ELDERLY OFFENDERS: AN AMERICAN CORRECTIONS CATCH-22?

By

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ABSTRACT

The problem of the aging offender population is an issue that will ultimately need to be addressed by state corrections departments and legislatures. As general prison populations continue to age, the type and extent of inmate health care needs will change. This thesis examines the experiences of the elderly offender in the prison environment. Specifically, the conditions surrounding incarceration are evaluated, including unique age-related impairments, disability accommodations, constitutional protections, and programs and policies addressing the elderly offender population. A review of sentencing policy in Kansas will then be conducted, with specific focus on downward departure sentencing based upon advanced age. Recommendations that are made to address the continued growth of the Kansas elderly offender population include both proposed state agency and legislative policy changes. Agency recommendations relate to the administration of the newly-renovated geriatric correctional facility in Oswego, Labette County, Kansas. Legislative policy proposals address changes in Kansas sentencing policy, for purposes of integrating the factors of extraordinary physical impairment and age in departure sentencing and parole hearings. Amendatory changes to state early release procedures will also be raised to provide early release mechanisms for offgrid offenders.

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I. Introduction

The American prison population is graying. Though elderly offenders represent only a small percentage of the overall prison population, the amount of funding expended for the treatment and care of elderly offenders by state correctional authorities continues to increase. It has been estimated that housing costs for an elderly offender can amount up to $70,000 annually, three times the costs to house a younger offender.[1] Such an expense in the housing of elderly offenders is a "hidden" cost, buried underneath a multitude of other large expenditures made annually by state correctional authorities to maintain and continue operations of state prison systems.

Ultimately, correctional authorities and state legislatures will have to address the unavoidable, naturally-occurring phenomenon of aging offender populations. Such a phenomenon can be characterized as an American corrections “Catch-22”, a problematic situation for which the only solution is denied by a rule.[2] This paradoxical rule of law stems from Joseph Heller's 1961 novel *Catch-22*:[3]

> There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind...Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to.
> ‘That's some catch, that Catch-22,’ [Yossarian] observed.
> ‘It's the best there is,’ Doc Daneeka agreed.[4]

The illogical, absurd and the paradox which is Catch-22 is much like the American corrections system. Offenders are incarcerated as a form of punishment for the commission of crimes to prevent and deter the further commission of crimes, and for

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[1] Chad Kinsella, *Corrections Health Care Costs*, THE COUNCIL OF STATE GOVERNMENTS 5 (2004).
[2] MERRIAM-WEBSTER, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 108 (Merriam-Webster, Incorporated 1996) (1831).
[3] JOSEPH HELLER, CATCH-22 (Everyman's Library 1995).
[4] *Id*. at 56.

purposes of rehabilitation. The cost of incarceration is burdensome on state budgets, and efforts to reduce state prison populations naturally include the reduction of severity level or repeal of crimes, amendments to sentencing guidelines, creation of optional, non-prison sentences for use by sentencing courts, and other non-imprisonment methods. However, in doing so, offenders are released back into the community when they would otherwise continue to be incarcerated, and concerns about the offender's tendency to re-offend are maintained.

Criminal recidivism is the central argument for continued incarceration of an offender. Rates of recidivism cannot be controlled without continued efforts by correctional authorities to implement pre- and post-release, evidence-based programming that prepares offenders for re-entry into the community. Strained state budgets limit the appropriation of funds needed for correctional authorities to implement such programs and offenders ultimately do not receive the beneficial programming during their tenure of incarceration. Upon release, the probability of re-offending within the community is likely, as well as re-incarceration of the offender.

The paradoxical situation, or Catch-22, of American corrections is that states are incapable of avoiding the continuing presence of criminal offenders and the commission of their crimes. States are presented with two, equally-unfavorable solutions: (1) Incarceration as a temporary, expensive solution toward preventing offenders from re-offending within the community; and (2) premature release of offenders from prison without proper treatment and rehabilitation education, which is likely to result in the offenders re-offending within the community. The fact that a percentage of the currently incarcerated population is aging, requiring additional expenditures to accommodate

age-related needs further complicates the states' overarching goals of punishing morally-offensive criminal conduct, deterring such criminal conduct from occurring, rehabilitating offenders from re-offending upon release and safeguarding the public safety.

Throughout Heller's novel, protagonist Yossarian is exposed to various situations of Catch-22. Such experiences cause Yossarian to realize the non-existence of the paradoxical law; since it does not exist, there is no way it can be repealed or undone. Ideally, states can as well come to recognize the non-existence of the American corrections paradox. While the existence of criminal conduct within a community is a naturally-occurring phenomenon, the manner in which offenders are sentenced or afforded non-prison sentences can be changed by states. Investment into evidence-based, rehabilitative programming for offenders and parolees will prove to have the long-term effect of deterring future criminal conduct, and employment of methods to reduce prison populations will provide states legislative and fiscal flexibility in determining the types of offenders worthy of incarceration, such as the violent, likely to re-offend, and offenders considered to pose a danger to the public welfare if released into the community.

As a larger number of aging inmates enter or age within the corrections system, management of the aging prison population has become a challenge for both state and federal prison systems. The conditions of institutionalization are not well suited for inmates of advanced age.[5] American prisons have historically not been designed to accommodate the unique needs of the elderly offender. On the contrary, prisons have been designed to institutionalize inmates between the ages of fifteen and twenty-four,

[5] RONALD H. ADAY, AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS (Praeger 2003).

the age range tending to commit the majority of crimes across the nation.[6] Institutional programs and policies used in correctional facilities have often more applicability towards younger inmates, and services generally accessible to the elderly within the community are typically not afforded elderly prisoners.[7] Finally, the increased medical needs of aging prisoners is burdensome to state budgets, as housing costs for elderly offenders are triple the costs for housing a younger offender.[8] It is clear that as current incarceration trends continue, the amount of spending by the corrections industry will increase to accommodate the housing and healthcare needs of the elderly offender, the fastest growing segment of special-needs prisoners.

In the last two decades, the population of incarcerated elderly prisoners has substantially increased. While viewed as a minority segment of the general prison population, the size of the elderly prison population has tripled since 1980.[9] Between 2007 and 2010, the number of sentenced federal and state prisoners age 65 or older grew at a rate 94 times faster than the total sentenced prisoner population.[10] Additionally, the National Institute of Corrections reported in 2004 that the number of state and federal prisoners age 50 years or older increased by 172.6% between 1992 and 2001, or from approximately 42,000 prisoners to more than 113,000.[11]

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[6] Nadine Curran, *Blue Hairs in the Big House: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225 (2000).
[7] *Id*.
[8] Kinsella, *supra* note 1.
[9] STATEMENT OF PROFESSOR JONATHAN TURLEY, TESTIMONY BEFORE THE HOUSE SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY COMMITTEE ON JUDICIARY (December 6, 2007).
[10] HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 6 (2012).
[11] CARRIE ABNER, GRAYING PRISONS: STATES FACE CHALLENGES OF AN AGING INMATE POPULATION 9 (State News 2006).

The growth of the number of aging inmates in American prison populations has been attributed to the same baby-boom demographics currently threatening the future of social security benefits for younger generations, or approximately 80 million persons born between the years 1946 and 1964.[12] The increase in life expectancy and advances in medicine have as well decreased the mortality rate of the elderly offender population. State sentencing policies, most notably the "three strikes" tough-on-crime sentencing laws, have also been attributed to the increase of state prison populations. The "three strikes" felony sentencing trend mandated that offenders serve mandatory 25-years-to-life sentences, an especially punitive sentencing measure associated with the United States domestic policy "War on Drugs" campaign of the 1980s and 1990s.[13] Many states, as well as the Federal Bureau of Prisons, have eliminated parole, which had formerly provided prison facilities temporary relief from overcrowding and inmates an opportunity for early release based on good behavior.[14] Finally, the passage of the federal Violent Crime Control and Law Enforcement Act of 1994 discouraged early release of offenders, offering prison construction grants and other benefits to states that enacted laws requiring violent criminals to serve at least 85% of their sentences.[15]

The fiscal year (FY) 2011 annual report published by the Kansas department of corrections (KDOC) demonstrated an increase in the state's prison population over the last three years, from 8,610 inmates in 2007 to 9,186 inmates in 2011.[16] Due to the

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[12] R.V. Rikard & Ed Rosenberg, *Aging Inmates: A Convergence of Trends in the American Criminal Justice System*, J. OF CORRECTIONAL HEALTH CARE 150, 152 (2007).
[13] U.S. DEPARTMENT OF JUSTICE, CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF THE ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 7 (National Institute of Corrections, 2004).
[14] *Id*.; FRANK SCHMALLEGER & JOHN ORTIZ SMYKLA, CORRECTIONS IN THE 21ST CENTURY 5-6 (McGraw-Hill Publishing Company 2008) (2000).
[15] U.S. Department of Justice, *supra* note 13, at 7-8; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat.1796 (1994).
[16] ANNUAL REPORT: FISCAL YEAR 2011 (Kansas Department of Corrections 2011).

increase in the male prison population, prison capacity was exceeded by 178 beds in 2011. While several strategies to control the male prison population have been attempted by the agency, a number of correctional facilities across the state exceeded capacity in 2011. The male prison population is projected to increase by 1,819 inmates within the next 10 years, challenging the agency's use of resources and funding.

In 2011, there were approximately 753 inmates housed in Kansas correctional facilities 55 years of age and older.[17] Approximately 38% of these elderly offenders had committed a serious sexual offense, while approximately 47% elderly offenders had committed other serious person-offenses. Only about 10% of the elderly offenders had committed a serious drug offense, and less than 3% had committed a serious property offense. Additionally, 491 of these older inmates (65% of the total older inmate population), were classified in minimum or low medium security custody, and 225 older inmates (30% of the total older inmate population) were classified in high medium or maximum security custody.[18] In 2012, there were approximately 838 inmates housed in Kansas correctional facilities 55 years of age and older, an 11.2% increase compared to the previous fiscal year.

Before recommendations to address Kansas' elderly offender population are made, the elderly offender, in contrast to the younger offender, requires further examination. While similarly incarcerated amongst younger offender counterparts, the elderly offender's prison experience is unique due to different challenges, needs, and life-span issues that affect the elderly offender within the prison environment. Disability accommodations and constitutional protections afforded the elderly offender also

[17] DAVID G. FRAMPTON, *DATA AS OF END OF FISCAL YEAR 2011*, Kansas Department of Corrections data request, on file with the author.
[18] *Id*.

requires discussion, as many elderly offenders suffer from one or more disabilities and have long-term care needs. In addition, programs and policies to address the elderly offender population will be reviewed to understand the various approaches states have taken working with aging prison populations. Sentencing policy in Kansas will be reviewed, as the changes made by the state legislature to sentencing policy throughout the past two decades have significantly impacted the amount of time certain types of offenders serve, or, conversely, do not serve behind bars. Finally, a number of recommended state agency and legislative policy changes will be proposed to address the challenges posed by Kansas' growing aging offender population.

A. Defining the Elderly Offender

1. *Profile of the Elderly Offender*

It is unclear what characterizes an offender as "elderly". The age of 65 as a marker between "middle age" and "old age" was based off of social legislation during the late 19th and early 20th centuries for purposes of determining eligibility for social, retirement or other benefits.[19] Many offenders are considered by correctional authorities to be a part of the "older" prison population, despite being aged 15 years or more below societal perceptions of ages traditionally affiliated with "being old." States have applied different factors to gauge the "true" age of elderly inmates as a result of their continuous exposure to the prison environment. Such factors include the stress and anxiety associated with living in an isolated environment, the degree of mental and physical impairment, and the higher risk of victimization due to the offender's advanced

[19] Aday, *supra* note 5, at 16.

age.[20] Other factors contributing to the acceleration of aging in confinement involve lifestyle choices common among prison populations, prior to and after imprisonment, such as the abuse of drugs and alcohol, unsafe sexual practices and lack of preventative health and dental care.[21] A national survey of state correctional departments conducted in the late 1990's suggested that 50 years of age was the most common criterion for old age used by corrections officials, reporting that there was a general consensus that a typical inmate in his or her 50s has the physical appearance and health problems of a person at least ten years older. [22] Despite the inability of academic researchers to agree upon the criterion required to qualify an offender as an "elderly offender," such a classification is recognized within the corrections community.

Approximately 92% of incarcerated elderly offenders in the U.S. are male, though the number of elderly female offenders is increasing.[23] Most elderly female convicts are serving long-term sentences for nonviolent, drug or property-related crimes.[24] The majority of elderly inmates test at a sixth-grade level, and few offenders possess marketable employment skills needed to acquire and maintain employment upon release from prison.[25]

The elderly offender prison population has been studied, in large part, based upon each offender's criminal history. Categorization of elderly offenders in this manner

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[20] JEREMY L. WILLIAMS, THE AGING INMATE POPULATION SOUTHERN STATES OUTLOOK 2 (Southern Legislative Conference, The Council of State Governments 2006).
[21] *Id*.
[22] John D. Burrow & Barbara A. Koons-Witt, *Elderly Status, Extraordinary Physical Impairments and Intercircuit Variation under the Federal Sentencing Guidelines*, 11 ELDER L.J. 273, 274 (2003).
[23] KATHERINE S. VAN WORMER & CLEMENS BARTOLLAS, WOMEN & THE CRIMINAL JUSTICE SYSTEM (Allyn & Bacon 2007); Cindy Snyder, Katherine van Wormer, Janice Chadha, & Jeremiah W. Jaggers, *Older Adult Inmates: The Challenge for Social Work*, 54 NAT'L ASS'N OF SOC. WORKERS 117 (2009).
[24] Snyder *et al.*, 54 NAT'L ASS'N OF SOC. WORKERS 117 (2009).
[25] *Id*.; *see generally* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (Oxford University Press 2003) (argues that the current criminal justice system is failing parolee's attempts to reenter society and proposes solutions to better prepare prisoners for release).

was initially proposed by experts in 1997, establishing three distinct types of offenders: First-time offenders, recidivists, and long-term servers. First-time offenders are inmates that committed crimes after the age of 50, usually serious offenses accompanied with longer sentences. First-time offenders are less likely to adjust to institutionalization and are considered to be at a higher risk of victimization due to their advanced age. [26] Recidivists are habitual offenders with longer criminal histories, often entering the corrections system multiple times to serve a major sentence or a series of cumulative, shorter sentences. [27] Long-term servers are inmates that have "aged in place" within the corrections system, entering prison as young inmates to serve long-term sentences, and are the most institutionalized of all three types of offenders.[28]

Elderly offenders have also been distinguished based upon functional impairments, classified as "geriatric" or "non-geriatric" inmates. The geriatric inmate is characterized by one or more mental or physical impairments that necessitate assistance with activities of daily living, such as bathing, dressing, or eating. Depending upon the amount of assistance required, a geriatric inmate may be housed differently from the remainder of the general prison population so that long-term care needs may be accommodated. Despite requiring extra assistance such as a ramp or elevator to assist with mobility impairments, non-geriatric inmates are typically housed within the general prison population and not completely dependent upon prison officials.[29]

[26] U.S. Department of Justice, *supra* note 13, at 10.
[27] *Id*.
[28] *Id*.
[29] Snyder *et al.*, 54 NAT'L ASS'N OF SOC. WORKERS 117, 118 (2009).

2. *Health Concerns Unique to the Elderly Offender*

Serious physical and mental health problems are more prevalent within the older offender population as compared to their younger inmate counterparts, influencing an older offender's ability to rehabilitate and function within the prison environment.[30] Gustave Karpanty, who was 60 years of age in 1997 and serving a five-to-fifteen-year sentence in the Regional Medical Unit at Coxsackie Correctional Facility in New York was documented in a study to demonstrate the challenges correctional authorities were facing in dealing with older offenders with chronic, co-morbid medical illnesses:

> Bedridden for more than a year, he's unable to care for himself. He has a laundry list of ailments: Asthma, deafness, schizophrenia, anemia, ulcers, high blood pressure, diverticulitis, [and] arthritis. Last year, [correctional] guards shuttled him to an outside hospital for surgery to remove a serious intestinal blockage. [31]

It is common for older adults within the prison environment to demonstrate a need for specialized nursing care to address aging-related health conditions such as arthritis, respiratory problems, cardiovascular diseases, cancer, diabetes, and various cognitive disorders.[32] On average, the elderly offender suffers from at least three chronic illnesses.[33] A 2005 study that reviewed the academic literature on the health status of elderly offenders identified the most common health problems: "Dementia, cancer, stroke, incontinence, arthritis, ulcers, hypertension, chronic respiratory ailments, chronic gastrointestinal problems, prostate problems, heart disease, and deteriorating

[30] Alexander Kakoullis, Nick Le Mesurier, & Paul Kingston, *The Mental Health of Older Prisoners*, 22 INTERNATIONAL PSYCHOGERIATRICS, 693 (2010).
[31] Jennifer R. Holman, *Prison Care: Our Penitentiaries are Turning Into Nursing Homes. Can We Afford It?*, 40 MODERN MATURITY 30, 33 (1997).
[32] Aday, *supra* note 5; Jeff Yates & William Gillespie, *The Elderly and Prison Policy*, 11 JOURNAL OF AGING & SOCIAL POLICY 167 (2000).
[33] Ronald Aday, *Golden Years Behind Bars: Special Programs & Facilities for Elderly Inmates*, 58 FEDERAL PROBATION 47 (1994).

kidney functions."[34] Dental prostheses and additional, continued dental care, due to lack of or limited history of previous dental care, were also noted by the Florida Corrections Commission in 1999 as a need unique to elderly offenders.[35] Elderly inmates with quadriplegia, paralysis due to stroke, or Alzheimer's disease may require 24-hour nursing care, potentially prompting the passage or utilization of early-release or medical-release laws. As state prison populations age, it will not be uncommon for correctional systems to make changes to current prison security policies to address elderly offenders' growing health needs.

Older female offenders were specifically targeted by a 2001 study which emphasized that a significant increase in the incarceration of women will demand gender-specific care plans for delivery of health care services.[36] Essentially, the study proposed that services for older female offenders will be much greater than any costs incurred by their older male offender counterparts. Since women tend to have greater health care needs in the community, it was predicted that such needs would translate to the regular prison and prison hospice environment, as well.[37] Illnesses that specifically impacted older female offenders included HIV, heart disease, primary coronary artery

[34] Robynn Kuhlmann & Rick Ruddell, *Elderly Jail Inmates: Problems, Prevalence & Public Health*, 3 California Journal of Health Promotion 49, 51 (2005).
[35] FLORIDA CORRECTIONS COMMISSION, ANNUAL REPORT (1999); *see also* F.S.A. § 944.8041 (requiring the Florida Department on Corrections and the Florida Correctional Medical Authority to submit an annual report to the legislature on the status and treatment of elderly offenders within the state's correctional system, which includes an examination of and recommendation for "promising" geriatric policies, practices and programs currently in place within other state correctional systems).
[36] Carol Caldwell, Mack Jarvis, & Herbert Rosenfield, *Issues Impacting Today's Geriatric Female Offenders*, 63 CORRECTIONS TODAY 110, 112-114 (2001).
[37] *Id*.

disease, congestive heart failure, cancer, diabetes, kidney disease, peripheral vascular disease, vision impairments, cerebral vascular accidents, arthritis, and dementia.[38]

Mental health issues are widespread within the prison environment. Nationwide surveys of correctional facilities have gauged that approximately 40% of elderly offenders suffer from mental illness.[39] Due to offenders' lack of routine health care, risky lifestyle behaviors, and history of substance abuse, older offenders can suffer from a number of mental health conditions simultaneously, all requiring treatment by correctional healthcare providers.[40] The mental health needs of the elderly offender population should not be overlooked, as the population tends to suffer from depression, isolation and loneliness.[41] The ability of a correctional system to provide elderly offenders with sufficient continuity of care, including continued psychiatric monitoring or psychotropic medication administration has a direct correlation with such elderly offenders' successful reentry into the community.[42]

3. *Causes of Elderly Offender Criminal Behavior*

There are a number of underlying causes of elderly offender criminal behavior, which have been classified into four categories: (1) Mental or behavioral; (2) physical; (3) emotional; and (4) economic. First, mental or psychological disorders can be attributed to the natural process of aging, while behavioral issues may stem from

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[38] *Id*.; MELVIN DELGADO & DENISE HUMM-DELGADO, HEALTH & HEALTH CARE IN THE NATION'S PRISONS: ISSUES, CHALLENGES, AND POLICIES 93 (Rowman & Littlefield Publishing Group, Inc. 2009).
[39] Lauren E. Glaze & Doris J. James, *Mental Health Problems of Prisons and Jail Inmates*, National Criminal Justice Service Publication No. 213600 (2006).
[40] Ronald H. Aday & Jennifer J. Krabill, *Older and Geriatric Offenders: Critical Issues for the 21st Century*, in LIOR GIDEON, SPECIAL NEEDS OFFENDERS IN CORRECTIONAL INSTITUTIONS 210 (Sage Publications, Inc. 2012).
[41] Catherine C. McVey, *Coordinating Effective Health and Mental Health Continuity of Care*, 63.5 CORRECTIONS TODAY 58, 59 (2001).
[42] *Id*.

alcohol or drug addictions.[43] Second, physical disability or high costs for health care treatment may create financial strain, establishing a motive for an elderly adult to commit crime. Third, emotional responses to growing older or losing a spouse, employment, or independence have been linked to older adult criminal activity. Finally, loss of economic or social status have also been shown to drive such crime commission. However, due to the varying circumstances surrounding an elderly offender's health, social, and economic status, the underlying causes of an elderly offender's criminal behavior may span across two or more categories.[44]

The reasons for elderly crime commission should be supplemented with the understanding that external factors unrelated to the elderly offenders themselves may be involved.[45] For example, the continuous shift in sentencing policy impacts the length of sentences served, or whether non-prison sanctions are afforded the elderly offender. The availability and funding for substance abuse treatment or community-based alternatives to imprisonment may as well affect whether an elderly offender receives the appropriate assistance for psychological or addictive behaviors.

B. Disability Accommodations and Constitutional Protections

1. *Americans with Disabilities Act of 1990*

Legal remedies for harms suffered as an incarcerated offender can be found within both state and federal constitutions, and the Americans with Disabilities Act of 1990 (ADA). While lawsuits regarding prison conditions are often brought based upon

[43] Lyle B. Brown, *The Joint Effort to Supervise and Treat Elderly Offenders: A New Solution to a Current Corrections Problem*, 59 OHIO ST. L.J. 259, 266 (1998).
[44] *Id*.
[45] Dawn Miller, *Sentencing Elderly Criminal Offenders*, 7 NAELA J. 221, 225 (2011).

constitutional grounds, offenders have used the ADA as a basis for an injunction or other legal remedies.[46] The applicability of the ADA to state prisoners is particularly significant for the elderly offender. Many elderly offenders may fall under the ADA's definition of a "qualified individual with a disability" due to physical or mental impairments affiliated with old age. Thus, discriminatory prison practices may amount to a valid claim under the ADA if an elderly offender has a qualifying disability or impairment. While the ADA's protections clearly extend to individuals with physical disabilities, it has also applied by courts to individuals with hearing or visual impairments, mental retardation, and diseases.[47] "Older prisoners are not necessarily disabled, but they are far more likely to be disabled, to become disabled, or to develop conditions that require special accommodation."[48]

In 1998, the United States Supreme Court held in *Pa. Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998) that Title II of the ADA, which prohibits public entities from discriminating against a "qualified individual with a disability" based upon such individual's disability, was applicable to inmates housed in state prisons.[49] This decision was significant for elderly offenders, as disability is a common characteristic of the population. The suit involved an inmate with a medical history of hypertension who was denied the opportunity to participate in a prison program. The Court held that the department of corrections denying the inmate's participation in the program violated the ADA, as prisons fell "squarely" within the language of the ADA. As a result, state prisons

[46] Lynda Yamamoto, *Overcrowded Prisons and Filial Responsibility: Will States Utilize "Support of the Indigent" Statutes to Solve the Baby Boomer and Prison Crises?*, 41 RUTGERS L. J. 435, 454 (2009).
[47] Curran, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225, 256 (2000).
[48] Ira P. Robbins, *George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison*, 15 YALE L. & POL'Y REV. 49, 56 (1996).
[49] 42 U.S.C. § 12101 *et seq*.; Pa. Dept. of Corrections v. Yeskey, 524 U.S. 206 (1998).

that provide recreational activities, medical services and educational or vocational programs for the benefit of inmates are thus subject to the provisions of the ADA.[50]

The Supreme Court's decision in *Yeskey* was expanded eight years later in *U.S. v. Georgia*, 546 U.S. 151 (2006). A paraplegic prisoner sued prison officials under Title II of the ADA when he was held in a cell too small to allow him to rotate his wheelchair, so that he could not shower or use the toilet without assistance. The court held that the inmate had a valid Title II claim against the state, and that the state could be subject to liability for conduct that violated the Fourteenth Amendment.[51] Under guidance from the *Yeskey* and *Georgia* cases, lower courts have been consistent in applying the protections of Title II of the Americans with Disabilities Act to disabled inmates, which is a positive development of precedent for disabled elderly offenders.[52]

Kansas courts apply a three-part test to determine the validity of claims brought under the Title II of the Americans with Disabilities Act. Inmates must demonstrate: (1) The existence of a qualified disability; (2) denial by prison officials of the inmate's participation in or benefits of prison services, programs, or activities; and (3) a disability-based reason for denial of such prison services, programs, or activities.[53] In evaluating accessibility to government programs, "meaningful access" to the program must be provided, rather than mere physical access to the program. Thus, "meaningful access"

[50] Pa. Dept. of Corrections v. Yeskey, 524 U.S. 206, 209 (1998).
[51] U.S. v. Georgia, 546 U.S. 151, 159 (2006).
[52] See, e.g., Clarkson v. Coughlin, 898 F.Supp. 1019 (1995) (failure to provide interpreters or devices to assist deaf and hard-of-hearing inmates was discriminatory); Scott v. Garcia, 370 F.Supp.2d 1056 (2005) (California inmate's severe gastrointestinal problems constituted a "disability" under the Americans with Disabilities Act because the major life activity of eating was substantially limited).
[53] Laubach v. Roberts, 90 P.3d 961, 968 (2004).

may require that reasonable accommodations be made in order to provide access to the individual with a disability.[54]

However, an inmate bringing a claim alleging a violation of Title II of the Americans with Disabilities Act must demonstrate that a request for reasonable accommodations was made and subsequently denied. In 2002, 60-year-old Kansas inmate Roger Laubach filed an action against the Kansas department of corrections alleging Americans with Disabilities Act violations.[55] Laubach had been terminated from a sexual abuse treatment program upon signing a voluntary termination form. Due to Laubach's termination from the program, he lost incentive privileges.

Laubach alleged that termination from the sexual abuse treatment program occurred based upon his inability to read and poor eyesight.[56] Since Laubach had voluntary withdrawn from the program instead of requesting reasonable accommodations to assist with the reading and writing requirements of the program, the appellate court upheld the dismissal of the inmate's petition. The court emphasized that public entities administering such programs "need not guess" the accommodations needed by a person with a disability in order to provide access.[57] Rather, reasonable accommodations must have been requested by Laubach and such accommodations denied by prison officials to establish a claim under Title II.[58]

While the ADA provides legal recourse for elderly offenders that have been denied opportunities or services while incarcerated, the ADA may not always require special accommodations. However, states have acted in response to the *Yeskey*

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[54] Chaffin v. Kansas State Fair Bd., 348 F.3d 850, 857 (2003).
[55] Laubach v. Roberts, *supra* note 53.
[56] *Id*, at 966.
[57] *Id*. at 969.
[58] *Id*.

decision by ensuring the availability of recreational activities and educational or vocational programs.[59] In addition, some private correctional facilities have been required under the ADA to be accessible to inmates with disabilities.[60]

2. *Right to Adequate Medical Care*

The rising cost of medical treatment for elderly offenders is a continued concern for correctional authorities. While state and federal governments ultimately provide for an elderly adult's medical needs whether or not incarcerated, the transactional cost expended for elderly offenders' correctional health care is much more of a financial burden on state and federal budgets.[61] In understanding the financial strain for elderly offender correctional healthcare, the U.S. Supreme Court's acknowledgement of inmate complaints under the Eighth Amendment is especially worthy of discussion.

As the government is prohibited from imposing cruel and unusual punishments, claims filed by prisoners arguing violation of Eighth Amendment rights usually involve alleged deficiencies or inadequacy of medical treatment, in circumstances where corrections officials failed to provide or allow access to such treatment.[62] In *Estelle v. Gamble*, 429 U.S. 97 (1976), an inmate in Texas brought a civil rights action against the state corrections department claiming violation of his Eighth Amendment rights for inadequate treatment of a back injury sustained while working within the prison. The United States Supreme Court recognized that the government's obligation to provide medical care for persons punished by imprisonment, based upon basic Eighth

[59] Patricia S. Corwin, *Senioritis: Why Elderly Federal Inmates are Literally Dying to Get Out of Prison*, 17 J. Contemp. Health L. & Pol'y 687, 696 (2001).
[60] Substance Abuse and Mental Health Services Administration, U.S. Department of Health & Human Services, Treatment Improvement Protocol Series: Continuity of Offender Treatment for Substance Use Disorders From Institution to Community ch. 6 (2001).
[61] Corwin, *supra* note 59, at 689.
[62] U.S. CONST. amend. VIII.

Amendment principles against punishments was “incompatible with the evolving standards of decency” and “involve the unnecessary and wanton infliction of pain”. [63]

The Supreme Court concluded that deliberate indifference to serious medical needs of prisoners was an unnecessary and wanton infliction of pain in violation of the Eighth Amendment, whether by denying, delaying access to or intentionally interfering with medical treatment.[64] However, negligence alone or the inadvertent failure to provide adequate medical care to a prisoner is insufficient to sustain a claim under the Eighth Amendment. Rather, acts or omissions sufficiently harmful to evidence a deliberate indifference to a prisoner’s serious medical needs must be alleged, in order to "offend the evolving standards of decency in violation of the Eighth Amendment."[65]

The Court examined the standard of deliberate indifference in greater depth nearly 20 years later in *Farmer v. Brennan*, 511 U.S. 825 (1994), by applying both an objective and subjective test. A constitutional violation occurs when a prisoner is deprived of a basic human need, to the extent that the need withheld amounts to an objectively “sufficiently serious” deprivation.[66] If the deprivation is “sufficiently serious”, then the objective component of the test has been met.[67] A medical need amounts to being “sufficiently serious” if diagnosed by a physician as mandating treatment, or as being so obvious that laypersons would recognize the necessity for an examination by a physician.[68] Sufficiently serious conditions that satisfy the objective component of the *Farmer* test must “deprive inmates of the minimal civilized measure of life’s

[63] *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).
[64] *Id*. at 104.
[65] *Id*. at 106.
[66] *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).
[67] *Id*.
[68] *Ramos v. Lamm*, 639 F.2d 559, 575 (1980), *cert. denied* 450 U.S. 1041 (1981).

necessities".[69] However, inmates are not required to actually suffer from a serious medical problem in order to demonstrate a sufficiently serious condition.[70] Instead, the frequency and duration of the condition are to be considered by the court in the determination of the objective prong of the *Farmer* test.[71]

The second prong of the *Farmer* test is a subjective component, applied to determine whether a prison official has acted with "deliberate indifference" toward a prisoner. The prison official must be aware of the facts from which an inference can be drawn that a substantial risk of serious harm to an inmate's health or safety exists, and then actually draw such an inference.[72] To satisfy the subjective prong of the *Farmer* test, the prison official, in acting or failing to act with deliberate indifference to a prisoner's health and safety, must have a culpable state of mind.[73] Essential human needs include access to food, clothing shelter, medical care, and reasonable safety.[74]

Kansas courts have recognized a prisoner's right to adequate medical care and treatment, derived from both constitutional and statutory authority.[75] The *Estelle v. Gamble* test has been applied by Kansas courts in the evaluation of whether deliberate indifference to an inmate's medical needs by prison officials existed in violation of the Eighth Amendment.[76] While the deliberate indifference *Estelle* standard is not self-defining, the phrases "callous inattention," "reckless disregard" and "gross negligence"

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[69] *Shannon v. Graves*, 257 F.3d 1164, 1168 (2001).
[70] *Helling v. McKinney,* 509 U.S. 25, 33 (1993).
[71] *Hutto v. Finney,* 437 U.S. 678, 686-87 (1979).
[72] *Farmer*, *supra* note 66, at 837.
[73] *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).
[74] *Hudson v. Palmer*, 468 U.S. 517, 526-527 (1984).
[75] Levier v. State, 497 P.2d 265, 271 (1972); U.S. CONST. amend. VIII; KAN. CONST. BILL OF RIGHTS §9; *see also* K.S.A. 75-5210(a) (inmates in the institutional care of the secretary of corrections to be treated humanely).
[76] Cupples v. State, 861 P.2d 1360 (1993).

have all been used by the Kansas federal district court to describe the deliberate indifference standard.[77]

A finding of an express intent to harm is not required to establish a claim of cruel and unusual punishment, but "more than an ordinary lack of due care for a prisoner's interests or safety" must be involved.[78] Obdurate and wanton conduct, not inadvertence or good faith error, is prohibited under the Eighth Amendment, regardless if such conduct occurs in the supply of medical need or in relation to the conditions of an inmate's incarceration.[79] However, mere differences in opinion between an inmate and prison medical staff regarding the medical treatment received by the inmate does not amount to a sufficient claim of cruel and unusual punishment.[80] In circumstances where the opinion of prison medical staff differs from that of the inmate, medical evidence must be presented in order to support the inmate's conflicting opinion.[81] Additionally, the deliberate indifference standard may still not be met despite allegations from an inmate that professional conduct constituted civil medical malpractice.[82]

The Kansas Court of Appeals emphasized in *Van Dyke v. State*, 70 P.3d 1217, 1225 (2003) that "Cadillac care" was not the standard of medical care demanded by federal or state constitutions. Conditions of confinement may be "restrictive and even harsh", and yet not violate constitutional rights.[83] As long as the state provides prisoners with reasonably adequate food, shelter, sanitation, medical care, and personal

[77] *Id.*; Medcalf v. State of Kansas, 626 F.Supp. 1179, 1190 (1986)(citing Ramsey v. Ciccone, 310 F.Supp. 600, 605 (1970).
[78] Cupples v. State, 861 P.2d 1360 (1993), quoting Berry v. City of Muskogee, 900 F.2d 1489, (1990).
[79] Johnson v. KSIR Principal Adm'r and Staff, 804 F. Supp. 173, 179 (1992), quoting Whitley v. Albers, 475 U.S. 312, 319 (1986).
[80] Johnson v. Stephan, 6 F.3d 691, 692 (1993)(prisoner's opinion that medical staff's prescription of a leg stocking for prisoner's leg cramps was improper did not rise to level of deliberate indifference).
[81] Medcalf v. State of Kansas, 626 F.Supp.1179, 1190 (1986).
[82] Knight v. Davies, 804 F.Supp. 182, 184 (1992).
[83] Ledbetter v. City of Topeka, Kan., 318 F.3d 1183, 1188 (2003).

safety, the state will generally meet the constitutional requirements of the Eighth Amendment.[84]

The *Van Dyke* court also applied the two-prong *Farmer* test to evaluate the validity of Van Dyke's claim of deliberate indifference to his medical needs by prison officials.[85] Van Dyke had been undergoing therapy while housed in prison, and attempted to argue on appeal that his wife's inability to participate in his psychological treatment gave rise to a claim of deliberate indifference to his medical needs.[86] Van Dyke, at the age of 79, struggled with depression, anxiety, reduced mobility in his shoulders, shaky hands, weight loss, and a variety of medical problems ranging from heart, prostate, kidney, and back conditions while in confinement.[87] The court held that correctional placement of Van Dyke to accommodate the attendance of his wife at his therapy sessions was not a basic human need, thus failing the first prong of the *Farmer* test required to demonstrate deliberate indifference.[88]

The *Farmer* test has been applied by the federal Kansas district court regarding claims based upon the failure of prison officials to prevent harm to an inmate. Such claims require that the inmate demonstrate detention or incarceration under conditions that pose a substantial risk of serious harm, such as a substantial risk of suicide, exposing an inmate to raw sewage, or denying an inmate outdoor exercise for more than nine months.[89] Under the second prong of the *Farmer* test, a prison official may be

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[84] Darnell v. Simmons, 48 P.3d 1278, 1283 (2002); *see also* Levier v. State, 497 P.2d 265, 271 (1972)(appellate court recognized a prisoner's entitlement to the "basic necessities of civilized existence").
[85] Van Dyke v. State, 70 P.3d 1217 (2003).
[86] *Id*. at 1225.
[87] *Id*. at 1220.
[88] *Id*.; Farmer v. Brennan, 511 U.S. 825, 838 (1994).
[89] *See, e.g.,* Estate v. Sisk v. Manzanares, 262 F.Supp.2d 1162, 1175 (2002) (estate of deceased prisoner failed to show that supervisory corrections officer was deliberately indifferent to substantial risk

"found free from liability" if an official was subjectively aware of a substantial risk to inmate health or safety and responded reasonably to such a risk, whether or not harm to the inmate occurred.[90] In other words, a prison official's conduct in reasonably responding to a known risk does not constitute acting with deliberate indifference.

A number of states, including Kansas, are struggling with the balance of appropriating sufficient funds for state correctional authorities to properly house convicted offenders and the need to provide constitutionally-adequate healthcare for elderly offenders. While Kansas has recognized that "Cadillac" correctional healthcare is not mandated by the constitution, there is a large amount of legal precedent addressing whether deliberate indifference existed affecting an inmate's interests or personal safety. As elderly offender population continues to grow, the number of complaints alleging inadequate or insufficient safety, care, or special needs accommodations will likely be made based on constitutional grounds.[91]

3. *Prison Overcrowding*

Eighth Amendment "cruel and unusual punishment" claims can also be brought by elderly offenders alleging inadequate safety or care due to prison overcrowding. Increased prison populations have resulted in prison overcrowding, where individual cells and general design capacity of prisons exceed maximum occupancy levels.[92] Both state departments and organizations have applied different standards towards

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that the deceased would attempt to commit suicide); Shannon v. Graves, 257 F.3d 1164, 1168 (2001) (prisoner failed to demonstrate that exposure to raw sewage was a result of prison officials acting with deliberate indifference); Perkins v. Kansas Dept. of Corrections, 165 F.3d 803, 810 (1999) (prison officials' denial of outdoor exercise for more than nine months gave rise to a cause of action under the Eighth Amendment).

[90] Farmer v. Brennan, 511 U.S. 825, 844 (1994).

[91] Yamamoto, *supra* note 46, at 455.

[92] Curran, *supra* note 6, at 228.

defining minimum cell capacity, which complicates the ability to comprehend prison overcrowding statistics; nationwide, there is a lack of uniformity in defining cell and institution capacity. Additionally, the use of the phrase "prison overcrowding" is unclear, making no distinction between social density (the number of persons in an area), and spatial density (the amount of space designated to a person).[93]

Prison overcrowding became officially unconstitutional with the U.S. Supreme Court's recent *Brown v. Plata* decision in 2011, holding that overcrowding in California's prisons was the primary cause of Eighth Amendment violations and that no relief other than the 137.5% prisoner release remedial order entered by the federal district court would remedy such constitutional violations.[94] Writing for the majority, Supreme Court Justice Kennedy described placement of suicidal inmates in "telephone-booth sized cages without toilets" and segregation of up to 50 sickly inmates seeking medical treatment in a 12-by-20-foot cage for up to five hours at a time.[95] A report estimated that the deficiencies of California's correctional system caused the unnecessary and preventable death of an inmate approximately every six to seven days.[96]

The state of Kansas has also experienced problems with prison overcrowding. In general, the Kansas department of corrections and state legislature have had to periodically review the growth of the Kansas inmate population to ensure adequate housing capacity. The inmate population exceeded prison capacity in the late 1980s, and eventually resulted in a 1989 federal court order granting permanent injunctive relief to address the needs of mentally-ill inmates and establish a statewide long-term plan to

[93] Gerald G. Gaes, *Prison Crowding Research Reexamined*, 74 THE PRISON J. 329 (2004).
[94] Brown v. Plata, 131 S.Ct. 1910, 1934 (2011).
[95] *Id*.
[96] *Id.* at 1927.

control capacity problems.[97] In response, the state legislature funded construction of new correctional facilities, El Dorado Correctional Facility and Larned Correctional Mental Health Facility.[98]

The growth of the Kansas inmate population and resulting lack of prison housing capacity continued throughout the 2000s. The utilization rate peaked at 98.7% in FY 2004, and averaged at 94.2% between FY 2004 and FY 2008.[99] In 2009, state budget reductions caused the Kansas department of corrections to suspend operational use of three minimum-custody facilities in Stockton, Osawatomie and Toronto and close conservation camps in Labette County. However, utilization rates reached 98.0% at the end of FY 2010, with an average daily prison population of 8,689.[100] The Stockton Correctional Facility was reopened due to legislative funding in 2010. As a result of subsequent budget cuts, the Kansas department of corrections has reduced parole services, post-release services and offender program services statewide.

In April 2012, prison overcrowding concerns in Kansas made national headlines when four inmates escaped from a county jail. Twenty-two inmates had been transferred from Ellsworth Correctional Facility to Ottawa County Jail, a common housing maneuver utilized by the state department through contracts with five county jails across the state.[101] At the time of the escapes, the department of corrections had

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[97] *See* Order, Arney v. Hayden (1989). Today, Judge Rogers' orders remain "dormant" until the Kansas prison population exceeds capacity of its facilities once again or the state loses accreditation of its facilities in Lansing, Hutchinson, or El Dorado, William J. Rich, *Prison Conditions and Criminal Sentencing in Kansas: A Public Policy Dialogue*, 11 KAN. J. L.. & PUB. POL'Y 693, 705 (2002).
[98] JAROD WALTNER, *KANSAS LEGISLATOR BRIEFING BOOK* 2 (Kansas Legislative Research Department 2011).
[99] *Id.* The utilization rate is the average daily prison population/total prison housing capacity.
[100] *Id*.
[101] John Milburn & Bill Draper, Associated Press, *Kansas Removes All Inmates From County Jail After 4 Escape; 2 Remain at Large*, Fox News Channel, April 19, 2012, *available at* www.foxnews.com/us/2012/04/19/2-kan-jail-inmates-at-large-1-in-custody-in-neb/.

contracted out approximately 90 inmates statewide at approved county jails.[102] One month later, 71 inmates were contracted out to county jails, leaving the average daily population at approximately 185 over housing capacity.[103]

In response to the continued problem of overcrowding in Kansas' prison facilities, the 2012 Kansas Legislature approved renovation of the former Labette Correctional Conservation Camp in Oswego, Labette County, Kansas, for the purpose of housing up to 262 male elderly offenders. The former adult prison camp will generally house 232 medium custody elderly offenders and 30 minimum custody elderly offender offenders, all of which face challenges with mobility due to physical impairments. The removal of 262 elderly offenders from other state prisons will provide the agency needed flexibility in housing placements of younger offenders statewide and the ability to decrease placement of offenders in community corrections.

C. Programs and Policies Addressing the Elderly Offender Population

1. *Geriatric Prisons*

The majority of American prisons were not architecturally designed to accommodate the mobility needs of the older offender. Narrow doorways and the lack of handrails and grab bars create accessibility problems for the older offender with a mobility disability or long-term care medical needs.[104] Health care services, daily meals, and prison programming opportunities may be housed in separate buildings

[102] *Kansas House Rejects Prison Inmate Policy Change*, THE WICHITA EAGLE, May 8, 2012, *available at* www.kansas.com/2012/05/08/2327722/kansas-house-rejects-prison-inmate.html.
[103] *Id*.
[104] Snyder *et al*., 54 NAT'L ASS'N OF SOC. WORKERS 117 (2009).

within the prison complex, requiring inmates to walk longer distances to receive certain services.[105]

Elderly offenders may require mobility assistance devices such as walkers, wheelchairs, orthopedic shoes, and prosthetics.[106] In experiencing these mobility barriers within the prison environment, an older offender may require more time to walk from a cell block to a dining hall, for example, or require assistance with showering, administration of medication, or moving about the prison complex. As a result, the older offender is targeted by stronger, younger inmates and vulnerable to predatory behaviors.[107] According to a report made by the National Institute of Corrections in 2004, the absence of personal protections for older offenders from younger predatory offenders only contributes to their psychological and physical deterioration.[108]

Older prison infirmaries have often been designed for offenders only requiring acute nursing care and thus may not provide accommodations for wheelchairs or other mobility disability devices.[109] Despite the passage of the Americans with Disabilities Act in 1990 (ADA), older prisons that were built prior to ADA's implementation continue to maintain cells that do not accommodate older offenders' needs.[110] Typical cell blocks in older prisons have six-by-nine-foot individual cells, containing a bunk bed, chair, cabinet, and built-in sinks and toilet. This small living space becomes even more limited

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[105] Cynthia M. Mara, *Expansion of Long-Term Care in the Prison System: An Aging Inmate Population Poses Policy and Programmatic Questions*, 14 JOURNAL OF AGING & SOCIAL POLICY, 43 (2002).
[106] Snyder *et al.*, *supra* note 104, at 118.
[107] Mara, *supra* note 105, at 43; U.S. DEPARTMENT OF JUSTICE, CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF THE ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 29 (National Institute of Corrections, 2004).
[108] Abner, *supra* note 11, at 9.
[109] *Id*.
[110] Diane K. Duin & Mary Helen McSweeney-Feld, *The Aging Male Inmate: Long-Term Care Service Needs and Resulting Policy Implications*, 40 THE J. OF PASTORAL COUNSELING 97 (2005).

for an older offender, who may require use of an oxygen tank, wheelchair, or other special accommodations.[111]

More than half of the states provide accommodations for geriatric offenders, either by selected clustering of the older offenders, dedication of certain housing units specifically for older offenders, free-standing geriatric prisons, or special nursing home facilities.[112] Some states, such as Kansas, have remodeled and converted existing facilities (such as old mental health hospitals or juvenile detention facilities) for purposes of housing elderly offenders.[113] However, stand-alone facilities or segregated units wholly dedicated to the housing of elderly offenders are considered safer for the more vulnerable prison population as compared to housing with the general prison population.[114] The majority of such specialized units, in addition to a quieter living environment, often provide lower bunk-beds, accommodations for wheelchairs, and elevated toilets.[115] Newer-constructed geriatric facilities are providing additional amenities, such as prison-controlled thermostats, non-slip flooring, brighter fluorescent lighting, and fire alarms with strobe lights.[116]

Within Oregon's department of corrections' Oregon State Correctional Institution is a 61-bed dorm geriatric unit, called Unit 13. It provides a more protected housing environment for elderly, disabled, and mobility-impaired male inmates. [117] The geriatric

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[111] *Id*.
[112] Abner, *supra* note 11, at 8-12.
[113] Aday, *supra* note 5.
[114] J.W. Marquart & G. Doucet, *The Health-Related Concerns of Older Prisoners: Implications for Policy*, 20 AGEING AND SOCIETY 79-96.
[115] *Id*.; Ronald H. Aday, *Managing Aging Prisoners in the United States*, in AZRINI WAHIDIN & MAUREEN CAIN, AGEING, CRIME AND SOCIETY 210-229 (Willan Publishing 2006).
[116] Robert G. Falter, *Selected Predictors of Health Services Needs of Inmates Over 50*, 6 J. OF CORRECTIONAL HEALTH CARE, 149-175 (1999).
[117] U.S. DEPARTMENT OF JUSTICE, CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF THE ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 31 (National Institute of Corrections, 2004).

unit contains hospital-style, extra-padded beds; handicap-accessible toilets, sinks, and showers; and a therapeutic gym equipped with a handicap-accessible pool table.[118] A barbershop and sewing program are specifically housed within the unit to limit the amount of movement required for an elderly offender to move about the facility. However, the unit is not an inpatient nursing-care unit, though nursing care is available at the correctional facility 22-hours-a-day. Inmates housed within the geriatric Unit 13 do not require ongoing nursing services; instead, they only require assistance with activities of daily living or mobility impairments.[119] Admission to Unit 13 is based on the age (50 years of age or older) and functional limitations of the offender.

Minnesota's department of corrections also offers special housing for elderly offenders, aged 55 years or older. The Minnesota Correctional Facility at Faribault, Minnesota, has established the Linden unit, a medium security unit for older offenders with chronic health problems.[120] Male inmates housed in the Linden are required to be able to perform all activities of daily living; inmates requiring assistance with activities of daily living or 24-hour nursing care are transferred to an infirmary at another correctional facility. Hospital beds with railings are provided on an as-needed basis, and elderly inmates confined to a wheelchair or otherwise have severe disabilities may be assigned a personal care attendant to assist the inmate in performing non-activity of daily living tasks such as cleaning a cell. Linden inmates are prohibited from working, as the state

[118] *Id*.
[119] *Id*.
[120] *Id*. The Linden unit also houses inmates younger than 55 years of age that have disabilities such as blindness, deafness, or mobility impairments.

corrections department considers them to be “retired”, but are afforded the opportunity to participate in programming offered by the facility.[121]

Addressing the treatment needs of the most chronically-ill inmates can be a challenge for states housing a large elderly offender population. Chronic illnesses are those that are ongoing, or reoccurring, and include asthma, AIDS, heart disease, hypertension, hepatitis C, and diabetes.[122] Comorbidity of health conditions also can affect the extent of an elderly offender’s treatment and placement within a state correctional system. Facilities offering emergency services, acute nursing care and 24-hour specialty care best serve elderly offenders suffering from chronic health conditions.[123] Within the correctional institution, elderly offenders with chronic illnesses may require other special accommodations, other than additional nursing services. Older inmates suffering from seizure disorders, for example, may require a bottom bunk bed, as well as inmates suffering from heart disease, respiratory conditions, or ambulatory impairments.

In addition to requiring assistance with ADLs (activities of daily living, such as bathing, eating, or toileting), elderly offenders may struggle with IADLs, or Instrumental Activities of Daily Living (such as taking medications) and PADLs, Prison Activities of Daily Living (such as standing in line for an indefinite period of time, dropping to the floor for alarms, and hearing and responding to orders by correctional officers).[124] Thus, an adequate functional assessment during the routine, intake screening process of the elderly inmate into the correctional system will provide correctional officers and medical

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[121] *Id*.
[122] *Id*. at 34.
[123] *Id*.
[124] Ronald H. Aday & Jennifer J. Krabill, *Older and Geriatric Offenders: Critical Issues for the 21st Century*, in LIOR GIDEON, Special Needs Offenders in Correctional Institutions 210 (Sage Publications, Inc. 2012).

staff a proper analysis of functional limitations or health treatment needs prior to housing placement.[125]

2. *Age-Specific Programming*

Counseling programs intended to assist the rehabilitation of younger inmates often do not serve the programming needs of the older offender. Such counseling programming topics are based on rehabilitation of offenders and reentry into the community's workforce.[126] Life-span and prison environment issues such as dying in prison, the presence of chronic illness, complete social isolation, and institutional dependence are only a few of the concerns harbored by the older offender, most of which are likely not addressed within counseling programs designed for younger offenders.[127] Instead, such counseling programming involves topics like prison parenting or childrearing education, which would not generally benefit and discourage participation by the older offender population. [128] This programming, as well as vocational training programs, is of little use and application to the older offender.[129]

The Criminal Justice Institute surveyed 44 states and territories in 2001, of which approximately 15 participating states indicated that supervised, recreational programming opportunities geared toward older offenders was provided.[130] However, the majority of states have yet to follow suit in creating programming specifically designed for the older offender. This is attributed to the fact that older offender

[125] U.S. DEPARTMENT OF JUSTICE, *supra* note 115, at 58.
[126] Aday, *supra* note 33, at 47.
[127] Snyder *et al.*, *supra* note 104, at 117; Aday, *supra* note 5.
[128] Snyder *et al.*, *supra* note 104, at 117.
[129] Aday, *supra* note 33, at 47; U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Parents in Prison and Their Minor Children*, National Criminal Justice Reference Service Publication No. 222984 (2008).
[130] Abner, *supra* note 11, at 9.

populations are smaller in size and overlooked in the evaluation of an overall prison population's programming needs.[131] As a result, the majority of programming offered is targeted toward the younger and more able-bodied, such as physically-demanding sports programming.[132] An older offender could better be served by participating in recreational activities that take into account the presence of mobility disabilities and cognition impairments, gauge activity or programming preferences of the older offender population, and accommodate the pace and delivery of programming to adult learners.[133]

For example, one of Ohio's correctional facilities offers a "50+ and Aging" program, specifically designed to address the changing physical, psychological and other needs of older offenders. This program includes adult education classes, GED classes, and recreational activities such as bingo, horseshoes, and shuffleboard. The "50+ and Aging" program also provides case management for older offenders seeking application for Social Security and Medicare benefits.[134] Geriatric offenders in Ohio are offered other programming options, targeted toward health and wellness, including:

> 1) Stress reduction, anger management, AA and NA programs (age-specific);
> 2) memory improvement programs, focusing on both short-term and long-term memory recall strategies;
> 3) medication management programs that educate participants on the benefits of adhering to medication protocols and side effects of commonly-used medications;
> 4) aging-related programming, educating participants on health changes affecting older adults, such as sensory and mobility impairments, osteoporosis, and dementia; and

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[131] Snyder *et al.*, *supra* note 104, at 117.
[132] *Id*.; J.J. Kerbs, *Arguments and Strategies for the Selective Decarceration of Older Prisoners*, in M. B. ROTHMAN, B. D. DUNLOP & P. ENTZEL, ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM: MYTH, PERCEPTIONS, AND REALITY IN THE 21ST CENTURY 229 (Springer Publishing Company 2000)
[133] Snyder *et al.*, *supra* note 104, at 117.
[134] *Id*.

5) Medicare and Medicaid program educational programming.[135]

Currently, the most widely-recognized programming most appropriate for elderly offenders are programs focused on improvement of diet and exercise.[136] Corrections authorities are being encouraged to reevaluate the nutritional content of meals served to older offenders, with recommendations to lower starchy and sugary foods for replacement with increased servings of fruits and vegetables.[137] Implementing changes to inmates' meal plans can prove difficult for corrections food services staff facing a limited amount of resources within the prison environment and charged with feeding large populations of inmates within small periods of time.[138] However, elderly offenders have unique health care needs, of which nutritional health and dental health can have a great impact upon such offender's overall health condition. Some elderly offenders may require more time to eat during meals, due to age-related conditions increasing sensitivity of the mouth or teeth, such as dysguesia (distortion of sense of taste), ageusia (complete lack of taste), or general dental health problems (edentulism, oral cancer, periodontal disease, missing teeth, ill-fitting dentures).[139]

Other states, such as Pennsylvania, Alabama, Georgia, Virginia, and Louisiana have put educational programs in place that address wellness and aging-related issues relevant to older offender populations, in response to the growth of state aging

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[135] Ronald H. Aday & Jennifer J. Krabill, *Older and Geriatric Offenders: Critical Issues for the 21st Century*, in LIOR GIDEON, SPECIAL NEEDS OFFENDERS IN CORRECTIONAL INSTITUTIONS 220 (Sage Publications, Inc. 2012).
[136] *Id.*
[137] RONALD H. ADAY & JENNIFER J. KRABILL, WOMEN AGING IN PRISON: A NEGLECTED POPULATION IN THE CRIMINAL JUSTICE SYSTEM (Lynne Rienner Publishers 2011).
[138] J.W. Wick, & R. Zanni, *Challenges in Caring for Aging Inmates*, 24 CONSULTANT PHARMACIST 424 (2009).
[139] Aday & Krabill, *supra* note 135, at 213.

populations.[140] The Northern Nevada Correctional Center in Carson City, Nevada, recently received national recognition for the programming offered its elderly offenders. The Dr. Mary Ann Quaranta Elder Justice Award was presented to Nevada department of corrections psychologist Mary Harrison for administration of the Senior Structured Living Program, dubbed "True Grit", at the Northern Nevada Correctional Center.[141] True Grit was established by the state's correctional authorities in 2004 primarily due to the fact that the majority of the state's elderly offenders (60 years of age or older) suffered from one or more medical conditions.[142] While admission into the geriatric program requires an inmate to be at least 60 years old, the majority of the male population is in their late 70s.[143] True Grit was not appropriated any funding for its operations by the Nevada Legislature, instead relying entirely upon volunteerism and private donations.[144]

The True Grit program houses all male older offender participants together in a separate unit within the correctional facility, providing a number of physical, social and mental activities to be completed on a daily basis; each inmate is required to participate in educational programming directly associated with the reason for their imprisonment (such as drug or sex crimes).[145] As the majority of elderly offenders in the program are serving sentences that, in effect, impose imprisonment for life, issues surrounding death and dying are a strong focus of the correctional facility's program. However, program topics are very diverse, intended to be therapeutic in order to enhance the offender's

[140] *Id*.
[141] Molly Waldron, *Nevada Gets Award for Program for Aging Prisoners*, ABC 13 ACTION NEWS, Sept. 28, 2011, http://www.ktnv.com/news/local/130730068.html.
[142] Mary T. Harrison & Jim Benedetti, *Comprehensive Geriatric Programs in a Time of Shrinking Resources: "True Grit" Revisited*, 71 CORRECTIONS TODAY 44, 45 (2009).
[143] *Id.*
[144] Waldron, *supra* note 141.
[145] Aday & Krabill, *supra* note 40, at 210.

rehabilitation and quality of life within the prison environment, such as life skills training, music appreciation, art appreciation, pet therapy, writing groups, and physical fitness.[146] The physical fitness activities are cognizant of the elderly status of offenders, and are designed to accommodate inmates' mobility impairments. The True Grit program has made a significant impact upon Nevada's elderly offenders, demonstrating less infirmary visits, decreased use of psychotropic and psychoactive medications, and a general increase in the morale of the elderly offenders housed in the Nevada correctional facility.[147]

The Kansas department of corrections currently operates a total of 8 prisons in 10 Kansas communities across the state. The agency also provides community supervision of offenders released from prison, program services to offenders to assist them in returning back to the community, and administering grants to local governments pursuant to the provisions of the community corrections act, K.S.A. 75-5290 *et seq*. The programs offered by the agency include academic education programs, vocation education programs (such as home building, cabinet making, plumbing, and welding, etc.), substance abuse treatment, work-release programs, sex offender treatment, and pre-release "values-based" programs providing mentoring and support to participating inmates pre and post-release.[148] It is unclear whether age-specific programming will be provided at the proposed Kansas geriatric prison facility in Oswego, Kansas. While it is likely that limited programming opportunities currently exist for elderly offenders in Kansas prisons due to the small population of such inmates, correctional officials may

[146] *Id*. at 218.
[147] Mary T. Harrison, *True Grit: An Innovative Program for Elderly Inmates*, 68 CORRECTIONS TODAY 46, 48 (2006).
[148] *JUST THE FAQS: KANSAS DEPARTMENT OF CORRECTIONS GENERAL INFORMATION HANDBOOK* 22 (Kansas Department of Corrections 2011).

opt to provide age-based programming as the majority of the inmates to be housed within the Oswego facility will be advanced in age.

3. *Hospice or End-of-Life Care Services*

The concept of dying in prison is not unfamiliar to the older offender population. Over the last 15 years, the number of older offenders dying within prison walls continues to increase.[149] Dying while incarcerated poses a multitude of issues for correctional facilities, including security concerns, financial costs, legal issues, and humanitarian or ethical questions.[150] While some states have prison hospice programs in place, not all states have implemented prison hospice services or provide older offenders access to end-of-life care.[151] As of 2010, there are an estimated 69 prison hospice programs in operation within the United States.[152]

Within the prison environment, death of an inmate is perceived as an event which can either aggravate the prison population or undermine prison security measures.[153] Providing hospice or end-of-life care services to a dying older offender is challenging, due to prison administrative rules or policies, lack of accessibility to dying offender's friends and family members, racism, distrust between prison staff and dying inmates, and barriers to providing communication and displays of affection due to the prison

[149] J. Linder, S. Enders, E. Craig, J. Richardson, & F. Meyers, *Hospice Care for the Incarcerated in the United States: An Introduction*, 5 J. OF PALLIATIVE MED. 549 (2002); B. Williams & R. Abraldes, *Growing Older: Challenges of Prison Reentry for the Aging Population*, in R. GREIFINGER, PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITY (Springer Publishing Company 2007).
[150] Aday, *supra* note 5; S. Yampolskaya & N. Winston, *Hospice Care in Prison: General Principles and Outcomes,* 20 AM. J. OF HOSPICE & PALLIATIVE CARE 290 (2003).
[151] Duin & McSweeney-Feld, *supra* note 110, at 97.
[152] Heath C. Hoffman & George E. Dickinson, *Characteristics of Prison Hospice Programs in the United States*, 28 AM. J. OF HOSPICE & PALLIATIVE MED. 245, 246 (2011).
[153] Barbara Granse, *Why Should We Care? Hospice Social Work Practice in a Prison Setting*, 73 SMITH COLLEGE STUDIES IN SOCIAL WORK 359 (2003).

environment[154]. In addition, a 2001 study reported findings that despite correctional nurses' professionalism in providing health care services, negative attitudes with providing dying inmates basic end-of-life care services are maintained.[155] For example, correctional nurses were conscious of inmates' demands for pain-relieving drugs, but perceived the dying inmates' suffering as either "deserved" due to their criminal status in society, or exaggerated cries for help that were made to exploit health care providers for painkillers to be used later recreationally.[156]

States may want to consider the implementation of hospice programs solely for the cost savings that can be realized as a result of weaning an elderly offender off of continuous nursing care. In 1997, the state of California spent $900,000 to maintain 24-hour, continuous nursing care coverage of a dying inmate over the course of six months:[157]

> For seven months, convicted burglar Frederick Lopez lay dying of AIDS in a bleak prison hospital while a warden's request "strongly urging" that he be allowed to spend his last days in the care of his family languished in the Orange County courthouse. "He suffers from dementia...he cannot walk. He cannot dress himself. It's hard for him to feed himself. He's dying...and deserves to die outside prison near his family" [said his sister]. A judge...finally ordered Lopez's release to a hospice near his family...his care in the final six months of his life ultimately cost the state $888,709, including more than $200,000 for armed correctional officers while he lay immobile in a Marin County hospital.

Formal hospice programs, however, do not necessarily have to be implemented within a geriatric correctional facility environment to successfully treat the end-of-life issues facing elderly offender populations. The Nevada department of corrections, for

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[154] *Id*.; Katherine Maeve & Michael Vaughn, *Nursing with Prisoners: The Practice of Caring, Forensic Nursing or Penal Harm Nursing?,* 24 ADVANCES IN NURSING SCIENCE 47 (2001).
[155] Maeve & Vaughn, *supra* note 154, at 47.
[156] *Id*.
[157] MELVIN DELGADO & DENISE HUMM-DELGADO, HEALTH & HEALTH CARE IN THE NATION'S PRISONS: ISSUES, CHALLENGES, AND POLICIES 128 (Rowman & Littlefield Publishing Group, Inc. 2009).

example, does not provide any formal hospice program. However, an environment similar to a prison hospice setting has been created due to volunteerism; volunteers hold educational programs on death and dying, spiritual "retreats" within the correctional facility, and general end-of-life spiritual care by volunteers ordained in a variety of mainstream denominations.[158]

Prisons that have established hospice programs in place incorporate pain management services and support compassionate care and dying-with-dignity philosophies.[159] Such hospice programs have also been documented to include spiritual services, psychosocial services, and bereavement counseling.[160] Prison policies are also relaxed for inmates receiving hospice services, allowing more time for visitation hours and accommodating special food and clothing requests.[161] As the number of elderly offenders presenting with chronic and terminal medical illnesses increases, correctional authorities will need to reevaluate prison policies and procedures for prison hospice care, pain management, and utilization of medical or compassionate early release.[162]

4. *Early Release Programs*

The theory behind compassionate release is to provide for either medical parole or "compassionate" release of terminally-ill inmates. Compassionate release has been referred to as "medical parole, medical furlough, executive clemency, medical pardon,

[158] Harrison & Benedetti, *supra* note 142, at 45.
[159] D. Higgins & Margaret Severson, *Community Reentry and Older Adult Offenders: Redefining Social Work Roles,* 52 JOURNAL OF GERONTOLOGICAL SOCIAL WORK 784 (2009).
[160] *Id*.
[161] Aday, *supra* note 5.
[162] Mary F. O'Connor, *Finding Boundaries Inside Prison Walls: Case Study of a Terminally Ill Inmate*, 28 Death Studies 63 (2004).

medical reprieve, medical release, parole for humanitarian reasons, parole of dying prisoners, community furlough, and compassionate leave."[163] Programs of compassionate release are based on the notions that releasing terminally-ill inmates is ethically and legally justifiable, and that the financial burden of treating terminally-ill inmates' extensive medical needs outweigh any benefits of continued imprisonment.[164] Compassionate release programs vary, as each jurisdiction has different requirements for medical eligibility, application, and final approval of an inmate's release.[165] Completion of the entire release process within both federal and state correctional systems may take anywhere between several months to several years.[166]

The development of compassionate release programs across the U.S. was primarily for purposes of addressing the high costs of incarceration. U.S. state and federal prison populations grew 271% between 1982 and 2006, increasing the elderly offender population (55+) by 418% and increasing spending costs by 660%.[167] Despite the shift of some terminally-ill offenders' health care costs from a correctional facility to Medicaid and Medicare social welfare programs, cost savings will most likely still be realized with reduced spending for hospital security, medical transport to and from hospitals, and re-construction of existing correctional facility structures to accommodate disability or protective-housing needs.[168]

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[163] Majorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse than the Disease?*, 3 WIDENER J. PUB. L. 799, 836 n.10 (1994).
[164] Brie A. Williams, Rebecca L. Sudore, Robert Greifinger, & R. Sean Morrison, *Balancing Punishment and Compassion for Seriously Ill Prisoners*, 155 ANNALS OF INTERNAL MEDICINE 122 (2011).
[165] Russell, *supra* note 163, at 818.
[166] John A. Beck, *Compassionate Release From New York State Prisons: Why Are So Few Getting Out?*, 27 J. LAW. MED. ETHICS 216 (1999).
[167] Williams, Sudore, Greifinger, & Morrison, *supra* note 164.
[168] Beck, *supra* note 166; TIA GUBLER & JOAN PETERSILIA, ELDERLY PRISONERS ARE LITERALLY DYING FOR REFORM (Stanford University Criminal Justice Center 2006).

American sentencing policies, for more than half a century, have reflected the philosophy that "early" release of a prisoner was the rule, and not the exception, to corrections practices.[169] The nationwide use of indeterminate sentencing systems in the early to mid-twentieth century resulted in felony offenders receiving maximum imprisonment terms and provided parole boards the authority to determine inmates' release dates based upon "largely subjective assessments of prisoners' moral rehabilitation".[170] In such indeterminate sentencing systems, the release of prisoners prior to the expiration of their sentences was the desired goal, as a prisoner's failure to be provisionally released on parole was viewed as the correctional system's failure to properly rehabilitate the prisoner.[171]

Jurisdictions began to question the fairness of indeterminate sentencing practices in the mid-1970s, sprouting a "truth-in-sentencing" movement that sought to increase the "truthfulness" of sentences, so that an inmate's time of release was closer to the term of years originally imposed by the sentencing court.[172] Truth-in-sentencing legislation was prominent throughout the 1990's, and 41 states had passed laws or imposed state policy addressing truth-in-sentencing reforms.[173] A number of different methods were used by states to regulate the calculation of an offender's time to be served, as compared to the sentence originally imposed. These included:

> 1) The base sentence to which the percentage to be served might be determinate or indeterminate, and for states with indeterminate sentences, the

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[169] Cecilia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 417 (2012).
[170] *Id.* at 418; Harvard Law Review Association, *Indeterminate Sentence Laws: The Adolescence of Peno-Correctional Legislation*, 50 HARV. L. REV. 677 (1937).
[171] Klingele, *supra* note 169, at 418.
[172] *Id*.
[173] WILLIAM J. SABOL, KATHERINE ROSICH, KAMALA MALLIK KANE, DAVID KIRK, & GLENN DUBIN, INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS, EXECUTIVE SUMMARY 1 (National Criminal Justice Reference Service 2002).

> percentage requirements could apply to either the minimum or maximum sentence.
>
> 2) Most states required that offenders serve at least 85 percent of their imposed sentences, but the percentage requirements ranged from 25 percent to 100%.
>
> 3) Some states eliminated parole release and imposed determinate sentences, thereby permitting relatively precise calculations of release dates, assuming that good time credits were earned…
>
> 4) States differed on the types of offenses that were subject to truth-in-sentencing requirements. In some states, all or most felony offenses were subject to truth in sentencing…[174]

Legislative efforts to expand opportunities for early release have recently emerged, indicating a shift away from the sentencing policies of the 1980s and 1990s.[175] The increased costs associated with mass imprisonment of offenders have caused jurisdictions to review the number of inmates within their state correctional systems, as well as the types of offenses that are resulting in long terms of imprisonment.[176] The challenge posed for state lawmakers is significant: Recognizing the need for lengthy sentences in certain cases, while ensuring that sentences are generally served in full; addressing the lack of funding or resources available for existing correctional systems, while not underfunding other state initiatives; and balancing the safety of the public interest against a rehabilitated offenders' urgency to re-enter the community.

Approximately 7 percent of incarcerated American inmates serve a life sentence, while the remaining 93% spend one or more years in prison prior to their release into the community.[177] States have struggled with assisting offenders in the transition from

[174] *Id*.
[175] Klingele, *supra* note 169, at 418.
[176] *Id*. at 419.
[177] *Id.* at 422-423.

the prison environment to the community environment, as a 1990s study demonstrated that 50% to 66% of offenders released into the community were incarcerated within three years of release.[178] In addition, despite the fact that the average prison term is 2.5 years, "many prison terms are short enough so that forty-four percent of all those now housed in state prisons are expected to be released within the year."[179]

In 1998, Kansas reported to the National Center on Institutions and Alternatives that approximately 85% of the state's elderly offender population was classified as non-violent.[180] In fiscal year 2011, 112 out of 753 of elderly offenders age 55 years of age and older (approximately 15%) were incarcerated in Kansas for non-person crimes, such as property and drug offenses.[181] However, it is unclear whether any elderly offenders within this 15% non-violent population are appropriate candidates for early release from the correctional system.

Both functional incapacitation release and terminal medical release are available for offenders seeking options for early release. The state's prisoner review board is charged with granting release to persons deemed functionally incapacitated, subject to administrative rules and regulations promulgated by the secretary of corrections governing the board's procedure for initiating, processing, and reviewing applications for functional incapacitation release.[182] Offenders seeking functional incapacitation release cannot represent a future risk to the safety of the public and meet the board's criteria for functional incapacity.[183] The board may request evidentiary findings or other

[178] *Id.* at 423.
[179] Petersilia, *supra* note 25, at 3.
[180] *Id*.
[181] Frampton, *supra* note 17.
[182] K.S.A. 22-3728.
[183] *Id*.

information from an offender's medical or mental health practitioner, if needed, to properly make a finding or denial of functional incapacitation.

Conditions surrounding an offender's release may be imposed, in addition to the conditions of continued functional incapacity and lack of threat to the public's safety.[184] Offenders that are released are to remain on supervised release, until the revocation of release, expiration of the offender's maximum sentence, or discharge from the corrections system by the prisoner review board.[185] However, a functional incapacitation release cannot be granted by the board until at least 30 days' notice is provided of the application for release to the prosecuting attorney, offender's sentencing judge, and any victim of the offender's crime or victim's family.[186]

The functional incapacitation release statute was recently amended by the 2010 Kansas Legislature. The substantive amendment made to the statute prohibited offenders sentenced to imprisonment for an offgrid offense from eligibility for early release based upon functional incapacity.[187] Elderly offenders convicted of crimes such as capital murder, murder in the first degree, and aggravated human trafficking, despite the age of the offender and degree of functional incapacity, are ineligible for functional incapacitation release in Kansas.[188]

Terminal medical release is also available in Kansas. The chairperson of the prisoner review board is granted the authority to grant release on the basis of a terminal medical condition, subject to a physician's prognosis that the offender is likely to die due

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[184] *Id*.
[185] *Id*. In fiscal year 2011, the prisoner review board did not receive nor review any applications for functional incapacitation release. ANNUAL REPORT: FISCAL YEAR 2011 (Kansas Department of Corrections 2011).
[186] K.S.A. 22-3728.
[187] 2010 Kan. Sess. Laws ch. 107, § 1.
[188] K.S.A. 22-3728; K.S.A. 21-5401, 21-5402, and 21-5426.

to such medical condition within 30 days.[189] Similar to the requirements for functional incapacitation release, an offender seeking release based upon a terminal medical condition must not pose a risk to the public's safety and abide by all conditions imposed by the board. In addition to reviewing a prognosis from a physician that an offender's medical condition is terminal and likely to cause death within 30 days, the chairperson is to consider a number of other factors prior to granting an offender terminal medical release, including the offender's age and personal history, offender's criminal history, length of the sentence imposed and the amount of time served, nature of the circumstances of the offense for which the offender is incarcerated, and risk or threat to the community, if released.[190]

It is clear that the needs of the elderly offender population differ significantly from those of the mainstream offender population. Elderly offenders are institutionalized at varying stages of life, suffer from unique mental and physical health issues, and commit crime for a variety of reasons. Recognizing elderly offenders' right to certain disability accommodations and constitutional protections is imperative for both corrections officials and elderly inmates alike. In addition, application of age-specific programming, health care services, and early release policies to older inmates is only the first step toward addressing the continuing growth of the elderly offender population.

[189] K.S.A. 22-3729.
[190] *Id*.

II. Sentencing Policy in Kansas

Sentencing reform in Kansas came about only after "major flaws in the system of justice were exposed through a combination of litigation and education [of the executive branch]."[191] In order to appreciate the impact of sentencing policy upon the elderly offender population in Kansas, the development of the Kansas Sentencing Guidelines Act requires discussion. In doing so, the interplay between departure sentencing schemes and available aggravating or mitigating factors will be reviewed. Finally, a new sentencing law in Kansas significantly contributing to the growth of the state's elderly offender population will be examined.

A. Kansas Sentencing Guidelines Act

The creation of the Kansas Sentencing Commission in 1989 was a legislative response to overcrowding of inmate populations in state institutions, a state investigation correlating bias in felony offender sentencing with judicial sentencing discretion, and a federal 1989 ruling that inmate overcrowding in Kansas violated the Eighth Amendment.[192] Initially established as a 13-member commission in 1989, the Commission was charged with the development of a sentencing guideline model to reduce sentence disparity and link with correctional resources and policies.

[191] William C. Rich, *Prison Conditions and Criminal Sentencing in Kansas: A Public Policy Dialogue*, 11 Kan J.L. & Pub. Pol'y 693, 694 (2002).
[192] Steven J. Crossland, *Durational and Dispositional Departures Under the Kansas Sentencing Guidelines Act: The Kansas Supreme Court's Uneasy Passage Through Apprendi-land [State v. Carr, 53 P.3d 843 (Kan. 2002)]*, 42 WASHBURN L.J. 687, 700 (2003).

In 1991, the Commission submitted its finalized, statutorily-mandated report to the legislature recommending proposed sentencing guidelines.[193] The report proposed the Kansas Sentencing Guidelines Act (KSGA), which eventually became effective July 1, 1993. The report was to establish a "guideline model or grid establish[ing] rational and consistent sentencing standards…specify[ing] the circumstances under which imprisonment of an offender is appropriate and a presumed sentence for offenders for whom imprisonment is appropriate, based on each appropriate combination of reasonable offense and offender statistics."[194] The Commission stated in the submitted report that the sentences issued under the KSGA were based on the assumptions that imprisonment was to be reserved for serious offenders, and that the primary purposes of a prison sentence were incapacitation and punishment.[195]

In establishing the guidelines, the Kansas Sentencing Commission primarily focused upon sentences imposed in Kansas for the crimes of burglary, drugs and theft.[196] The Commission made a number of conclusions, the most significant of which was the affirmation that racial and geographic biases existed in current sentencing structures, where non-whites experienced higher incarceration and revocation rates, longer minimum sentences, and served longer periods of time incarcerated.[197] The sentencing guidelines recommendations made by the Kansas Sentencing Commission were eventually codified as the Kansas Sentencing Guidelines Act, K.S.A. 21-4701 *et seq.*

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[193] *See* K.S.A. 74-9104. The Kansas Sentencing Commission issued a finalized report of the proposed sentencing guidelines on January 15, 1991, Robert J. Lewis, Jr., *The Kansas Sentencing Guidelines Act*, 38 WASHBURN L.J. 327 (1999).
[194] 1989 Kan. Sess. Laws, ch. 225, § 1.
[195] RECOMMENDATIONS OF THE KANSAS SENTENCING COMMISSION 1 (Kansas Sentencing Commission 1991).
[196] *Id*. at 23.
[197] *Id*. at 25.

The Commission was determined to abandon the former sentencing system in favor of a "level-playing field". As a result, the revised sentencing grid system addressed punishment of offenders by their crimes currently and formerly committed, instead of, unintentionally or not, allowing social or demographic factors play a role in sentence imposition. In organizing the sentencing grids, the Commission intended for crimes to be "ranked" so that punishments imposed were in proportion to the seriousness of the crime committed.[198] Crime seriousness rankings were determined by the Commission based on a number of working principles.[199] The first and third principles led the Commission to rank crimes based on the amount and type of harm caused to society. The second principle ensured that any blameworthiness of the defendant was only to be taken into account upon the evaluation of whether aggravating or mitigating circumstances existed to justify departure from the presumptive sentencing range. In effect, this excluded the offender's personal culpability as a determinant of the crime's seriousness.[200]

A presumptive sentencing system was therefore established by representation of sentencing grids for both non-drug and drug offenses.[201] The grids were two-dimensional, classifying sentences by the severity level of crimes upon the grids' vertical axes and the offender's criminal history upon the grids' horizontal axes.[202] The sentencing grids defined presumptive punishments for felony convictions, yet afforded

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[198] *Id.* at 27.
[199] *Id*. at 28.
[200] *Id.*
[201] 1992 Kan. Sess. Laws, ch. 239, §§ 4, 5. These sections were codified at K.S.A. 21-4704 and 21-4705, respectively. K.S.A. 21-4704 was repealed by 2011 Kan. Sess. Laws, ch. 30, § 288 and K.S.A. 21-4705 was repealed by 2010 Kan. Sess. Laws ch. 136, § 307.The non-drug and drug sentencing grids were recodified at K.S.A. 2012 21-6804 and K.S.A. 21-6805, respectively, under the revised Kansas sentencing guidelines act, K.S.A. 21-6801 *et seq.*
[202] *See* K.S.A. 21-6804 and 21-6805.

the judiciary discretion to depart from the grids' sentencing ranges upon "substantial and compelling" reason to do so.[203]

Each grid "block" stated a presumptive sentencing range with three different numbers, representing the range of months of imprisonment that could be imposed. The number in the middle of the grid block is the "standard" number of months for an offender's sentence, the upper number in the grid block is the "aggravated" number of months, and the lower number in the grid block is the "mitigated" number of months.[204] A dispositional line separates un-shaded grid blocks, which presume a disposition of imprisonment, and shaded grid blocks, which presumes a disposition of presumptive non-imprisonment, or a probation sentence. Certain classifications of grid blocks, known as "border boxes", affords the court the opportunity to impose non-prison or probation sentences upon findings that an appropriate treatment program was available for the offender and would likely prove more effective that presumptive imprisonment, or that the non-prison sanction was in the interest of the community's safety. Structurally, both grids presume the disposition for non-violent offenders to be probation, and presume disposition for violent offenders to be imprisonment.

A sentencing court uses the upper or lower numbers within grid blocks in cases that involve aggravating or mitigating circumstances, but do not justify departure from the sentencing guidelines.[205] However, a court may "depart" upward to increase the length of a sentence, or "depart" downward to lower the duration of a presumptive sentence. This method of "departure" sentencing is considered a durational departure, affecting the duration of time of which the offender is sentenced. The other method of

[203] 1993 Kan. Sess. Laws, ch. 291, § 254.
[204] Kansas Sentencing Guidelines Desk Reference Manual 51 (2011).
[205] *Id.* at 31; K.S.A. 21-6804.

departure sentencing is dispositional departure, in which probation is imposed by the court where the guidelines call for presumptive imprisonment, or imprisonment is imposed where the guidelines call for presumptive probation.[206]

Any departure from the guidelines may also be made by the sentencing court, upon the finding of substantial and compelling aggravating or mitigating circumstances.[207] In considering whether or not substantial and compelling reasons exist for a departure sentence, the court may consider a number of factors, such as whether or not the offender played a minor or passive role in the criminal offense, or whether the offense involved a fiduciary relationship between the defendant and the victim.[208] While the age of the defendant is not explicitly a mitigating factor to be considered by the court, the offender's lack of substantial capacity for judgment when the criminal offense was committed, due to a physical or mental impairment, is a statutorily-prescribed mitigating factor that may be taken into consideration by the sentencing court.

B. Impact of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

In 2000, the United States Supreme Court held that other than the fact of a prior conviction, any fact that would increase a penalty for a criminal offense beyond a prescribed statutory maximum sentencing range must be submitted to a jury and be proven beyond a reasonable doubt. The *Apprendi* court emphasized the criminal defendant's entitlement to a jury determination of every element of the criminal offense charged and the applicability of such Fifth and Sixth amendment protections to

[206] Crossland, *supra* note 192, at 702.
[207] K.S.A. 21-6815.
[208] K.S.A. 21-6815(c)(1)(B) and (c)(2)(D).

defendants charged under state sentencing statutes.[209] In 2001, the Kansas Supreme Court applied *Apprendi v. New Jersey* to the Kansas Sentencing Guidelines' method for imposing upward durational departure sentences. Defendant Crystal Gould had been convicted of three counts of child abuse and subsequently received upward durational departure sentences of 68 month each on two of three counts, to be served consecutively.

The Kansas Supreme Court held K.S.A. 2000 Supp. 21-4716 "unconstitutional on its face", as the statutory sentencing procedure provided for a judge to make the determination as to whether any aggravating factors existed to justify an upward durational departure sentence.[210] Gould's receipt of a sentence beyond the statutory maximum had been based on a court finding of aggravating factors found by a preponderance of the evidence, despite *Apprendi*'s requirement that facts, other than criminal history, enhancing a criminal penalty beyond a statutory maximum must be sent to a fact-finding jury, proven beyond a reasonable doubt.[211] The Kansas Legislature amended both K.S.A. 21-4716 and K.S.A. 21-4718 during the 2002 Legislative Session, in an attempt to cure the constitutional defects with the upward durational departure statutes as outlined by the *Gould* court.[212] Effective June 6, 2002, all aggravating factors that may enhance a maximum statutory sentence are now submitted to the jury, determined beyond a reasonable doubt pursuant to *Gould* and *Apprendi*.[213]

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[209] "The Fourteenth Amendment commands the same answer when a state statute is involved," Apprendi v. New Jersey, 530 U.S. 466 (2000); U.S. CONST. amend. XIV.
[210] State v. Gould, 23 P.3d 801, 814 (2001).
[211] *Id*.
[212] Kansas Sentencing Guidelines Desk Reference Manual, 32 (2011).
[213] K.S.A. 21-6815; formerly K.S.A. 21-4716.

C. Downward Departure Sentencing Based Upon Age: Kansas

While the age of the defendant may be taken into consideration by sentencing courts as a mitigating circumstance to justify departure from the sentencing guidelines, Kansas courts have not yet granted downward durational departure for the few cases that have arisen where old age has been pleaded as a substantial and compelling reason to depart. Only three cases reached the Supreme Court of Kansas seeking departure, involving defendants that were 59, 65 and 76 years of age: *State v. Thomas*, 199 P.3d 1265 (2009), *State v. Villiland*, 227 P.3d 977 (2010), *State v. Spencer*, 248 P.3d 256 (2011). In *State v. Thomas*, 59-year-old Thomas was sentenced to life imprisonment. He moved for downward durational or dispositional departure, indicating his age, among other factors, in support of his motion. Thomas attempted to argue that he would not live long enough to seek an opportunity for conditional release after 25 years.[214] Additionally, he argued that each mitigating circumstance listed in K.S.A. 2006 Supp. 21-4643(d) constituted a *per se* substantial and compelling reason for departure from the guidelines.[215]

The court was not persuaded that each mitigating circumstance *per se* amounted to a substantial and compelling reason for departure. The statutory language of K.S.A. 2006 Supp. 21-4643 supported a two-step analysis: First, a review of the mitigating circumstances, and then second, a determination of whether substantial and compelling reasons to depart existed.[216] The appellate court ultimately affirmed the lower court's decision to deny sentence departure.

[214] State v. Thomas, 199 P.3d 1265, 1267 (2009).
[215] *Id.* at 1269-1270.
[216] *Id*. at 1270; State v. Ortega-Cadelan, 194 P.3d 1195 (2008).

In *State v. Gilliland*, 227 P.3d 977 (2010), Gilliland also challenged the district court's denial of his motion for a downward departure sentence. Gilliland indicated his age of 65 in support of his motion, in addition to other mitigating factors (lack of prior criminal activity, acceptance of responsibility for his actions, etc.) The district court considered his age and his lack of prior criminal activity to be the most significant mitigating factors supporting sentence departure. In weighing the evidence against such factors, both district and appellate courts supported denial of Gilliland's motion, as the severity of Gilliland's conduct outweighed Gilliland's arguments.

The 2011 case of *State v. Spencer* is a recent case addressing age as a mitigating factor in sentencing, involving a much older defendant at 76 years of age. Spencer pleaded guilty to 2 counts of aggravated indecent liberties with a child, felonies punishable under Jessica's Law. [217] Jessica's Law increases the penalty for certain sex crimes when the offender is 18 years of age or older and the victim is less than 14 years of age, and applies a "hard-25" sentence of presumptive imprisonment. Spencer moved the district court for departure, listing his age of 76 (among other mitigating factors) in support of his motion.[218]

Surprisingly, the district court granted his motion for departure, and departed both durationally and dispositionally. In outlining the reasons for departing dispositionally, the district court judge stated that "it would not serve the end of justice to incarcerate the defendant. I think that a significant amount of time in prison would be tantamount to a life sentence for this man in light of his age, and age is listed as one of the reasons to depart. Usually we think of that as a young person not really aware of his

[217] State v. Spencer, 248 P.3d 256, 260 (2011).
[218] *Id*.

responsibilities, but I think it also can be interpreted as age in the sense of an elder person."[219]

On appeal, the Kansas Supreme Court rejected the lower court's approach to age as a mitigating factor warranting sentence departure, indicating that Spencer's age of 76 was irrelevant. The appellate court viewed the lower court's treatment of Spencer's age as recognition of the fact that a Jessica's Law hard-25 was ultimately a life sentence.[220] However, the supreme court indicated that age was to be considered as a statutory mitigating factor if it affected the defendant's judgment at the time the crimes were committed (citing *State v. Favela*, 911 P.2d 792, 806 (1996), applying the doctrine of *expressio unius est exclusio alterius* to conclude that the defendant's young age at the time of the offense in itself was not a substantial and compelling reason, though it may be considered as part of the overall decision to grant or deny departure).

Old age has been a hard sell for the Kansas courts as a condition sufficient to warrant a downward sentencing departure. The few instances in which age has been applied in sentencing departure cases have involved the immaturity, not maturity, of the defendant.[221] In addition, when youth is considered as a factor warranting departure, the Kansas Supreme Court has emphasized that a defendant's youth was only to be considered as "part of the entire package of justifications" to depart downward, as youth was not a substantial and compelling reason to depart as a matter of law.[222]

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[219] *Id*.
[220] State v. Spencer, 248 P.3d 256, 268 (2011).
[221] *See, e.g.*, State v. Favela, 911 P.2d 792 (1996) (affirming dispositional and durational downward departure sentence for 17-year-old defendant's second-degree murder conviction, where court based its departure upon a number of factors, one of which was the defendant's youth); *see also* State v. Ussery, 116 P.3d 735 (2005) (reflecting upon the fact that both legislative and judicial branches have considered the relative immaturity of a defendant when reviewing mitigating sentencing factors).
[222] State v. Favela, 911 P.2d 792, 806 (1996).

D. Downward Departure Sentencing Based Upon Age: Federal

The Federal Sentencing Guidelines are a result of the passage of the Sentencing Reform Act in 1984, promulgated by the United States Sentencing Commission and issued pursuant to section 994(a) of Title 28 of the United States Code.[223] Early versions of the Federal Sentencing Guidelines were intentionally drafted to discourage judicial discretion in departing from the recommended sentencing framework, imposing a requirement that a judge state the specific reasons for sentencing the defendant against the guidelines' recommendations.[224] However, application of the sentencing guidelines for offenders did not entirely eliminate judicial discretion, understanding that offenders and their subsequent crimes are not, in all cases, uniform in circumstance. A departure scheme was ultimately developed for such unusual cases, to impose punishments outside of the recommendations of the guidelines' sentencing framework.[225]

The federal sentencing guidelines took effect in 1987, which included policy statements on age and physical condition, as specific offender characteristics to be considered in determining imposition of a sentence.[226] Since 1987, the guidelines' policy statements on age and physical condition have been amended multiple times. Prior to the 2010 amendments, the policy statements have always reflected, in one manner or another, that age and physical condition were not, ordinarily, relevant in the

[223] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).
[224] John D. Burrow & Barbara A. Koons-Witt, *Elderly Status, Extraordinary Physical Impairments and Intercircuit Variation Under the Federal Sentencing Guidelines*, 11 ELDER L.J. 273, 279 (2003); *see also* 18 U.S.C. § 3553(b).
[225] *Id.*
[226] U.S.S.G. § 5H1.1 (2010).

sentencing court's consideration of whether to depart from the guidelines.[227] The following tables demonstrate the amendments to U.S.S.G. §§ 5H1.1 and 5H1.4 since 1987:

Year	TABLE 1: Language of § 5H1.1 of the U.S.S.G.
1987	Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. Age may be a reason to go below the guidelines when the offender is elderly and infirm and where a form of punishment (e.g., home confinement) might be equally efficient as and less costly than incarceration. If, independent of the consideration of age, a defendant is sentenced to probation or supervised release, age may be relevant in the determination of the length and conditions of supervision.
1991	Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guidelines. ~~Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options.~~ Age may be a reason to ~~go~~ impose a sentence below the ~~guidelines~~ applicable guideline range when the ~~offender~~ defendant is elderly and infirm and where a form of punishment ~~(e.g., home confinement)~~ such as home confinement might be equally efficient as and less costly than incarceration. ~~If, independent of the consideration of age, a defendant is sentenced to probation or supervised release, age may be relevant in the determination of the length and conditions of supervision.~~ [Irrelevant amendments omitted]
1993	[Irrelevant amendments omitted]
2004	Age (including youth) is not ordinarily relevant in determining whether a ~~sentence should be outside the applicable guideline range~~ departure is warranted. Age may be a reason to ~~impose a sentence below the applicable guideline range when~~ depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. [Irrelevant amendments omitted]
2010	~~Age (including youth) is not ordinarily relevant in determining whether a departure is warranted.~~ Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. [Irrelevant amendments omitted]

[227] *Id*. Amendments took effect November 1, 1991, November 1, 1993, November 1, 2004. *See also*, U.S. Sentencing Guidelines Manual, ch. 1, pt. (A)(4)(b) (1993).

Year	TABLE 2: Language of § 5H1.4 of the U.S.S.G.
1987	Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. However, an extraordinary physical impairment may be a reason to impose a sentence other than imprisonment. [Irrelevant amendments omitted]
1991	Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the ~~guidelines~~ applicable guideline range ~~or where within the guidelines a sentence should fall~~. However, an extraordinary physical impairment may be a reason to impose a sentence other than imprisonment. [Irrelevant amendments omitted]
1997	[Irrelevant amendments omitted]
2003	Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a ~~sentence should be outside the applicable guideline range~~ departure may be warranted. However, an extraordinary physical impairment may be a reason to ~~impose a sentence other than imprisonment~~ depart downward; e.g. in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.
2010	~~Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted.~~ Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. ~~However,~~ An extraordinary physical impairment may be a reason to depart downward; e.g. in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

The United States Sentencing Commission recognized a decrease in application of guidelines manual departure provisions in favor of sentencing variances across the circuits and undertook a review of the departure provisions of the manual in 2009.[228] Amendments to the guidelines' policy statements on age and physical condition were made in 2010. In the development of such amendments, the commission was concerned with presenting the federal courts with a sentencing scheme that would take

[228] 74 FR 46478, 46479 (September 9, 2009); U.S.S.G. § 5H1.1, Historical Notes, 2010 Amendments.

into account specific characteristics of an offender for application to sentence imposition in a consistent manner.[229] Uniform application of the sentencing guidelines was important to the commission, for purposes of "securing nationwide consistency" and "avoid[ing] unwarranted sentencing disparities" among defendants with similar criminal histories.[230]

As a result, it was recommended by the commission that courts do not give any specific weight to offender characteristics and consider an offender's characteristics broadly. The sentencing range provided by the guidelines was to continue to serve as "the starting point and the initial benchmark" of an offender's sentence, as range calculations were based upon the offender's criminal history and criminal conduct.[231] However, after review of federal sentencing data, federal case law, testimony from the public, and commentary from federal judges, the U.S. Sentencing Commission adopted an amended departure standard with regard to age in 2010.[232] Both policy statements on age and physical condition in U.S.S.G. §§ 5H1.1 and 5H1.4 were changed from age and physical condition initially considered as "not ordinarily relevant" in determining whether a departure is appropriate to a statement that age and physical condition "*may be relevant*" in such a determination (emphasis added). Further, the 2010 amendments continued to provide that age and physical condition, "individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines", may be relevant in the court's

[229] U.S.S.G. § 5H1.1, Historical Notes, 2010 Amendments, citing Gall v. U.S., 552 U.S. 38, 49 (2007), 28 U.S.C. § 991(b)(1)(B).
[230] *Id*.
[231] *Id*.; 18 U.S.C. § 3553(a).
[232] U.S.S.G. § 5H1.1, Historical Notes, 2010 Amendments.

determination of whether to grant a departure sentence. U.S.S.G. §§ 5H.1.1 and 5H1.4 (2010).

There have been no cases discussing these specific guidelines' policy statements since the passage of the 2010 amendments.[233] The 2010 amendments are unique in that the tone of the first sentence was changed from a negative to positive outlook; almost 20 years of guidelines policy indicated that age and physical condition were "*not* ordinary relevant" and were recently changed to affirmative statements supporting the notion that such conditions *"may* be relevant" in sentencing.[234] It is unclear how courts will approach the U.S. Sentencing Commission's shift in drafting style of the guidelines' age and physical condition policy statements. Currently, it appears that the majority of courts review both U.S.S.G. §§ 5H1.1 and 5H1.4 policy statements in the evaluation of the elderly status of the defendant, and that a court's departure from the sentencing guidelines generally occur in the atypical circumstance clearly demonstrating the defendant's infirmity, limited life expectancy, and affliction with chronic, debilitating health conditions that would be more efficiently treated in home detention.

Whether or not deciding to depart from the recommended guidelines, a number of federal courts have adopted the federal policy guideline rejecting age as a sole mitigating factor to justify a departure sentence.[235] Though a rare occurrence,

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[233] A recent case discussing U.S.S.G. § 5H1.4 is U.S. v. Kurland, 718 F.Supp.2d 316 (2010). The Kurland court was not convinced that the defendant's various health issues, ranging from diabetes, prostate cancer, and hyperlipidemia amounted to the "extraordinary" physical impairment standard under the federal sentencing guidelines. However, this decision was based on the 2003 version of U.S.S.G. § 5H1.4, as the court's decision came down on May 26, 2010, and the 2010 amendments did not take effect until November 1, 2010.

[234] U.S.S.G. §§ 5H.1.1 and 5H1.4 (2010).

[235] *See, e.g.* U.S. v.Thornbrugh, 7 F.3d 1471, 1474 (1993) (interpreting U.S.S.G. § 5H1.1 to mean that age, without other mitigating factors, is generally irrelevant for purposes of sentence departure); U.S. v.

sentencing courts have departed downward upon a finding of "extraordinary circumstances" to justify such a departure.[236] In *U.S. v. Baron*, 914 F.Supp. 660 (1995), the sentencing court considered the defendant's age of 76 and extent of his physical infirmities for purposes of determining whether a departure sentence was appropriate. The court considered defendant Baron's life expectancy of 7.39 years, noting that very few cases involve defendants in Baron's age range, and interpreted the U.S.S.G. § 5H1.1 (1993) policy statement as providing judicial discretion to consider the defendant's age, *in conjunction with infirmity*, in order to make a quantitative judgment on departure (emphasis added).[237] These 2 factors were thus evaluated, in light of whether home detention would be as efficient, or less costly than, incarceration.[238]

The court found defendant Baron's medical condition to be unstable, and complex: Baron's pituitary gland had been removed, requiring treatment with steroid replacement drugs; physicians suspected Baron of having prostate cancer, and confirmed the presence of coronary artery disease and hypertension. Baron's physician perceived that incarceration would only exacerbate the defendant's other chronic medical conditions, potentially "precipitat[ing] a serious cardiovascular event", which is a physiological reaction that would be difficult to control.[239] The court rejected the Bureau of Prisons' argument that the federal facility in Fort Worth, Texas would be able to

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Goff, 20 F.3d 918, 921 (1994) (referring to the courts' history of denying departures for healthy defendants in the appellee's late 60's age group).

[236] *See, e.g.* U.S. v. Guajardo 950 F.2d 203 (1991) (55-year-old defendant's age not an "extraordinary circumstance" justifying departure sentence on the basis of advanced age); U.S. v. Haversat, 22 F.3d 790 (1994) (50-year-old defendant's age did not justify departure based on advanced age); *see also* Burrow & Koons-Witt, *supra* note 224, at 279, 322 (demonstrating intercircuit variation of departure sentencing based on elderly status or extraordinary physical impairments. The Second and Ninth circuits reflected the greatest amount of variation in the discretion to depart downward, in contrast to the Seventh and Eleventh circuits, which were found to have significantly less variation).

[237] U.S. v. Baron, 914 F.Supp. 660, 662 (1995).

[238] *Id*. at 663.

[239] *Id.* at 664.

accommodate Baron's medical needs, as imprisonment had a significant potential of triggering a life-threatening event.[240]

Recognizing the high costs associated with incarcerating the infirm elderly, as compared to incarcerating younger offenders, coupled with the fact that home detention is significantly less expensive and more efficient, the court departed downward to one year of probation, six months of which were to be served in home detention. Several cases were cited in support of the decision to depart, noting that departures had been imposed in cases where the defendants were younger and "less infirm" than Baron.[241] However, the cited case law merely departed in duration, due to the nature of the crimes committed and the substantial sentencing ranges recommended by the guidelines. The *Baron* court's departure differed in this regard, as a dispositional departure sentence, part of which was to be served in home detention.[242] In summarizing the justifications for departing from the federal sentencing guidelines, the court quoted U.S. federal district judge Jack Weinstein: "Some [offenders] would be destroyed by a term in prison. There are defendants for whom prison incarceration makes no sense."[243]

Judge Weinstein himself has departed from the federal sentencing guidelines in the U.S. District Court, Eastern District of New York. In *U.S. v. Gigante*, 989 F.Supp. 436 (1998), 69-year-old gang boss was convicted of racketeering and conspiracies involving racketeering and faced a statutory maximum concurrent term of life

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[240] *Id*.
[241] *Id*. at 665, citing U.S. v. Maltese, 1993 WL 222350 (1993) (downward departure granted to 62-year-old defendant suffering from liver cancer); U.S. v. Moy, 1995 WL 311441 (1995) (78-year-old defendant suffering from coronary artery disease, recent hernia repair, and depression granted a 48-month departure to a 30-month sentence for an illegal gambling conviction).
[242] U.S. v. Baron, *supra* note 237, at FN 14.
[243] *Id*. at 665, citing Jack B. Weinstein, *Prison Need Not be Mandatory, There are Options Under the New U.S. Sentencing Guidelines*, 28 No. 1 Judge J. 16, 18 (1989).

imprisonment, or a statutory maximum consecutive term of two life sentences in addition to thirty-five years imprisonment. The trial and sentencing hearings were highly publicized, due to Gigante's notorious position as head of the New York-based, Italian-American Genovese crime family.[244] The court paid special attention to the fact that Gigante had entered old age, recognizing that the defendant was a different person than the young man who had participated in decades of criminal conduct. However, it was emphasized that imposing punishment upon the aged was necessary:

> While the ancient is in a sense a different person from who he was in his youth, deterring the young requires the law to insist that there be no escape from the whip of justice in aging…we must be careful not to push the concept of multiple selves to the point of saying that an old person may not be punished for crimes he committed when young because they are different selves. The pragmatic reason is such a policy that would reduce the effect of the threat of punishment in deterring crime…[245]

The court recognized that departure from the sentencing guidelines was intended by the U.S. Sentencing Commission only in atypical cases where a specific guideline was textually applicable, but aggravating or mitigating circumstances existed to such a degree that a departure was warranted.[246] As a result, Vincent Gigante was sentenced to twelve years of imprisonment with a recommendation that the twelve-year term be served in a federal correctional facility able to accommodate Gigante's medical and psychiatric health needs.[247] Gigante's age and infirmity were taken into account by the *Gigante* court, ultimately resulting in a decision to depart from the federal sentencing

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[244] The court opinion noted that Gigante was one of the nation's "most notorious organized crime figures….a leader in the world of crime" and indicated that he had been promoted to many leadership positions within the Genovese family, including Captain and Consigliere. *U.S. v. Gigante*, 989 F.Supp. 436, 440 (E.D.N.Y. 1998); *see also* Selyun Raab, *Vincent Gigante, Mafia Leader Who Feigned Insanity, Dies at 77*, THE NEW YORK TIMES, Dec. 19, 2005, http://www.nytimes.com/2005/12/19/obituaries/19cnd-gigante.html.

[245] U.S. v. Gigante, 989 F.Supp. at 441, quoting RICHARD A. POSNER, AGING AND OLD AGE 90 (1995).

[246] *Id*.; U.S.S.G. § 5K2.0; 18 U.S.C. § 3553(b).

[247] U.S. v. Gigante, 989 F.Supp. at 443-444. Gigante was also fined $1,250,000 by the court.

guidelines. However, unlike the dispositional and durational departure taken in *U.S. v. Baron*, the Honorable Judge Weinstein imposed only a durational departure for the 69-year-old mobster. In recognition that an upward, horizontal departure would demonstrate "a futile act of cruelty" despite the defendant's considerable extensive criminal history and egregious criminal conduct, probation was found to be "entirely inappropriate" for a criminal such as Gigante.[248]

Not all federal courts have taken the *Baron* and *Gigante* approaches in imposing downward departure sentences from the sentencing guidelines under U.S.S.G. § 5H1.1 based on age and infirmity. The Seventh Circuit, for example, has construed and strictly applied policy statements such as the U.S.S.G. § 5H1.1 policy statement on age.[249] Discussing the Seventh Circuit's application and interpretation of U.S.S.G. § 5H1.1, the district court in *U.S. v. Tolson*, 760 F.Supp. 1322 (1991) declined to depart from the guidelines in the sentencing of 60-year-old defendant Tolson, convicted of participating in a drug conspiracy involving the transport of three to four thousand pounds of marijuana from Indiana to New York. Tolson, at the age of 60, suffered from a myriad of medical problems, including fungal fingernail and toenail infections, nerve damage, episodes of fainting, circulatory system problems, arthritis, and lung disease.[250] However, even under the court's assumption that 60 years of age implied elderly status, Tolson's physical impairments did not amount to "extraordinary" disabling, according to the court, and precluded departure on the basis of age, infirmity,

[248] *Id*. at 440, 442.
[249] U.S. v. Tolson, 760 F.Supp. 1322, 1331 (1991).
[250] *Id.* at 1330. Among other health problems, Tolson specifically suffered from onychomycosis of his fingernails and toenails, peripheral neuropathy, syncope, and emphysema.

or physical impairment pursuant to U.S.S.G. §§ 5H1.1 and 5H1.4.[251] As a result, Tolson was sentenced within the guidelines' range of 168 to 210 months (14 to 17.5 years of imprisonment).[252]

Other jurisdictions have refused to depart on the basis of age, due to a lack of a finding that the defendant was "advanced" in age or that the defendant's age amounts to, individually, an "extraordinary" circumstance.[253] In *U.S. v. Booher*, 962 F.Supp. 629 (1997), the court reviewed both the age and physical condition policy statements of the federal sentencing guidelines prior to denying the 64-year-old defendant with an advanced age and failing health a downward departure under the guidelines.[254] Booher suffered from coronary heart disease, which the court eventually determined did not amount to an "extraordinary physical impairment" recommended by the guidelines as a reason for a court to impose a sentence below the applicable range:

> Many elderly defendants will suffer from heart problems, and not all of them should benefit from a downward departure. Recognizing such a general exception would carve a hole in the [U.S. Sentencing] Guidelines which the [U.S. Sentencing] Commission never intended. The guidelines specifically state that the medical condition must be "an *extraordinary physical impairment*"… [255]

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[251] *Id*. at 1331.
[252] *Id*. at 1332.
[253] *See, e.g*., U.S. v. Guajardo, 950 F.2d 203 (1991) (defendant's age of 55 years was not an "extraordinary circumstance" warranting downward departure on the basis of advanced age); U.S. v. Haversat, 22 F.3d 790 (1994) (50-year-old defendant denied downward departure on the basis of advanced age); U.S. v. Dowd, 451 F.3d 1244 (2006) (affirming district court's sentence of 65-year-old defendant within sentencing guidelines range); U.S. v. Harrison, 970 F.2d 444 (1992) (64-year-old defendant denied downward departure solely on the basis of age; defendant failed to demonstrate that her age and health condition amounted to an "extraordinary circumstance").
[254] U.S.S.G. §§ 5H1.1 & 5H1.4. The district court case was reversed by U.S. v. Booher, 159 F.3d 1353 (1998), an unreported opinion.
[255] *Id*.; U.S. v. Booher, 962 F.Supp. 629, 633-634 (1997). *See also*, U.S. v. Charles, 531 F.3d 637 (2008)(53-year-old defendant that suffered from congestive heart failure, among other health conditions, denied departure sentence after court's three-step analysis of whether the defendant had an "extraordinary" physical impairment).

The federal sentencing guidelines, while entirely different from the Kansas Sentencing Guidelines Act, may continue to serve as a model of sentencing policy as applied to elderly and infirm offenders. The consideration of age and physical condition by the federal guidelines as potential legal justification for elderly offender departure sentencing is compelling, especially in light of the recent 2010 amendments. While elderly and infirm defendants have been generally unsuccessful in seeking departure sentences based upon age and physical condition in federal court, there have been few documented cases where downward durational or dispositional departures have been granted. With the rise of Kansas' elderly offender population, the application of old age and physical infirmity by state sentencing courts may be appropriate.

E. Jessica's Law in Kansas

Kansas' prison population has increased significantly in fiscal year (FY) 2012, a third consecutive year in which admissions to prison exceeded releases from prison.[256] In calculating the projections for the Kansas prison population in FY 2013, the Kansas Sentencing Commission noted six sentencing policies adopted by the Kansas Legislature since 2006 that have contributed to the prison population's growth. These included 2006 Senate Substitute for House Bill 2576, or otherwise commonly known as "Jessica's Law", 2008 House Bill 2707, and 2010 House Bill 2435. All three legislative policies have contributed to the number of Kansas elderly offenders or offenders aging within the Kansas correctional system. However, for purposes of discussion, "Jessica's

[256] KANSAS SENTENCING COMMISSION, FISCAL YEAR 2013 ADULT INMATE PRISON POPULATION PROJECTIONS 1 (Kansas Sentencing Commission, August 2012).

Law" is most profound, bringing back mandatory minimum sentencing law from the 20th century.

The criminal statute dubbed "Jessica's Law" stemmed from a Florida child-sex law enacted in May of 2005, following the death of a 9-year-old girl named Jessica who was murdered by her neighbor John E. Couey, a convicted sex offender.[257] Jessica's death was discovered in March; the bill quickly passed through the state legislature after an April murder of 13-year-old Sarah Lunde, also murdered by a registered, convicted sex offender. Jessica's Law mandated a 25-year term of imprisonment for persons convicted of certain sex crimes against children aged 11 years or younger, as well as GPS-satellite lifetime monitoring after release from prison.[258]

The Kansas equivalent of Florida's Jessica's Law was enacted in 2006, when the Kansas Legislature established mandated minimum terms of imprisonment for first-time sex offenders. The term of years in which a convicted offender would be incarcerated, without eligibility for parole until the term of confinement had been served, depended upon the type of crime committed. K.S.A. 21-6627 (formerly K.S.A. 21-4643) mandated a term of imprisonment, without possibility of parole, for either 25 ("Hard 25") or 40 ("Hard 40") years, depending upon the offender's sex crime conviction.[259] Hard 25 sentences were to be imposed in cases where the defendant was a first-time sex offender and the victim was a child. Hard 40 sentences were to be imposed for second-

[257] KANSAS LEGISLATIVE RESEARCH DEPARTMENT (KLRD), 2011 LEGISLATOR BRIEFING BOOK 5 (Kansas Legislative Research Department, 2011).
[258] *Id*. at 5-6.
[259] K.S.A. 21-6627; 2006 Kan. Sess. Laws, ch. 212, § 2; 2007 Kan. Sess. Laws, ch. 198, § 5; 2010 Kan. Sess. Laws ch. 109, § 18; 2010 Kan. Sess. Laws, ch. 155, § 7; Repealed, 2011 Kan. Sess. Laws, ch. 30, § 288.

time sex offenders. Sex offenders convicted of third or subsequent sex crimes were to serve a life sentence without the possibility of parole.[260]

Hard 25 sentences generally require first-time sex offenders 18 years of age or older, where the victim was less than 14 years of age, to serve a 25-year mandatory term of imprisonment for convictions of aggravated human trafficking, rape, aggravated indecent liberties with a child, aggravated criminal sodomy, promoting prostitution, sexual exploitation of a child, or an attempt, conspiracy or criminal solicitation of such crimes.[261] A sentencing judge is statutorily required to impose the mandatory minimum term unless such judge otherwise finds substantial and compelling reasons to depart, after a review of any mitigating circumstances. In departing from the mandatory minimum term of incarceration, the sentencing judge is required to state on the record such substantial and compelling reasons justifying the departure.[262]

Though the statute proposes that both the age and mental capacity of the defendant can be considered by the sentencing court as mitigating circumstances possibly warranting departure from the mandatory imprisonment term, no Kansas court has chosen to depart on the basis of old age.[263] As previously discussed, the Kansas Supreme Court has indicated that advanced age, if it has no effect upon the defendant's judgment at the time of the crime, will not constitute a substantial and compelling reason to depart from the hard 25 of Jessica's Law.[264] A limited number of cases have departed from the hard 25 minimum sentence where the defendant's mental capacity had been impaired at the time the offense was committed. In *State v. Gracey*, 200 P.3d

[260] KLRD, *supra* note 257, at 9.
[261] K.S.A. 21-6627.
[262] *Id*.
[263] K.S.A. 21-6627(d)(2)(E) and (F).
[264] State v. Spencer, 248 P.3d 256 (2011).

1275 (2009), the defendant had an IQ of 50, which the court acknowledged as a reason to depart downward from the 25-year minimum sentence for a conviction of aggravated indecent liberties with a child.

The statutory provision surrounding departure sentencing is codified at K.S.A. 21-6815, which provides that an offender's physical or mental impairment may be considered in the court's determination of whether substantial or compelling reasons existed to justify departure, if such impairment caused the offender to lack substantial capacity for judgment at the time of the offense.[265] This provision, housed within the revised Kansas sentencing guidelines act, K.S.A. 21-6801 through 21-6824, differs from the U.S. Sentencing Guidelines' provisions on age and physical impairment in that it does not specifically reference age or physical impairment (where the defendant is advanced in age and infirm) as a potential reason for the sentencing court to depart downward.[266] In addition, the federal guidelines suggest that age or physical condition may be a reason to depart if home detention, for example, proves equally efficient as and less expensive than imprisonment.[267]

The enactment of Jessica's Law by the 2006 Kansas Legislature has greatly increased the offgrid offense prison admissions, as certain child sex offenders previously classified as nondrug severity levels I, II, II and V will be re-classified as offgrid offenders serving a mandatory minimum sentence of 25 years imprisonment.[268] In FY 2012, 75 offenders were admitted to the Kansas corrections system under

[265] K.S.A. 21-6815(c)(1)(C).
[266] U.S.S.G. §§ 5H1.1 and 5H1.4.
[267] *Id*.
[268] KANSAS SENTENCING COMMISSION, FISCAL YEAR 2013 ADULT INMATE PRISON POPULATION PROJECTIONS 3 (Kansas Sentencing Commission, August 2012).

Jessica's Law convictions for sex crimes, 6 more admissions than FY 2011.[269] Of the 75 offenders, 31 received a 25-year or more minimum term of imprisonment, and 44 offenders were imposed departure sentences below 300 months' imprisonment (25 years). After a review of the sentencing data, the Kansas Sentencing Commission concluded that approximately 58.7% of the sentences imposed were downward durational departures from the sentencing guidelines, averaging approximately 126.9 months (approximately 10.6 years).[270] The most common reasons for departure cited by the Kansas courts in such cases included the fact that the defendant had no prior or no criminal history, or had entered into a plea agreement with the state recommending a downward sentence departure.[271]

Data from the Kansas Sentencing Commission reflects that FY 2012 demonstrates a total of 82 offenders sentenced under Jessica's Law. All 82 offenders were imprisoned as a result of the 2008 amendments to K.S.A. 21-4719 (currently codified at K.S.A. 21-6818), which prohibited downward dispositional departures in the sentencing of defendants convicted of a crime of extreme sexual violence.[272] This sentencing policy change was a result of the 2008 Kansas Legislature, through 2008 House Bill 2707. Sentencing courts were only provided flexibility to depart downward in duration for crimes of extreme sexual violence to less than 50% of the center of the range of the guideline sentence.[273] As a result of 2008 House Bill 2707, all 82 offenders that were sentenced under Jessica's Law during FY 2012 were imprisoned, 77

[269] *Id*. at 14.
[270] *Id*.
[271] *Id*.
[272] *Id*. A crime of "extreme sexual violence" is a felony crime specifically listed under K.S.A. 21-6815(c)(2)(F)(i).
[273] K.S.A. 21-6818.

offenders sentenced offgrid and 5 offenders sentenced of attempt at nondrug severity level I.[274]

III. Recommendations

A. Proposed State Agency Policy Changes

Many jurisdictions have come to recognize a need to evaluate their respective elderly offender populations, using the results of their evaluations to make changes to the housing conditions, physical and educational programming, and health care treatment within prison facilities. The decision to open a geriatric correctional facility is only one way to address the problem of the rising Kansas elderly offender population. However, the decision will prove beneficial for the overall Kansas prisoner population, with the movement of approximately 232 minimum custody elderly offenders from current prison placements to the renovated Labette Correctional Conservation Camp. By segregating elderly Kansas inmates at Labette, the state department of corrections will have a better understanding of the elderly offender population's varying needs.

For example, the state correctional agency will be in a better position to justify expenditures specifically targeted for the benefit of elderly offenders housed at the newly-renovated Labette facility. Architectural or structural changes to the Labette facility may be in order, depending upon the number of elderly offenders housed with physical disabilities. While the Americans with Disabilities Act of 1990 (ADA) may not require complete renovation of a correctional facility, the agency should be continually

[274] KANSAS SENTENCING COMMISSION, *supra* note 268, at 18. Sentences were imposed in accordance with the Kansas Supreme Court ruling in *State v. Horn*, 206 P.3d 526 (2009).

aware of case law involving ADA complaints and wheelchair-bound inmates.[275] ADA compliance aside, the state department of corrections may be inclined to install grab bars in the shower or place mobility-impaired inmates in cell blocks closest to services solely on its own initiative, for purposes of easing the work of correctional officers. The elderly offender population at Labette will likely take a longer amount of time to execute prison activities of daily living, in addition to standard activities of daily living. In the renovation of the Labette facility, the agency should consider the installation of hospital-style beds, or, at the very least, beds with railings. Bunk-style beds will surely cause problems for the geriatric offender population, including the inability to climb into the top bunk or potential for falls, causing medical care expenses. Instead, grab bars on beds and showers will prove to expedite the process of an elderly offender's activities of daily living, thus allowing the geriatric facility to run more efficiently.

The Kansas department of corrections should also consider implementation of appropriate age-specific programming for the Labette elderly offender population. Since correctional programming opportunities are intended to serve as both an educational and rehabilitative tool, such programming should be specifically designed for the needs of the target population. For example, programs emphasizing life-span experiences, such as death in prison, medication management, addressing age-related impairments (e.g. mobility impairments and sensory decline), or understanding how to apply for social security and Medicare benefits, are all appropriate for application to the elderly offender population. However, standard programming like substance abuse or high school equivalency education should not be discontinued, as such programming continues to have relevance to and benefit the older offender population.

[275] *See, e.g,* U.S. v. Georgia., 546 U.S. 151, 159 (2006).

In assisting elderly offenders with the transition to the Labette facility, correctional officers and correctional medical staff may recognize a number of differences in working with the older offender population. Continuing education hours in the areas of prisoner disability, geriatric prisoners, dementia, and death or bereavement may better equip Labette correctional staff in the treatment, monitoring, and discipline of Labette elderly offenders. Finally, implementation of a prison hospice program may prove beneficial as an end-of-life treatment option for elderly offenders, correctional staff, and the agency's health care budget.

B. Proposed Legislative Policy Changes

A number of policy changes can be implemented by the state legislative branch to curb the problem of the rising elderly offender population in Kansas. First, sentencing policy can be amended to incorporate the factors of age and physical condition of the elderly defendant, similar to the approach taken by the federal sentencing guidelines. Specifically, subsection (c)(1) of K.S.A. 21-6815 can be amended to allow the sentencing court to consider the mitigating factors of advanced age and physical infirmity:

> (c)(1) Subject to the provisions of subsections (c)(3) and (e), the following nonexclusive list of mitigating factors may be considered in determining whether substantial and compelling reasons for a departure exist:
>
> (A) The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction.
>
> (B) The offender played a minor or passive role in the crime or participated under circumstances of duress or compulsion. This factor may be considered when it is not sufficient as a complete defense.

(C) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs or alcohol does not fall within the purview of this factor.

(D) The offender's extraordinary physical impairment, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from typical cases covered by the guidelines.

(E) The offender's age, including youth, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from typical cases covered by the guidelines.

~~**(D)**~~ **(F)** The defendant, or the defendant's children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

~~**(E)**~~ **(G)** The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.

Proposed subsections (c)(1)(D) and (c)(1)(E) of K.S.A. 21-6815 are an attempt to mirror United States Sentencing Guidelines §§ 5H.1.1 and 5H1.4 (2010). Currently, K.S.A. 21-6815(c)(1)(C) takes into consideration the offender's physical or mental impairment and whether such impairment had affected the judgment of the offender in the commission of the crime. However, this paragraph addresses impairment in light of the offender's *judgment*; an offender with an extraordinary physical impairment which did not influence the decision of the offender to commit the crime is not considered by the sentencing statute as a potential mitigating factor (emphasis added). Proposed subsection (c)(1)(D) would provide the sentencing court flexibility to consider an offender's *extraordinary* physical impairment, which exists to an *unusual degree*, and is a *distinguishing* case from others considered under the sentencing guidelines (emphasis added).

As U.S.S.G. § 5H1.4 acknowledges, the offender's physical impairment is to be extraordinary, to such an unusual degree that it reflects distinguishing characteristics from other cases. These limitations are important so as to filter out offenders seeking departure sentences that suffer from physical health conditions common among prison populations such as heart or nerve problems.[276] The ability of the court to consider extraordinary physical impairment as a mitigating factor may potentially result in a downward sentencing departure. In such an event, the Kansas department of corrections will ultimately realize cost savings to their agency if the offender is sentenced to a shorter term of imprisonment or probation.

In addition, the age of the defendant is added as a mitigating factor under proposed subsection (c)(1)(E) of K.S.A. 21-6815. However, similar to U.S.S.G. § 5H1.1 (2010), the age of the offender must be such an unusual condition that such offender's case is distinguishing from standard cases reviewed under the sentencing guidelines. Advanced age, of itself, should not constitute a substantial and compelling reason to warrant a downward sentence departure. Instead, the proposed K.S.A. 2012 Supp. 21-6815(c)(1)(E) should be utilized by state sentencing courts to find unusual cases where the defendant's age, possibly in combination with other offender characteristics, demonstrates a need for a mitigated sentence.

A second proposed policy change that could be implemented by the Kansas Legislature requiring the state's sentencing scheme to take into account advanced age and physical impairment is an amendment to K.S.A. 22-3717(h), which outlines certain

[276] *See, e.g.,* U.S. v. Tolson, 760 F.Supp. 1322, 1330 (1991); U.S. v. Booher, 962 F.Supp. 629, 633-634 (1997).

factors to be considered by the prisoner review board at parole hearings. The amendment to K.S.A. 22-3717(h) could be proposed as follows:

> (h)…At each parole hearing, and, if parole is not granted, at such intervals thereafter as it determines appropriate, the [prisoner review] board shall consider: (1) Whether the inmate has satisfactorily completed the programs required by any agreement entered under K.S.A. 75-5210a, and amendments thereto, or any revision of such agreement; **(2) whether the inmate requires skilled nursing care to compensate for activities of daily living limitations, due to functional impairment** and ~~(2)~~ **(3)** all pertinent information regarding such inmate, including, but not limited to, the circumstances of the offense of the inmate; the presentence report; the previous social history and criminal record of the inmate; the conduct, employment, and attitude of the inmate in prison; the reports of such physical and mental examinations as have been made, including, but not limited to, risk factors revealed by any risk assessment of the inmate; comments of the victim and the victim's family including in person comments, contemporaneous comments and prerecorded comments made by any technological means; comments of the public; official comments; any recommendation by the staff of the facility where the inmate is incarcerated; proportionality of the time the inmate has served to the sentence a person would receive under the Kansas sentencing guidelines for the conduct that resulted in the inmate's incarceration; and capacity of state correctional institutions.

The amendment to K.S.A. 22-3717(h) would impose the requirement that the prisoner review board consider the inmate's functional abilities and whether any functional impairments requires skilled nursing care to assist with activities of daily living. While the amendment does not specifically refer to age, addressing whether limitations to an inmate's activities of daily living exist correlates with age-related cognitive and physical conditions. The amendment refers to skilled nursing care, a higher level of care applied in nursing facilities. An elderly offender that requires skilled nursing care within the prison environment would likely seek out residency in an adult care home, if such offender lived within the community environment, due to the extent of nursing care required to accommodate the offender's functional impairments.

In other words, elderly offenders with functional impairments that affect the offender's ability to independently execute activities of daily living are likely wheelchair bound, bed-ridden, or, at the very least, home-bound. An inability to independently eat, walk, shower, get dressed, and toilet is an inability to adequately function within the prison environment. However, the inability to execute a single activity of daily living may prove to be unsatisfactory to the prisoner review board justifying parole. Rather, the functional impairment of an elderly offender may require the inability to execute two or more activities of daily living independently for the prisoner review board to grant parole.

A final policy change for consideration by the Kansas Legislature is an amendment to the state's early release procedures. Currently, both statutes relating to functional incapacitation release and terminal medical release prohibit application to persons sentenced to imprisonment for an offgrid offense.[277] If an offender is functionally incapacitated or terminally ill, as properly confirmed by health care providers pursuant to K.S.A. 22-3728(a)(8)(A) and 22-3729(a)(7)(A), respectively, then the offense for which the offender was incarcerated is immaterial. If an offender is imprisoned for an offgrid offense, however egregious in nature, providing for terminal medical release will allow the offender *with 30 or fewer days of life expectancy* expedited special release (emphasis added). By prohibiting offgrid offenders from applying for terminal medical release, the state corrections agency is essentially absorbing hospice and other long-term care medical costs that could be shifted to the community.

[277] K.S.A. 22-3728 and 22-3729.

A similar argument can be made for the prohibition on offgrid offenders for applying for functional incapacitation release. Though the offender may not have a terminal medical condition, a health care provider has confirmed functional incapacity, possibly suggesting an inability to form a culpable mental state required to commit a crime under Kansas law. If it is unclear to the health care provider whether such offgrid offender is, in fact, functionally incapacitated, or there is any concern that such offender may pose a health or safety risk to the community, then functional incapacitation release is likely not to be granted by the prisoner review board. However, a blanket prohibition against application of both forms of early release to offgrid offenders is rather unreasonable, especially considering the financial strain placed upon the state corrections agency to manage the Kansas elderly offender population.

C. Concluding Remarks

Though the ethnic and socio-demographic makeup of an elderly offender population varies by state, offenders of all backgrounds, both male and female, enter advanced age and experience similar challenges during the last stages of life. Such age-related challenges are difficult to face within the community and even more so within the prison environment. The understanding of the elderly offender population by correctional authorities is important in order to provide constitutionally-adequate healthcare treatment and housing accommodations. Classification of elderly offender populations by criminal history or functional impairment is not an uncommon practice, and may aid state correctional systems in making administrative prison policy decisions.

The legal concerns associated with the imprisonment of persons are vast. The closure of prisons or underfunding of corrections budgets may create the problem of prison overcrowding, which the U.S. Supreme Court has declared to be in violation of inmates' Eighth Amendment rights. While concerns of overcrowding in Kansas prisons have not approached the magnitude of California's prison overcrowding problem, it is a reality that the Kansas department of corrections and Kansas Legislature must continue to monitor. Constitutionally-adequate health care has also been confirmed by the U.S. Supreme Court as a right of incarcerated persons.

Understanding where the line can be drawn for constitutionally-adequate care while balancing the need to effectively manage inmate health problems to deter future long-term costs is a challenge well known by the corrections community and state legislative bodies. In light of the legal requirements of adequate health care, prohibition on overcrowding, and ADA compliance measures, it is admirable that Kansas has opted to renovate the former Labette Correctional Conservation Camp into a geriatric correctional facility. In the renovation and development of policies for the Labette geriatric facility, there are a number of proposed changes that the state corrections agency can implement on behalf of the state and elderly offender population.

First, the agency may have a vested interest in making architectural or structural changes to the facility for the purpose of easing housing conditions for the older offender population. In establishing structural supports or widening doorways for offenders with mobility or other functional impairments, elderly offenders will likely be more independent and require less supervision by correctional staff. Due to the high population of elderly offenders to be housed at Labette, an increased interest in age-

specific programming may arise. Imposing the requirement of continuing education in geriatric prisoner health care may assist Labette correctional staff in managing the prison's elderly offender population. Finally, establishment of a prison hospice at Labette may create an end-of-life opportunity for terminally-ill elderly offenders while simultaneously allowing the agency to save funding that would otherwise be spent maintaining life supports.

Changes to state sentencing policy to acknowledge the growth of the elderly offender population in Kansas can also be made statutorily through amendment by the Kansas Legislature. While Kansas courts have considered age in the context of all mitigating and aggravating circumstances presented, advanced age and extraordinary physical impairment should specifically be incorporated into the Kansas Sentencing Guidelines Act as a potential mitigating factor in the determination of whether substantial and compelling reasons exist to justify a departure sentence. The ability of a sentencing court to consider extraordinary physical impairment or unusual conditions relative to the offender's age may have a considerable impact in the decision of whether to grant departure, a decision affecting both the liberty of the offender and the pocketbook of the state corrections agency. The proposed amendments incorporating extraordinary physical impairment and age are not drafted so broad as to "create a general exception [that] would carve a hole in the guidelines", as demonstrated by the conservative use of such factors by federal sentencing courts.[278]

In addition, an inmate's functional impairments should be taken into account by the prisoner review board in the evaluation of whether to grant parole. If an inmate has

[278] *See* U.S. v. Booher, 962 F.Supp. 629, 633-634 (1997).

a functional impairment to the extent that skilled nursing care is required to accommodate activities of daily limitations, then such inmate is so functionally dependent that continued incarceration on the corrections agency's dime is unreasonable. Elderly offenders can exhibit problems with independently executing activities of daily living, and require extensive skilled nursing care. Such increased levels of health care delivery are driving up correctional health care costs and can potentially be avoided by allowing the prisoner review board to consider the extent of inmates' functional impairments.

Finally, the provisions prohibiting offgrid offenders from applying for terminal medical release or functional incapacitation release is especially unreasonable and unnecessary, considering the statutory requirements for health care provider confirmation of terminal illness or functional incapacity. The Kansas department of corrections continues to operate at or above inmate capacity and has limited funding to expend on prison operations, prison administration, employee salaries and offender needs. The inability for an offgrid offender to apply for terminal medical release of functional incapacitation release may unnecessarily require spending from an already stretched-thin correctional agency budget.

Ultimately, the elderly offender population will present as a significant problem for corrections agencies as offenders continue to age and serve out the remainder of long-term sentences behind prison walls. The challenge for corrections officials and state legislatures is managing the size of the growing elderly offender population by entertaining various approaches to geriatric housing, educational programming, end-of-life treatment, and sentencing policy. The American correctional system is not, as

Yossarian comes to recognize, a Catch-22, or a system of incarceration that recycles non-rehabilitated offenders with the intention of reintegrating them into the community. As solutions exist to reform state administrative and legislative policy for effective management of the elderly offender population, American corrections is not subjected to the Catch-22 paradox. In the words of Yossarian, “That’s some catch, that Catch-22.”[279]

[279] JOSEPH HELLER, CATCH-22 56 (Everyman's Library 1995).