severity of the crime committed

75. ADAY, *supra* note 5, at 154.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *See* James, *supra* note 30, at 1037-1038.
84. *Id.*

and the extent to which the accused is personally responsible for the outcome of his or her action.[85] Because these two items are not proportional to the number of health problems the individual can expect to encounter while serving time, being issued a prison sentence should not penalize people for contracting physical or mental health disorders.

The growing demand for medical services within correctional facilities has become an important issue in prison health care. The U.S. Supreme Court's decision in *Estelle v. Gamble,*[86] in 1976, mandates that having custody of a prisoner's body and controlling his or her access to treatment imposes a duty for the state to provide needed care.[87] Any deliberate indifference to serious medical needs of prisoners may be judged as cruel and unusual punishment.[88] The three basic health care rights of prisoners include: (1) the right of access to care; (2) the right to care that is ordered; and (3) the right to a professional medical judgment.[89]

This ruling has presented prison health care providers with a dilemma to provide adequate treatment as they find themselves caught between the rising health needs of aging inmates and soaring health care costs. Because of *Estelle v. Gamble,* guards could no longer require inmates who were in severe pain to wait days before permitting them to visit the infirmary, and doctors were prevented from beginning procedures and quitting before the processes were completed.[90] Additionally, there is no doubt that state and federal institutions must provide mental health services for inmates.[91] There is now scarcely a prison or jail that has remained untouched by the courts' influence in securing basic minimum medical services for

85. *Id.*
86. 429 U.S. 97 (1976).
87. *Id.* at 103.
88. *Id.* at 104.
89. ADAY, *supra* note 5, at 88.
90. Estelle, 429 U.S. at 104-05.
91. *See* Dean H. Aufderheide, & Patrick H. Brown, *Crisis in Corrections: The Mentally Ill in America's Prisons*, CORRECTIONS TODAY, Feb. 2005, at 30, 32.

inmates.[92]

IMPLEMENTING HEALTH CARE

Prisons are faced with tremendous demands on their health care systems.[93] There has been widespread debate over the care and treatment of inmates and the amount of resources that should be allocated to their care.[94] With the prison population burgeoning, prison health care costs continue to rise.[95] Since an overwhelmingly large number of older offenders have had no preventative health care to speak of, a thorough medical examination at admissions is imperative.[96]

Shortly after arrival at a prison reception center, each inmate undergoes a comprehensive health screening for current illnesses, chronic conditions, or disabilities that would preclude him or her from performing tasks that are essential to institutional survival.[97] Also, a mental health assessment is conducted during this initial screening to determine any problems that would jeopardize the well-being of the inmate, peers, and any staff.[98] For a person with problems of a serious nature, the staff next determines whether the facility even has the personnel, equipment, or medications that are necessary to treat his or her given conditions. [99]

After the health screening, the medical staff must develop a treatment plan that includes diagnostic and therapeutic interventions.[100] For example, the staff will need to identify whether the individual has chronic conditions that require

92. ADAY, *supra* note 5, at 88.

93. Michael S. Vaughn & Leo Carroll, *Separate and Unequal: Prison Versus Free-World Medical Care*, 15 JUST. Q. 3, 3 (1998).

94. *Id.* at 3-4.

95. *Id.* at 3.

96. ADAY, *supra* note 5, at 109.

97. B. JAYE ANNO ET AL., U.S. DEPT. OF JUSTICE, CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL AND TERMINALLY ILL INMATES 17 (2004), http://www.nicic.org/Library/018735.

98. *Id.* at 22.

99. *Id.* at 17.

100. *Id.* 18-19.

special care, such as hypertension, arthritis, or heart diseases.[101] They also will need to consider how much assistance the inmate will need to manage his or her personal finances, clean his or her pod, or even dress, bath, or eat.[102] Those needs may be relevant to housing bunk assignments, needed prosthetics, work assignments, and recreational and educational activities.[103] Generally, inmates are classified into specific functional health categories for identifying special needs.[104]

ACCESS AND QUALITY OF HEALTH CARE

Aging inmates may have multiple chronic illnesses requiring numerous prescriptions and over-the-counter medications.[105] When faced with a large number of older inmates who have health problems, prison personnel must decide how treatment is to be administered. Chronic care clinics and other health promotion activities have been established to improve health response practices and reduce sick call frequency.[106] The majority of states now utilize managed care organizations to administer health care services to inmates.[107] As in the free world, inmates must provide a co-payment in order to receive health care.[108] These new prison policies often discourage needed health service.[109] In most prison systems, an inmate's initial visit to sick call will result in a medical assessment by the triage nurse.[110] Even though inmates must pay the co-payment for the initial visit, they are charged an additional co-payment

101. *Id.*
102. *Id.* 18-19.
103. ANNO, *supra* note 97, at 18.
104. *Id.* at 19.
105. ADAY, *supra* note 5, at 87.
106. *Id.* at 107-108.
107. Ira P. Robbins, *Managed Health Care in Prisons as Cruel and Unusual Punishment*, 90 J. CRIM. L. & CRIMINOLOGY 195, 195 (1999).
108. KENNETH L. FAIVER, HEALTH CARE MANAGEMENT ISSUES IN CORRECTIONS 114 (1998).
109. *Id.* at 117.
110. *Id.* at 114.

when and if they eventually see a prison physician.[111]

The basic goal of managed care is to introduce a health care system that operates more cost-effectively, but this can result in inadequate health care.[112] Concerns regarding inadequate health care are magnified in a prison setting where the federal courts keep a close eye on prison healthcare providers. Managed care in prisons is significantly different from managed care in the outside.[113] As Robbins points out, when compared to the free world, the general prison population is less healthy; the quality of care is usually lower; the patients in a prison setting have no choice; and if the healthcare provider in the prison refuses to provide treatment, it is difficult, or in some cases impossible, for inmates to get treatment.[114]

More specifically, when inmates enter the infirmary, their health problems often are treated by lesser quality staff, such as nurses or, in some cases, an unlicensed physicians.[115] Some physicians who are licensed may treat aliments for which they lack proper training or expertise.[116] Thus, inmates become particularly vulnerable to the prison health care system and from the inmate's perception; adequate treatment in a harsh prison environment is challenging to say the least. Prison policies and procedures serve as significant barriers to health care access and treatment.[117]

Initially, access to health care may depend on the judgment of correctional officers or prison guards.[118] Guards who identify with the penal harm movement, where the prison should reinforce punishment at every turn, may deny an inmate's

111. *Id.*

112. Robbins, *supra* note 107, at 197.

113. *Id.*

114. *Id.* at 202.

115. Michael C. Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 942 (1992).

116. *Id.*

117. ADAY, *supra* note 5, at 103-105.

118. *See* FAIVER, *supra* note 108, at 101.

request for health care.[119]

Although many providers entered their professions with a strong desire to genuinely care for their clientele, after they entered the prison system, penal harm soon may replace their duty to care.[120] From their first days at work, these physicians and nurses are quickly informed that inmates will feign debilitating illnesses to dodge engaging in unpleasant prison chores.[121] As time progresses, correctional officers reinforce any emerging suspicions by strongly encouraging them to count all supplies at every shift's end.[122] While this type of occupational socialization is intended to protect health care providers, some providers may lose sight of their caring mission and engage in practices that neglect or even harm prisoners.

For instance, when hearing comments from custodial officers, healthcare professionals may begin to question whether the prisoners' requests for health care should be met with speedy care or with suspicion. Such is the case in the California prison system, where investigators found that inmates often had to wait months for medical appointments.[123] In one case, a prisoner repeatedly seeking care for abdominal and chest pains was called "a faker" by a triage nurse, and his doctor's appointment was cancelled.[124] When the prisoner finally saw the physician several weeks later, he was refused treatment and died soon thereafter.[125] A court investigation revealed that the doctor in this case was quoted as saying that most of the prisoners she examined had "no medical problems and were simply trying to take advantage of physicians."[126] When the validity of inmates' medical complaints are questioned, inmate

119. *See* Vaughn & Carroll, *supra* note 93, at 5.

120. M. Katherine Maeve & Michael S. Vaughn, *Nursing with Prisoners: The Practice of Caring, Forensic Nursing or Penal Harm Nursing?*, 24 ADVANCES IN NURSING SCIENCE 47, 58-60 (2001).

121. *Id.*

122. *Id.*

123. Laurie Udesky, *Court Takes Over California's Prison Health System*, LANCET, Sept. 3, 2005, at 796.

124. *Id.*

125. *Id.*

126. *Id.*

health needs may not be met at the required standard.

MENTAL HEALTH CARE

"Mental disorders in later life are significant in number and have pervasive effects on older persons and those who are close to them."[127] Unfortunately, those in the general population who suffer from mental disorders are increasingly finding their way into the prison system.[128] Correctional facilities in the U.S. currently house more mentally ill individuals than hospitals and mental institutions; and approximately 300,000 persons have been recognized as either suffering from a current mental condition or having stayed overnight in a mental hospital, medical unit, or treatment program.[129] It is estimated that approximately 210,000 persons with severe mental illnesses are incarcerated in federal and state jails and prisons.[130] This number constitutes approximately fifteen percent of state prisoners identified as mentally ill.[131]

Many of the aged suffer from specific mental or emotional disorders of varying severity.[132] "The prevalence of psychiatric disorders among older persons who are living in the community is estimated at anywhere from fifteen to twenty-five percent depending on the population and categories of disorders examined."[133] "Substance abuse problems (drugs and alcohol), anxiety disorders, and schizophrenia increase significantly in middle age."[134] However, in old age, the onset of dementia becomes more prevalent.[135] Of all state and county mental

127. ADAY, *supra* note 5, at 101.

128. *Id.*

129. PAULA M. DITTON, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 1 (July 1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtip.pdf.

130. Nancy Vitucci, *Corrections Challenged with Treating Mentally Ill Inmates*, 13 CORRECT CARE 1, 1 (1999).

131. DITTON, *supra* note 129, at 1.

132. ADAY, *supra* note 5, at 101.

133. *Id.*

134. *Id.*

135. *Id.*

hospital resident patients, twenty-six percent have dementia as a primary diagnosis.[136] Older offenders between the ages of forty-five and fifty-four are the most likely age group to be classified as mentally ill.[137] About twenty percent of state prisoners, ten percent of federal prisoners, twenty-three percent of jail inmates, and twenty-one percent of probationers between the ages of forty-five and fifty-four reported at least one mental illness.[138]

Mental health professionals who work with a graying prison population must also remain cognizant of the countless emotions experienced by inmates when they learn that they will never return home.[139] Men and women who know they will be spending their final years behind bars may feel fear, anger, shame, and loneliness mixed with the slightest hint of hope.[140] For many, having a grave condition and being ill informed about what the medical procedures will entail can be anxiety provoking.[141] Having severed close ties to the outside world without forming new close connections may leave some feeling as if they have no one in whom they can confide.[142] For those who simply cannot cope with their fates, entire sentences may be spent longing for release and planning the activities they will engage in once they see the other side of the barbed wire.[143]

With each inmate who presents himself for treatment, the service provider will evaluate the seriousness of his condition, the individual's desire for treatment, and his motivation to change.[144] For those identified as optimal candidates for

136. *Id.*

137. DITTON, *supra* note 129, at 3.

138. *Id.*

139. *See* Mary-Frances O'Connor, *Finding Boundaries Inside Prison Walls: Case Study of a Terminally Ill Inmate*, 28 DEATH STUDIES 63, 66-67 (2004).

140. *See id.* at 67; *see also* Ronald H. Aday, *Aging Prisoners' Concerns Toward Dying in Prison*, OMEGA: J. OF DEATH & DYING (forthcoming 2006).

141. *Id.*

142. Jennifer Krabill, Exploring the Social World of Aging Female Prisoners (2004) (Unpublished thesis, Middle Tennessee State University) (on file with author).

143. O'Connor, *supra* note 139, at 70.

144. HOLLY HILLS, CHRISTINE SIEGFRIED & ALAN ICKOWITZ, U.S. DEPT. OF JUSTICE, EFFECTIVE PRISON MENTAL HEALTH SERVICES: GUIDELINES TO EXPAND AND IMPROVE TREATMENT 18-19 (2004), http://www.nicic.org/Library/018604.

therapy, group counseling is generally considered to be the preferred course of action.[145] Not only is this forum less costly than having each inmate with a given diagnosis meet individually with a staff member, it also teaches participants that others are also intimidated, frightened, or overwhelmed by institutional living.[146]Through group discussions, older inmates have opportunities to hear how others are coping with similar hurdles while learning to develop meaningful and rewarding relationships without the risk of rejection.[147] Hopefully, those who formerly found life's stressors too painful to endure will take from group counseling skills they can use to overcome debilitating addictions, cope with grief and loss, and adapt to inmate life.

INVOLUNTARY TREATMENT

While most inmates who complain about health care think that they are not receiving the treatments their conditions warrant, some may feel that prison personnel are giving them more medications than is really necessary or desired. Dying inmates also tend to be very skeptical about decisions to limit care and permit death, especially when a full range of efforts to extend and support life does not precede such decisions.[148] Debates over involuntary treatment have gained widespread attention over the years. Lawsuits could result if an inmate has a serious condition, refuses treatment, and later harms himself or others. However, if the staff is permitted to medicate the seriously ill inmate against his or her will, some devious personnel could use the privilege for self-fulfilling purposes, such as sedating prisoners whose behavior is often considered unruly.[149]

145. *Id.* at 29.

146. *Id.*

147. *Id.*

148. Nancy Dubler, *The Collision of Confinement Care: End-of-Life Care in Prisons and Jails*, 26 J. L. MED. & ETHICS 149, 149 (1998).

149. *See* ADAY, *supra* note 5, at 107.

COMPASSIONATE AND EARLY RELEASE

The aging prison population has created an increasing number of end-of-life issues as more offenders are dying in prison.[150] As of 2003, seventeen states have responded to this concern by instating some form of compassionate release program that permits terminally or seriously ill prisoners to leave the correctional facility prior to death.[151] Theoretically, such programs afford the inmate the opportunity to prepare for death without simultaneously having to cope with the shackles, strip searches, and cold, damp cells commonly associated with prison life. This option also gives the inmate the chance to reestablish meaningful connections with family and friends before it is too late. The criminal justice system also benefits from releasing the most vulnerable, as this alternative reduces the costs of prison medical care while freeing beds for more dangerous offenders.[152]

However, the release of the terminally ill inmate is neither guaranteed nor immediate.[153] Few inmates typically apply for such programs, and of those who do, only a fraction of their requests are granted.[154] Before the individual returns home to die, the prison medical staff must first determine the individual's projected life expectancy, capacity to function in the prison environment, and likelihood of receiving superior medical treatment if released.[155] For an inmate who would more than likely die within the following six months and would benefit substantially from services that are available in the free world, his case is referred to the warden who must then decide that setting the person free would in no way jeopardize the well-being of law-abiding citizens.[156] For inmates who are deemed

150. *Id.* at 127-129.

151. Elizabeth Anderson & Theresa Hilliard, *Managing Offenders with Special Health Needs: Highest and Best Use Strategies*, 67 CORRECTIONS TODAY 58, 60 (2005).

152. ADAY, *supra* note 5, at 210.

153. Dubler, *supra* note 148, at 153.

154. Anderson & Hilliard, *supra* note 151, at 61.

155. *Id.*

156. *See id.*

safe to leave the institution, assistance will be needed in securing housing, finding physicians, and completing the paperwork that is necessary for the receipt of Medicare, Medicaid, and Social Security benefits.[157]

CONCLUSIONS

"While the aging inmate comprises the fastest growing group of inmates in both U.S. and Canadian prisons, the growth rate will be even greater in the near future."[158] Currently, the age fifty and over category is growing at about ten percent per year and is expected to jump to twenty percent by 2010.[159] In responding to the special needs of this group of offenders, policy issues will continue to come to the forefront for deliberation.[160] "The programs and policies now in place vary from state to state and this will most likely continue."[161] "Economic resources, sentencing guidelines, policy priorities, and the variation in the number and diversity of older offenders will contribute to this multiplicity."[162]

Some have suggested that the elderly offenders should be treated differently than their younger counterpart at all stages of the criminal justice system.[163] In particular, given the mental and physical characteristics of the elderly, the purpose of legal sanctions may be different, leading to a de-emphasis on restraint, deterrence, and rehabilitation.[164] Some have urged that more drastic measures are needed in order to respond appropriately to the elderly offender.[165] They suggest that to fully recognize the distinct differences between extreme age groups, a separate system in recognition of an aging population

157. ADAY, *supra* note 5, at 212.
158. *Id.* at 218.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. Cohen, *supra* note 28, at 11-14.
164. James, *supra* note 30, at 1041.
165. Cohen, *supra* note 28, at 11.

should be put into place.[166] Such an alternative would not be simply lenient justice, but a separate and distinct legal system that differs from the current adult system in philosophy, purpose, and technique.

In many ways, geriatric policies and programming are still in the developmental stage. While it is obvious that the criminal justice system is becoming more sensitive to the special needs of aging offenders, barriers continue to exist that interfere with the ability of local jurisdictions and states to respond effectively. Most local governments and states are faced with the rising costs of medical care and overcrowded jails and prisons. Programs will need to be designed to accommodate the successful transition of new elderly offenders into the criminal justice system. Mental and physical assessment, counseling services, and other programming will be necessary. For inmates who will spend the rest of their lives in prison, managing their health care will become a critical issue. Prison officials will be faced with the problem of finding suitable work and recreational activities, so inmates can pass the time in reasonably good health. Of course, inmates who have spent a greater portion of their lives incarcerated will need intensive discharge planning and community placement orientation. Locating family or community members who will accept aging inmates eligible for parole will be a challenge.

166. *Id.* at 16-17.