

January 2012

The Past Coming Back to Haunt Them: The Prosecution and Sentencing of Once Deadly but Now Elderly Criminals

Kelly Porcella

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Porcella, Kelly (2007) "The Past Coming Back to Haunt Them: The Prosecution and Sentencing of Once Deadly but Now Elderly Criminals," *St. John's Law Review*: Vol. 81 : No. 1 , Article 16.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol81/iss1/16>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

NOTES

THE PAST COMING BACK TO HAUNT THEM: THE PROSECUTION AND SENTENCING OF ONCE DEADLY BUT NOW ELDERLY CRIMINALS

KELLY PORCELLA†

INTRODUCTION

When an eighty-year-old man in a wheelchair and on oxygen is wheeled past any citizen on a sidewalk, sympathy for his plight is surely felt.¹ When the same man is wheeled into a courtroom to stand trial for the murder of three young men forty years ago, a difference of opinion emerges. The debate is between those who see the aging defendant as he is today and argue to let the past remain the past, and those who see the defendant as he was in the past and urge that justice must be done today. Does an elderly person who took a life so much earlier in his or her own life² deserve our sympathy, and as a result, leniency?³ This Note

† J.D. Candidate, May 2007, St. John's University School of Law; B.S., 2003, St. John's University. I would like to thank my husband Dan for his support and suggestions.

¹ Sympathy may be defined as "a heightened awareness of the suffering of another and the urge to alleviate that suffering." Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 4 (1997).

² There is generally no statute of limitations on murder. See, e.g., 18 U.S.C. § 3281 (2000) (allowing no statute of limitations for murder under federal law); N.Y. C.P.L. § 30.10 (McKinney 2003) (banning a limitation on action for murder). There is also no federal statute of limitations for the prosecution of fugitives. See 18 U.S.C. § 3290 (2000) ("No statute of limitations shall extend to any person fleeing from justice."). With the prevalence of DNA testing, other classes of crimes are also being prosecuted decades after they were committed. See Julia Preston, *For '73 Rape Victim, DNA Revives Horror, Too*, N.Y. TIMES, Nov. 3, 2005, at A1 ("DNA can remove much of the guesswork for the police and prosecutors, and it can reach back to grab those who committed crimes decades ago or were charged but dodged conviction.").

³ This Note does not advocate punishment of those who, due to illnesses such as Alzheimer's Disease or other forms of dementia, are unable to understand what they did and why they will be imprisoned. See, e.g., *United States v. Graves*, 98 F.3d 258,

argues no.

Part I will define "elderly" and give a background on the prosecution and sentencing of elderly criminals. It will also present the "elderly evaders," those who committed violent crimes decades before being brought to justice.⁴ Part II will explore the role that an evader's age plays in his or her sentencing, first discussing official sentencing law and then the problem of courtroom sympathy for the evader. Part III will pinpoint the sources of sympathy for elderly evaders in the utilitarian and retributivist theories of punishment. It will then balance these considerations and summarize the arguments in favor of lenient sentencing of elderly evaders and those against such sentencing. Drawing on the prosecution and sentencing of elderly evaders such as mob bosses,⁵ murderers of civil rights workers,⁶ war criminals,⁷ and perpetrators of other previously

261-62 (7th Cir. 1996) (questioning competency of sixty-one-year-old stroke victim who, after his stroke, was left speaking gibberish and repeatedly robbed the same bank without any effort to prevent capture). *But see* United States v. Gigante, 166 F.3d 75, 84 (2d Cir. 1999) (affirming lower court's determination that mob boss Vincent "Chin" Gigante put on a "crazy act" for many years in order to avoid imprisonment (quoting United States v. Gigante, 925 F. Supp. 967, 976 (E.D.N.Y. 1996))); Biography: Vinnie Gigante, http://www.thebiographychannel.co.uk/new_site/biography.php?id=1290&showgroup=1450 (last visited Sept. 23, 2006) (claiming that Gigante gave up faking insanity after his conviction).

⁴ For the purposes of this Note, it is important to assume the guilt of the defendant. Otherwise, other issues, such as problems of evidence, come into play. *See Civil Rights: Justice, of a Sort*, ECONOMIST, June 25, 2005, at 30 (identifying problems with having a trial forty years after a crime); *Time Can't Quench Thirst for Justice*, USA TODAY, June 24, 2005, at 14a ("Reopening old investigations is controversial and difficult."). This Note will also ignore constitutional issues that arise from the reopening of old cases. *See, e.g.,* Henry J. Reske, *The Pitfalls of Prosecuting Old Cases*, A.B.A. J., Apr. 1994, at 30, 30 (raising issues such as the Sixth Amendment right to a speedy trial and the right to be free from double jeopardy).

⁵ *See Gigante*, 925 F. Supp. at 968, 970 (Vincent Gigante, 68, head of the Genovese crime family); United States v. Angiulo, 852 F. Supp. 54, 60, 62 (D. Mass. 1994) (four elderly members of La Cosa Nostra in their seventies).

⁶ *See* Denise Crittendon, *Medgar Evers' Killer Finally Convicted*, CRISIS, Apr. 1994, at 6 (Byron De La Beckwith, seventy-three, for the death of civil rights leader Medgar Evers thirty years before); Melba Newsome, *Another Ghost of Mississippi Laid to Rest*, CRISIS, Nov. 1998, at 8-9 (Sam Bowers, seventy-six, after thirty-two years, for the 1966 murder of Vernon Dahmer for helping African Americans register to vote); Bill Nichols, *Miss. Town Grapples with Killer's Release Amid Appeal*, USA TODAY, Aug. 23, 2005, at 2a (Edgar Ray Killen, eighty, after forty-one years, for the 1964 deaths of three civil rights workers).

⁷ *See, e.g.,* Fabiola Santiago, *Captured Nazi Fugitive Wealthy Man, U.S. Says*, MIAMI HERALD, Apr. 24, 1985, at 1D (Konrads Kalejs, seventy-two, a former Nazi commander accused of murdering thousands during World War II).

unsolved crimes,⁸ this Note argues that the case against lenient sentencing is stronger than that in favor⁹ and that courtroom sympathy should therefore not be given to elderly evaders.

I. AN INTRODUCTION TO ELDERLY CRIMINALS

A. Defining Elderly

There appears to be "confusion in the law and in American society in general" about what constitutes old age.¹⁰ The ages that define "elderly" have a host of sources—Social Security retirement benefits start at age sixty-five, the Older Americans Act starts benefits at age sixty, and the National Institute of Corrections defines the older criminal as being age fifty and over.¹¹ The United States Census Bureau appears to also use sixty-five as the dividing line, providing a population estimate for people ages eighteen to sixty-four and then a separate one for those sixty-five and over.¹² The specific age that separates "young" from "old" is not as important as the public perception of the elderly—regardless of age, the term "elderly" implies a certain frailty resulting from aging and associated health problems.¹³

⁸ See Larry Altman & Denise Nix, *Victims' Families Seek Answers in 1970s Slayings*, DAILY BREEZE (Torrance, Cal.), Sept. 10, 2003 (Adolph Theodore Laudenberg, seventy-seven, charged with raping and strangling Lois "Bonnie" Petrie more than thirty years ago); Julia Preston, *Man Sentenced for 1973 Rape; Victim Berates 'Rabid Beast'*, N.Y. TIMES, Nov. 29, 2005, at B1 (Fletcher Anderson Worrell, fifty-nine, convicted of raping Kathleen Ham thirty-two years ago).

⁹ Rehabilitation is not discussed because it may be considered irrelevant to the notion of fair punishment. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 21 (3d ed. 2001) ("[W]hen we cease to consider what the criminal deserves and consider only what will cure him . . . , we have tacitly removed him from the sphere of justice altogether." (quoting C.S. Lewis, *The Humanitarian Theory of Punishment*, in CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 194 (R. Gerber & P. McAnany eds., 1972))).

¹⁰ William E. Adams, Jr., *The Incarceration of Older Criminals: Balancing Safety, Cost, and Humanitarian Concerns*, 19 NOVA L. REV. 465, 467 (1995) [hereinafter Adams I].

¹¹ See *id.*

¹² See U.S. Census Bureau, National Population Estimates—Characteristics, <http://www.census.gov/popest/national/asrh/NC-EST2004-sa.html> (last visited Sept. 26, 2006) (estimating an age sixty-five and older population of 36,293,985 as of July 1, 2004).

¹³ See Nadine Curran, Note, *Blue Hairs in the Bighouse: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions To Correct It*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225, 225 (2000)

Ageism is a problem in America.¹⁴ Although the image of the fragile old person is a stereotype in our culture, it is accurate, however, for many in the older population because with age comes a decline in physical ability.¹⁵ As people age, their bodies start to deteriorate and they lose reflexes, strength, energy, and sharpness of senses.¹⁶ The efficiency of their immune systems and mental processes also decreases, resulting in loss of memory and weakening in their problem-solving skills and ability to adapt.¹⁷ The elderly criminals described in the next section are not protected from these changes.

B. *The Elderly Criminal*

There are different types of currently imprisoned elderly offenders. The types are distinguished by the timing of their crimes and the resulting sentences. Chronic offenders are career criminals that have grown old "during one major sentence or in a steady series of shorter stretches [in prison]."¹⁸ A second group of elderly offenders were young first-timers who were sentenced to long mandatory prison terms.¹⁹ A third group are the elderly prisoners serving time for a crime committed while elderly, often his or her first serious offense.²⁰ The final type of elderly

(envisioning "a fragile old man or woman needing help to carry groceries" upon hearing the term "elderly").

¹⁴ See William E. Adams, Jr., *The Intersection of Elder Law and Criminal Law: More Traffic than One Might Assume*, 30 STETSON L. REV. 1331, 1333 (2001) [hereinafter Adams II] ("[A]geism is an issue within our society . . .").

¹⁵ See *id.* at 1347 (stating that older prisoners need more medical attention than their younger counterparts).

¹⁶ See Curran, *supra* note 13, at 239.

¹⁷ See *id.*

¹⁸ Lyle B. Brown, Note, *The Joint Effort To Supervise and Treat Elderly Offenders: A New Solution to a Current Corrections Problem*, 59 OHIO ST. L.J. 259, 264 (1998) (quoting Sol Chaneles, *Growing Old Behind Bars*, PSYCHOL. TODAY, Oct. 1987, at 47).

¹⁹ See *id.*

²⁰ See *id.* Although the vast majority of crimes committed by the elderly are property crimes, see James, *supra* note 20, at 1026 (asserting that about eighty percent of the crimes committed by the elderly are property crimes like shoplifting), petty elderly offenders are not likely to be imprisoned because police officers tend to feel sympathy for them, see Brown, *supra* note 18, at 267 (speculating that police officers allowing elderly shoplifters to go free after returning shoplifted goods is "undoubtedly a daily occurrence"). Violent crimes committed by elderly people may be at least partly caused by "chronic brain syndrome," a syndrome associated with advanced age, resulting in a loss of inhibitions, suspiciousness, quarrelsomeness, and aggressiveness. See Molly Fairchild James, Note, *The Sentencing of Elderly*

offender is a combination of the latter two types—they are people who committed serious crimes, like murder, in their younger days but, either because they consciously evaded justice or escaped from prison, are only now, in their old age, being prosecuted and sentenced. They are people who were not imprisoned but should have been—"elderly evaders."²¹

A review of cases featuring elderly evaders revealed that most of them were prosecuted for murders that occurred during the Civil Rights Era. In 2005, Edgar Ray Killen, an eighty-year-old reputed Ku Klux Klan leader, became the most recently convicted. He organized a group of Klansmen that killed three civil rights workers in Mississippi in 1964.²² In 1998, Sam Bowers, then seventy-six, was convicted of the 1966 killing of a grocer who was helping African Americans register to vote.²³ In 1994, Byron de la Beckwith was convicted of the 1963 assassination of civil rights leader Medgar Evers.²⁴ Another well-known type of evader is the mob boss, such as Vincent "Chin" Gigante, who, at the age of sixty-nine, was convicted of conspiracy to commit murder during his 1980s term as boss of the Genovese organized crime family.²⁵ Still another category of evader is the Nazi who fled prosecution for war crimes. These include Hermine Braunsteiner-Ryan, a brutal death camp guard found living in Queens, New York, who was later sentenced to life in prison in Germany.²⁶

All of the above evaders were sentenced to terms of incarceration.²⁷ In fact, incarceration is an option for

Criminals, 29 AM. CRIM. L. REV. 1025, 1026 & n.15 (1992). It is theorized to be caused by the decline in economic and social status experienced upon retirement. *Id.* at 1026 n.15.

²¹ I introduce this term in order to avoid confusion with other types of elderly criminals.

²² See Nichols, *supra* note 6, at 2a (reporting that Killen was sentenced to sixty years in prison).

²³ See Newsome, *supra* note 6, at 9, 11 (disclosing that Bowers received life in prison).

²⁴ See Beckwith v. State, 707 So. 2d 547, 604 (Miss. 1997) (en banc) (sustaining sentence of life in prison).

²⁵ See United States v. Gigante, 166 F.3d 75, 29 (2d Cir. 1999).

²⁶ See Ralph Blumenthal, *Simon Wiesenthal Is Dead at 96; Tirelessly Pursued Nazi Fugitives*, N.Y. TIMES, Sept. 21, 2005 (detailing how Simon Wiesenthal discovered the "whip-wielding" Hermine Braunsteiner-Ryan, among other Nazi fugitives); see also Santiago, *supra* note 7, at 1D (imparting that Konrads Kalejs, a former Nazi commander was found living in Florida among Holocaust survivors).

²⁷ See, e.g., *supra* notes 22–24.

punishment for nearly all offenses.²⁸ Imprisonment, as opposed to any lesser alternatives, clearly expresses society's condemnation of the criminal's actions.²⁹ Therefore, for the purposes of this Note, incarceration will be considered the standard sentence for elderly evaders. Although the age of an evader generally should not be considered when a court determines the length of his or her prison term, this Note explains in the following sections how courtroom sympathy indeed affects the sentencing of elderly evaders.

II. THE MYTH OF AGE NEUTRALITY IN SENTENCING

A. Official Sentencing Law

"The law does not recognize a distinction of age."³⁰ Courts have held that advancing age does not automatically entitle a defendant to a lesser sentence³¹ because age is "generally irrelevant except in an extraordinary case."³² In fact, "age is 'far less indicative of culpability than factors such as the offense itself, the defendant's criminal history, or the manner in which the offense is committed.'"³³ One state's common law has expressly established that "[t]he worsening of a degenerative condition in a defendant who was old and in bad health at the time of sentencing does not constitute a . . . factor justifying reduction of sentence."³⁴

²⁸ See WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* 1213 (4th ed. 2004). In fact, sixty-eight percent of felons convicted in state court in 2000 were sentenced to either prison or jail. See *id.*

²⁹ See Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 *J.L. & ECON.* 365, 380-81 (1999) (commenting that imprisonment "unambiguously" expresses disapproval of a crime "because of the sacred place of liberty in our culture").

³⁰ *Time Can't Quench Thirst for Justice*, *supra* note 4, at 14a (quoting Circuit Judge Marcus Gordon during the sentencing of Edgar Ray Killen).

³¹ See, e.g., *United States v. Cox*, No. 89-10411, 1991 U.S. App. LEXIS 2015, at *11 (9th Cir. Feb. 8, 1991) (denying sentence reduction based on defendant's advanced age).

³² *United States v. Carey*, 895 F.2d 318, 322 (7th Cir. 1990); see *United States v. Brooke*, 308 F.3d 17, 23 (D.C. Cir. 2002) (reciting the trial court's refusal to consider the defendant's advanced age when determining his sentence).

³³ *Cox*, 1991 U.S. App. LEXIS 2015, at *11 (quoting *United States v. Brady*, 895 F.2d 538, 543 (9th Cir. 1990)).

³⁴ *State v. Coppens*, No. 90-0151-CR., 1990 Wisc. App. LEXIS 641, at *3 (Wis. Ct. App. July 3, 1990).

On the other hand, certain federal and state statutes allow for the consideration of age in sentencing. For instance, age was a factor under the former Federal Sentencing Guidelines.³⁵ Further, at least one state statute requires the consideration of age-related factors, such as impaired judgment, in sentencing.³⁶ A number of state statutes provide that "the age of the defendant *at the time of the crime*' can be a mitigating factor for judges to consider when sentencing."³⁷ In still other states, age is not a factor by statute but, under the state's common law, can be considered by the sentencing judges.³⁸ The following sections explain how, regardless of the official law explained here, the unwritten law of human emotions plays a powerful role in sentencing.

B. *An Introduction to Courtroom Sympathy*

The notion of jurors as neutral decision makers is fundamental to our criminal justice system.³⁹ The Sixth Amendment to the United States Constitution states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."⁴⁰ Jurors must take an oath to obey the judge's instructions on the law before being empanelled.⁴¹ If jurors understand but ignore the instructions out of sympathy for the defendant, they have violated that oath.⁴²

³⁵ See James, *supra* note 20, at 1028. The Federal Sentencing Guidelines stated: 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.

Id. (quoting U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (1989)).

³⁶ See ALASKA STAT. § 12.55.155(d)(5) (2004) (stating that age is to be considered when "the conduct of an aged defendant was substantially a product of physical or mental infirmities resulting from the defendant's age").

³⁷ James, *supra* note 20, at 1032 & n.68 (emphasis added) (listing statutes from Alabama, Arizona, California, Colorado, Florida, Missouri, New Jersey, Oregon, and Pennsylvania).

³⁸ See *id.* at 1033 & n.82 (referring to Kentucky).

³⁹ See U.S. CONST. amend. VI.

⁴⁰ *Id.*

⁴¹ See DRESSLER, *supra* note 9, at 6.

⁴² See *id.*

The effect of courtroom sympathy on the results of criminal trials, however, "has long been recognized."⁴³ Sympathy may be defined as "a heightened awareness of the suffering of another and the urge to alleviate that suffering."⁴⁴ It is no surprise then, that "[j]urors vote with their heart and use their minds to support it."⁴⁵ A famous jury study by Harry Kalven, Jr. and Hans Zeisel found that judges often attribute jury verdicts against the weight of the evidence to jury sympathy toward the defendant or toward witnesses such as the defendant's family or friends who appeared emotionally distressed or physically handicapped.⁴⁶ Moreover, although there is no Sixth Amendment right to jury sentencing,⁴⁷ juror sympathy also affects sentencing, as juries play at least some role in sentencing in the vast majority of jurisdictions.⁴⁸

Judges also feel sympathy toward offenders.⁴⁹ Although judges sometimes replace juries in deciding the guilt or innocence of defendants (via bench trials),⁵⁰ judicial sympathy is most likely to affect sentencing since judges are the most common sentencers.⁵¹ As stated by one judge, "It is all very well to argue generally 'lock 'em up and throw away the key.' It is quite another thing to sentence an individual . . . to spend the rest of his life behind bars. Only judges who have been required to discharge this responsibility can speak to its effect on the human

⁴³ Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 887 (1996).

⁴⁴ See *supra* note 1.

⁴⁵ Timothy Egan, *Not Guilty: The Jury; One Juror Smiled; Then They Knew*, N.Y. TIMES, Oct. 4, 1995, at 11 (quoting Sonya Hamlin, jury consultant). *But see* Linder, *supra* note 43, at 911 (suggesting that the statement is false and that "the heart and mind work together . . . to reach conclusions").

⁴⁶ See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 203-06 (1966) (revealing comments made by judges about sympathetic defendants and witnesses).

⁴⁷ See LAFAYE ET AL., *supra* note 28, at 1218 & n.1 (accumulating cases that show that the Supreme Court has continually found that there is no Sixth Amendment right to jury sentencing).

⁴⁸ See *id.* at 1218 (showing that the role of the jury in sentencing in both capital and non-capital cases varies by state).

⁴⁹ See Brown, *supra* note 18, at 269 (noting how judges show compassion toward elderly offenders).

⁵⁰ See *Patton v. United States*, 281 U.S. 276, 312 (1930) (authorizing bench trials in felony cases).

⁵¹ See LAFAYE ET AL., *supra* note 28, at 1218 (explaining that judges are the most common sentencers). Judges typically have "unguided discretion" in sentencing, subject generally only to the term limits proscribed for the offense. See *id.* at 1225-26.

spirit."⁵² The following section will discuss how the sympathy felt by judges and juries particularly affects the conviction and sentencing of elderly evaders.

C. Courtroom Sympathy for the Elderly Evader

Age neutrality is unrealistic in a jury system where one of the most common recipients of jury sympathy is the elderly.⁵³ Many judges are also "generally sympathetic toward the elderly."⁵⁴ Although age is not always a decisive factor for prosecutors in determining whether to prosecute and how harsh of a sentence to seek,⁵⁵ district attorneys are aware of juror sympathy toward elderly defendants, even elderly evaders.⁵⁶ In fact, prosecutors usually avoid seeking executions of elderly defendants, partly because juries are unlikely to approve it.⁵⁷

Courtroom sympathy toward elderly evaders is fueled by both the ages of evaders and the passage of time since their crimes. Dr. William Wilbanks, who conducted a study of elderly sentencing in California, found that the elderly do in general receive less jail time, even for homicide.⁵⁸ Another study showed that older persons in Pennsylvania were less likely to be sent to prison and more likely to receive shorter sentences.⁵⁹ A 2004 study considered the effect of the age of a convicted second-degree murderer on his sentencing and parole

⁵² *United States v. Angiulo*, 852 F. Supp. 54, 60 n.13 (D. Mass. 1994).

⁵³ See *KALVEN & ZEISEL*, *supra* note 46, at 211 (finding that defendants age fifty-five and over are more sympathetic than younger defendants).

⁵⁴ *Brown*, *supra* note 18, at 269 n.43 (quoting Gary Feinberg & Dinesh Khosla, *Sanctioning Elderly Delinquents: Judicial Responses to Misdemeanors Committed by Senior Citizens*, *TRIAL*, Sept. 1985, at 46); see *id.* (reporting that fifty-nine percent of 121 County Court judges in Florida surveyed were sympathetic).

⁵⁵ See *Elderly Inmates Are the Costliest Prisoners*, *MUSKOGEE DAILY PHOENIX & TIMES DEMOCRAT* (Okla.), Apr. 4, 2005 (quoting Richard Gray, a district attorney in Oklahoma) ("Age . . . may be a small factor, but it's not a determining factor.").

⁵⁶ See *Altman & Nix*, *supra* note 8, at A3 (reporting that Deputy District Attorney Ellen Aragon said, in reference to a murderer who evaded the law for decades but was recently caught, that "the evidence was strong, despite the age of the crimes and any sympathy that might be felt for the elderly defendant").

⁵⁷ See Elaine Monaghan, *Woman, 70, Faces Death for Murder of Neighbour; America*, *TIMES* (U.K.), Mar. 29, 2005, at 35 (conveying the inaction of American prosecutors in this area).

⁵⁸ See *James*, *supra* note 20, at 1027-28 (stating that the elderly were less likely to be incarcerated for such crimes as homicide, rape, and robbery, among others).

⁵⁹ See *Adams II*, *supra* note 14, at 1346 & n.110 (conveying that offenders aged twenty through twenty-nine were thirty percent more likely to be incarcerated than those sixty and older).

recommendations.⁶⁰ The study used a separate vignette for a twenty-, forty-, and sixty-year-old white male perpetrator and showed each vignette to ninety-five Canadian undergraduates.⁶¹ Participants sentenced the sixty-year-old more leniently than the twenty-year-old, and both more leniently than the forty-year-old.⁶² This study is important because elderly evaders committed the crimes at twenty- or forty-years-old but are being sentenced at the sixty-year-old rate. As this Note will explain, for retributivists especially, the problem is that jurors see elderly evaders as they are now and not as they were when they committed their crimes.⁶³ Aware of this obstacle, the prosecutor in the case of Adolph Theodore Laudenberg, who was accused of committing a murder thirty years prior, reminded everyone that: "We're not talking about Mr. Laudenberg today, we're talking about Mr. Laudenberg in 1972."⁶⁴

Overcoming juror apathy toward older crimes is another difficulty presented by cases dealing with elderly evaders. Many peers of these elderly defendants, to whom their crimes would be significant, have died.⁶⁵ A comment from a prospective juror in Sam Bower's 1998 trial for the 1966 murder of Vernon Dahmer reflects present-day indifference: "I feel like he's got away this long. It should be dismissed."⁶⁶ On the other hand, the delayed prosecution of these evaders may actually work against them in some cases. First, the details of these older crimes may have been analyzed and commented on for many years.⁶⁷ Such publicity may change the memories and opinions of the public.⁶⁸

⁶⁰ See Christine E. Bergeron & Stuart J. McKelvie, *Effects of Defendant Age on Severity of Punishment for Different Crimes*, 144 J. SOC. PSYCHOL. 75, 75 (2004).

⁶¹ *Id.* at 81.

⁶² See *id.* at 82-85.

⁶³ See DRESSLER, *supra* note 9, at 16 (explaining that retributivists justify punishment because of the perpetrator's choice to commit the crime, and that the punishment should be carried out independent of what has occurred since the time of the choice).

⁶⁴ Altman & Nix, *supra* note 8, at A3 (quoting Deputy District Attorney Ellen Aragon).

⁶⁵ See Danielle Knight, *Trying Times (Edgar Ray Killen Murder Trial)*, U.S. NEWS & WORLD REP., June 27, 2005, at 30 (noting that after forty years, many of Edgar Ray Killen's peers had died).

⁶⁶ Newsome, *supra* note 6, at 11.

⁶⁷ See Knight, *supra* note 65, at 30 (suggesting that Edgar Ray Killen could not get a fair trial forty years after the crime since the jurors "had time to think about [it] for 40 years").

⁶⁸ See Reske, *supra* note 4, at 30 (suggesting that publicity of a case over many

Moreover, especially pertinent to the prosecutions of civil rights murderers, the increased recognition of diversity in our society has affected jury composition.⁶⁹ For example, Edgar Ray Killen would have faced a jury composed entirely of white segregation-supporting men forty years ago in Mississippi, instead of the racially diverse jury that convicted him in 2005.⁷⁰

Ultimately, courtroom sympathy toward elderly evaders, attributable to their advanced age and the amount of time that has passed since their crimes, should be re-directed. The following section explains that this can only be accomplished by digging deeper into the logic behind what we generally refer to as "sympathy."

D. *Re-Directing Courtroom Sympathy Away from the Elderly Evader*

This Note does not argue that a court should not be sympathetic toward any criminal defendant. In fact, such sympathy may be "inevitable" when human beings are confronted with the person who will be directly affected by their decisions.⁷¹ This Note instead argues that our society must become sensitized to elderly stereotypes⁷² and that sympathy is misplaced when directed at the elderly evader.⁷³

In order to re-direct courtroom sympathy away from elderly evaders, it is important to explore the underpinnings of sympathy, which although commonly thought of as a gut feeling,⁷⁴ actually has its basis in the traditional utilitarian and retributivist justifications of punishment.⁷⁵ For example, we may

years may change the memories of people).

⁶⁹ See Allen G. Breed, *Time Could Be on Side of Justice in 1964 Case; Civil Rights Trial Probably More Fair Today, Attorney Says*, COLUMBIAN (Vancouver, Wash.), Jan. 10, 2005, at A.

⁷⁰ See *id.*

⁷¹ Linder, *supra* note 43, at 888 (discussing the human decision-making process); see Feigenson, *supra* note 1, at 37 ("At worst, [excluding sympathy from the decision-making process] risks excluding from law an essential component of humanity.").

⁷² See Adams II, *supra* note 14, at 1333-34 (despairing over the "troubling characterization of older persons").

⁷³ Research indicates that sympathy can be regulated. See Feigenson, *supra* note 1, at 69.

⁷⁴ See *supra* note 45 and accompanying text.

⁷⁵ See James, *supra* note 20, at 1037-38 (describing the "classic debate" between utilitarianism and retributivism).

feel sympathy for elderly criminals because we believe that time in prison would be too harsh for them, a retributivist reason, or because we believe that they are no longer dangerous so confinement would serve no useful purpose, a utilitarian reason. In order to make a case for conquering courtroom sympathy for elderly evaders, it is necessary to explore these and similar arguments in detail and then weigh them against justifications for strict punishment, such as general deterrence, a utilitarian rationale, and the punishment fitting the crime, a retributivist rationale.

III. THE BALANCING TEST

A. *Competing Theories of Punishment*

Although it is commonly thought that only utilitarians favor lenient sentencing and only retributivists favor strict sentencing, this notion is false. For a utilitarian, punishment is based on predictions of future harm and the degree to which the crime is deterrable.⁷⁶ In fact, a utilitarian argument against the lenient sentencing of elderly evaders is the general deterrence of people considering committing similar crimes and then fleeing the law. Unlike retributivism, under which punishment can be just for the sake of punishment,⁷⁷ utilitarianism holds that punishment is undesirable unless it will result in a net benefit to society.⁷⁸ Therefore, this Note presents the evaders' low risk to the public, high cost of incarceration, and contributions to society as utilitarian factors that are used to justify their lenient sentencing.

In contrast to utilitarians, retributivists look solely to past, voluntary conduct to justify present punishment.⁷⁹ Retributivist theory views punishment as a way to restore the moral balance in society by requiring a wrongdoer to pay his or her debt for violating society's rules.⁸⁰ Retributivists seek proportionality between the sentence, the offender's culpability, and the harm

⁷⁶ See DRESSLER, *supra* note 9, at 54.

⁷⁷ See James, *supra* note 20, at 1037.

⁷⁸ See DRESSLER, *supra* note 9, at 14.

⁷⁹ See *id.* at 16 (asserting that retributivism looks backward to justify punishing humans who possess free will).

⁸⁰ See *id.* at 52 (maintaining that retributivists view punishment as a "mode of repayment").

caused by the crime.⁸¹ For instance, this Note maintains that retributivists supporting the lenient sentencing of elderly evaders would argue that evaders' short life expectancies and inability to adapt to prison life make their sentences disproportionately harsh when compared to those of younger offenders who are as blameworthy. The retributivist arguments presented in this Note as against the lenient sentencing of elderly evaders, however, center on the harm caused by the crime and include the need for the punishment to fit the crime, uniformity in sentencing, and the vindication of victims' rights.

B. Arguments for Leniency

1. Utilitarian: Low Risk to the Public

A key argument for the lenient sentencing of elderly convicts is that they pose only a nominal threat to society—both presently and in the future.⁸² Illustrative of this point is that elderly prisoners in general have a very low risk of escape.⁸³ “[N]o matter what the elderly criminals did, they don’t need handcuffs, leg irons and a 30-foot wall . . .”⁸⁴ Similarly, older offenders have the lowest risk of recidivism.⁸⁵ Only about one percent of released elderly inmates are ever convicted of another crime,⁸⁶ and the sickly elderly person is the least likely to ever commit another crime.⁸⁷

⁸¹ See *id.* at 53.

⁸² See Susan Lundstrom, Note, *Dying To Get Out: A Study on the Necessity, Importance, and Effectiveness of Prison Early Release Programs for Elderly Inmates and Inmates Suffering from HIV Disease and Other Terminal-Centered Illnesses*, 9 *BYU J. PUB. L.* 155, 156 (1994) (arguing for alternatives to incarceration for elderly and terminally ill prisoners because they pose a low risk to society).

⁸³ See *id.* at 170 (attributing the low risk to old age and infirmity).

⁸⁴ *Id.* (emphasis added) (quoting Donald Newman, sociologist with the State University of New York at Albany).

⁸⁵ See Patricia S. Corwin, Comment, *Senioritis: Why Elderly Federal Inmates Are Literally Dying to Get Out of Prison*, 17 *J. CONTEMP. HEALTH L. & POL'Y* 687, 706–07 (2001) (reporting that the reincarceration rate of older parolees and probationers was 1.4%); Mary Foster, *Prisons' Costly Dilemma: Caring for Elderly Prisoners Punishment: Younger, More Dangerous Men Are Released While Aging Inmates Sentenced to Life Without Parole Cost the System Millions*, *L.A. TIMES*, May 6, 1990, at A2 (citing a 1989 Bureau of Justice Statistics report).

⁸⁶ See Corwin, *supra* note 85, at 687–88.

⁸⁷ See *Friedgood v. N.Y. State Bd. of Parole*, 22 A.D.3d 950, 951, 802 N.Y.S.2d 268, 270 (3d Dep't 2005) (“Given the unique features of petitioner’s crime, his severe physical limitations and need for continuous medical care, we find the notion that he

This public safety argument is not persuasive when posed toward elderly evaders because of the severity of their crimes. Even if an elderly evader would not commit another crime as drastic as murder, if that person is not sufficiently punished for the first one, he or she is actually given "one free kill."⁸⁸ Additionally, another important goal of sentencing is to send a message to others considering committing similar crimes that there will be consequences for their actions.⁸⁹ For example, in *State v. Baker*,⁹⁰ the defendant was convicted of voluntary manslaughter.⁹¹ Due to his advanced age and declining physical condition, he argued that he was not a risk to society and would therefore be appropriately punished through probation.⁹² The court disagreed, stating that such a lesser punishment "would be saying to the community that it is okay to take another's life."⁹³

2. Utilitarian: Elderly Inmates Are Costly

Related to their low risk to the public, the cost of incarcerating older criminals is a widely-cited argument for more lenient sentences or alternate punishment methods. Elderly inmates do not require the same safety measures that prisons use when dealing with younger inmates; therefore, society should not have to pay for these measures to be applied to them.⁹⁴ As former Attorney General Janet Reno contended, "you don't want to be running a geriatric ward at age 75 or 80 for people who are

is prone to engage in violent conduct to be . . . so irrational under the circumstances as to border on impropriety."); James, *supra* note 20, at 1027 (questioning the necessity of keeping "frail elderly people" behind bars). *But see Et Cetera*, AUSTRALIAN, July 31, 2004 (detailing a camp on a remote island where elderly criminals "train[ed] a force of young thieves").

⁸⁸ This sentence purposely parallels the language of the mythical "one free bite" rule in tort law. See RESTATEMENT (SECOND) OF TORTS § 509 cmt. g (1977) (cautioning that the technicalities of the scienter requirement of strict liability for a dog's abnormally dangerous propensities do not necessarily entitle a dog to one bite).

⁸⁹ See Cristina J. Pertierra, Note, *Do the Crime, Do the Time: Should Elderly Criminals Receive Proportionate Sentences?*, 19 NOVA L. REV. 793, 817 (1995).

⁹⁰ 644 P.2d 365 (Idaho Ct. App. 1982).

⁹¹ See *id.* at 366.

⁹² See *id.* at 369.

⁹³ *Id.* (quoting the district court judge).

⁹⁴ See Lundstrom, *supra* note 82, at 170 (relying on personal experience, the author concludes that elderly inmates do not require such things as razor wire to control their behavior).

no longer dangerous."⁹⁵ In effect, housing elderly inmates only serves to contribute to the already overcrowded prison system.⁹⁶

The average annual cost of confining an elderly prisoner is estimated to be between sixty and seventy thousand dollars.⁹⁷ Driven by the special medical needs of older inmates,⁹⁸ this figure is at least three times the cost spent to incarcerate younger inmates⁹⁹ and more than double that of running a nursing home.¹⁰⁰ In Oklahoma, inmate medical care costs are double the cost of food and five times the cost of utilities.¹⁰¹ It is no wonder that it has been said that "[t]he last years of life are the most expensive."¹⁰²

Some claim that the elderly have access to services outside prison, such as specialized transportation, which improve their quality of life and do not cost the taxpayer.¹⁰³ Reduced sentences and alternative forms of punishment for elderly and infirm prisoners, then, might be as efficient and less costly.¹⁰⁴ Such

⁹⁵ *Id.* at 185.

⁹⁶ See Curran, *supra* note 13, at 225.

⁹⁷ See Corwin, *supra* note 85, at 688 (\$69,000); James, *supra* note 20, at 1026-27 (\$60,000).

⁹⁸ See Brown, *supra* note 18, at 273 ("Nearly every geriatric inmate has some long-term chronic debilitation that requires frequent medical attention." (quoting O.W. Kelsey, *Elderly Inmates: Providing Safe and Humane Care*, CORRECTIONS TODAY, May 1986, at 56)); Corwin, *supra* note 85, at 688 (citing a study of federal elderly inmates in which it was found that each inmate had an average of twenty-four medical encounters per year); Justin George, *His Way Out*, ST. PETERSBURG TIMES, Jan. 9, 2005, at 1E ("[I]nmates older than 55 suffer, on average, three chronic health problems during the course of their sentences."). In addition to office visits, older inmates also generally need corrective aids such as hearing aids, dentures, and orthopedic shoes. See Corwin, *supra* note 85, at 697.

⁹⁹ See Corwin, *supra* note 85, at 688 (more than three times); James, *supra* note 20, at 1026-27 (three times); George, *supra* note 98, at 1E (about three times).

¹⁰⁰ See Corwin, *supra* note 85, at 688 & n.8 (citing the annual cost for a full service nursing home as \$32,000 per year).

¹⁰¹ See *Elderly Inmates Are the Costliest Prisoners*, *supra* note 55. In addition to medical services, prison costs for the elderly inmate also include the improvements to prison design and personnel training on special elderly needs. See Curran, *supra* note 13, at 226-27.

¹⁰² *Elderly Inmates Are the Costliest Prisoners*, *supra* note 55.

¹⁰³ See Curran, *supra* note 13, at 226 (referencing also recreational services and wheelchair ramps).

¹⁰⁴ See *United States v. Maltese*, No. 90 CR 87-19, 1993 U.S. Dist. LEXIS 8403, at *28-30 (N.D. Ill. June 18, 1993) (granting an alternative punishment for defendant whose life expectancy was reduced due to cancer and whose treatment would be extremely expensive); Adams II, *supra* note 14, at 1350 (indicating that an alternative punishment such as home confinement might be as efficient as and less expensive than imprisonment). *But see* *United States v. Carey*, 895 F.2d 318, 324

alternatives include pardons, medical releases, electronic home detention, probation, parole, and specialized housing.¹⁰⁵

The first rebuttal to this cost argument lies in the reality of government taxing and spending: Whether an elderly person is in prison or outside paying for services such as special transportation through Medicare, Medicaid, or Social Security, the public is still paying for their care through taxes.¹⁰⁶ A second, retributivist counterpoint dealing specifically with elderly evaders is that alternative sentences to imprisonment might not be punishment enough; in other words, they would not be proportionate to the crime.¹⁰⁷ Sentencers determine who will be given an alternative form of punishment based on the risk that they pose to society.¹⁰⁸ As elderly offenders are usually determined to be a small risk to the community, they are given lower risk ratings *regardless of the offense committed*, and are consequently more lightly supervised.¹⁰⁹ Under these circumstances, even a person who killed someone and then evaded the law for decades could get no more than light supervision as punishment. In addition, family-based supervision, another form of punishment, may be in effect "no supervision," when the elderly evaders' families shield them from the consequences of their criminal conduct.¹¹⁰ Quite the opposite, younger criminals are being sentenced to long prison terms for

(7th Cir. 1990) (finding defendant elderly and infirm but remanding for determination of efficiency and cost).

¹⁰⁵ See Lundstrom, *supra* note 82, at 171-77.

¹⁰⁶ See Howard Gleckman & Amy Barrett, *The Coming Showdown over Medicare*, BUS. WEEK, June 16, 2003, at 34 (urging Medicare reform since the program cost taxpayers approximately \$263 billion in 2003); Ralph Loos, *Adding It All Up: Medicare, Medicaid Spending Will Keep Skyrocketing*, MODERN HEALTHCARE, Feb. 21, 2005, at 8 ("By the time today's kindergartners reach age 65, total Medicaid spending will consume over \$5 out of every \$100 generated by the U.S. economy." (quoting Jeffrey Brown, an assistant professor of finance at the University of Illinois)). See generally *Medicare Overview: How the Program Works*, CONG. DIG., Feb. 2004, at 37 (illuminating the difference between Medicare and Medicaid).

¹⁰⁷ See DRESSLER, *supra* note 9, at 53-54 (explaining the retributive system's process of ranking offenses and assigning punishment according to the severity of the offense, with intentional killing as the most serious offense and therefore the most deserving of punishment).

¹⁰⁸ See Brown, *supra* note 18, at 280-82.

¹⁰⁹ See *id.* But see *id.* at 281 n.104 (pointing out that elderly sex offenders are still considered high-risk).

¹¹⁰ See *id.* at 278 ("The family provides too many avenues for older offenders to return to criminal activity.").

crimes less serious than murder.¹¹¹ If they learn that older evaders receive lesser sentences even for harsher crimes, these young criminals will just do their best to avoid being prosecuted.

3. Retributivist: Short Life Expectancy

"So the defendant said to the judge [upon sentencing], 'I'm 65 years old. I don't think I can do that much time.' So the judge said, 'Do the best you can.'"¹¹² This anecdote, though amusing, demonstrates an important point: The life expectancy of a defendant is immaterial to sentencing.¹¹³ As put another way, "senior citizens are entitled to discounts to movies' not in [sentencing]."¹¹⁴

Proponents of proportionality in sentencing argue that the same sentence is more severe for an older person than a younger person since the older person would be forced to spend a greater percentage of his or her remaining life behind bars.¹¹⁵ In fact, any sentence might constitute life imprisonment for the elderly prisoner.¹¹⁶ To preserve proportionality, the elderly should instead be sentenced to periods that represent the same

¹¹¹ See, e.g., Susan A. Burns, Comment, *Is Ohio Juvenile Justice Still Serving Its Purpose?*, 29 AKRON L. REV. 335, 360 n.100 (1996) (noting that in one Ohio county, juveniles sentenced in adult criminal court received substantial sentences—presumably not all of the juveniles so sentenced were murderers); Adam Liptak, *Ideas & Trends: Crime and Punishment; Sentences Are Too Long or Too Short. Rarely, Just Right.*, N.Y. TIMES, Aug. 24, 2003, at 43 (detailing how, under Alabama's habitual offender law, a forty-eight-year old small-time burglar will spend the rest of his life in prison for stealing a \$16 bicycle). *But see* Foster, *supra* note 85, at A2 ("[Elderly prisoners] cost taxpayers millions of dollars annually and remain behind bars while more dangerous prisoners are turned out . . .").

¹¹² See *Justice Junkies*, READER (Chi.), June 18, 2004, at 14 (quoting story told by court buff George Berkowitz).

¹¹³ See *Alvarez v. State*, 358 So. 2d 10, 12 (Fla. 1978) ("Mortality and life expectancy are irrelevant to limitations on the terms of incarceration set by the Legislature for criminal misconduct."); *State v. Stenzel*, 688 N.W.2d 20, 27 (Wis. Ct. App. 2004) (agreeing with other jurisdictions that courts do not have to consider life expectancy in sentencing); *supra* notes 32–33 and accompanying text. *But see* *United States v. Baron*, 914 F. Supp. 660, 662–65 (D. Mass. 1995) (lowering sentence of seventy-six-year-old man who, because of cancer and other health problems, had a life expectancy of about seven years).

¹¹⁴ *News Agenda*, BROAD. NEWS, June 30, 2005 (quoting the prosecutor in the case of seventy-one-year-old Victor Riccitelli, an alleged member of the Gambino crime family).

¹¹⁵ See James, *supra* note 20, at 1040.

¹¹⁶ See Pertierra, *supra* note 89, at 793.

percentages of their remaining lives as do the sentences imposed on younger offenders.¹¹⁷

This proportionality argument is unpersuasive for several reasons. First, if it were persuasive, terminally ill patients would have "a license to kill," a license to hurt someone without being punished for very long, if at all.¹¹⁸ "[Proportionality] should not amount to a 'get out of jail free' card for defendants of a certain age or with certain conditions."¹¹⁹ In the case of elderly evaders, it would appear that a more logical proportionality scheme would calculate the criminal's remaining life from the date of the crime, not the date of sentencing. Otherwise, criminals are encouraged to evade the law.

Second, although a defendant may argue that a sentence amounting to life in prison is disproportionate to his or her crime, cases in which defendants challenged sentences on Eighth Amendment "Cruel and Unusual Punishment" grounds¹²⁰ have been unsuccessful.¹²¹ In *Harmelin v. Michigan*,¹²² the Supreme Court held that the Eighth Amendment only prohibits "grossly disproportionate" sentences, of which life in prison is not one.¹²³

Third, the process that courts would use to predict life expectancy if they had to take into account an evader's remaining life would be problematic and impractical.¹²⁴ For example, in *People v. Moore*,¹²⁵ the court stated that trial courts would be "reviewing the life expectancies of demographic subgroups,

¹¹⁷ See James, *supra* note 20, at 1040.

¹¹⁸ Compassionate release is available in at least eighteen states for prisoners who are terminally ill, have one year or less to live, or are completely unable to function within the prison system. See Curran, *supra* note 13, at 259. See generally Corwin, *supra* note 85, at 699 (expounding on the mechanics of compassionate release).

¹¹⁹ *United States v. Willis*, 322 F. Supp. 2d 76, 83 (D. Mass. 2004).

¹²⁰ The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

¹²¹ See, e.g., *Palermo v. United States*, No. 98-2890, 1999 U.S. App. LEXIS 13504, at *5 (7th Cir. June 17, 1999) (stating that there is no support for the claim that a court must consider life expectancy); *United States v. O'Driscoll*, 761 F.2d 589, 599 (10th Cir. 1985) (allowing sentence exceeding defendant's life expectancy).

¹²² 501 U.S. 957 (1991).

¹²³ See *id.* at 961, 963-64, 996. The Court even includes as examples two permissible sentencing alternatives for a sixty-five-year-old man that would amount to his life in prison. See *id.* at 996.

¹²⁴ See Pertierra, *supra* note 89, at 816 (describing a complicated and inaccurate process).

¹²⁵ 439 N.W.2d 684 (Mich. 1989).

family health histories, and behavioral risks of acquiring certain illnesses, such as cancer and heart disease."¹²⁶ Such analysis might be futile anyway because anyone could die at anytime—even shorter sentences could amount to longer than an offender's actual life.¹²⁷ Similarly, when Edgar Ray Killen was freed pending appeal after being sentenced for three counts of manslaughter, victims' friends and families worried that he might die before ever going to prison; justice would never had been done had he died a free man.¹²⁸

Finally, making individualized life expectancy a factor would raise possible Equal Protection problems.¹²⁹ Although a court may be sympathetic toward aging defendants who will or may spend the rest of their lives in prison, "sympathy cannot properly serve as a basis for a modification of a sentence," because, if it did, punishments would be applied inequitably at the discretion of the court.¹³⁰

4. Retributivist: Inability to Adapt to Prison Life

Retributivist proponents of lenient sentencing argue that if a younger prisoner and an older prisoner are each given the same sentence, the older prisoner will suffer more for each year in prison because the prison environment is harsher on older inmates than on younger ones.¹³¹ To ensure proportionality and account for that difference, proponents argue the elderly should receive lesser or alternative sentences or special treatment in prison.¹³²

The prison environment can be unkind for an elderly prisoner. Elderly prisoners are less able than younger prisoners to cope with problems caused by prison design; they have trouble with the noise and fast pace of prison and may have difficulty walking up and down stairs and walking distances within the

¹²⁶ *Id.* at 693.

¹²⁷ See *Alvarez v. State*, 358 So. 2d 10, 12 (Fla. 1978) ("Any sentence, no matter how short, may eventually extend beyond the life of a prisoner.")

¹²⁸ See *Nichols*, *supra* note 6, at 2a (observing that townspeople were shocked and dismayed when the elderly convict was freed pending appeal).

¹²⁹ *Pertierra*, *supra* note 89, at 816.

¹³⁰ *State v. Belanger*, 158 A.2d 753, 756 (Conn. Super. Ct. 1958).

¹³¹ See *James*, *supra* note 20, at 1038.

¹³² See *Curran*, *supra* note 13, at 245-46 (reporting that proponents of prison reform advocate separate facilities and special programs for the elderly).

prison building itself.¹³³ They are also susceptible to the aggressive acts of younger prisoners, including threats and attacks.¹³⁴ Still, elderly prisoners are not usually given special treatment in prison. Most elderly inmates spend their time in the mainstream prison system; they are not separated or given lighter work assignments unless they are also sick.¹³⁵

In addition to physical health, mental health is also an issue for elderly inmates. Older prisoners generally demonstrate very high stress levels.¹³⁶ Some proponents of reduced sentences argue that individuals near the end of their lives feel compelled to get their affairs in order before they die, that a prison sentence prevents them from doing so, and thus causes mental suffering.¹³⁷

Alternatively, an elderly person's life outside prison may be unfulfilling or so similar to prison life that he or she may suffer less than a younger inmate.¹³⁸ The court in *United States v. Angiulo*¹³⁹ stated that the argument that a sentence falls more harshly upon an elderly offender is "an untested conclusion, unsupported by any psychological or sociological analysis."¹⁴⁰ In fact, the court suggested that the opposite might be true—long prison sentences are more adverse for young offenders who will probably be unable to marry, be a parent, or have a career.¹⁴¹

¹³³ See Brown, *supra* note 18, at 272 (cataloguing uncomfortable temperatures, dampness, and lack of privacy as problems for older inmates); Corwin, *supra* note 85, at 697–98 (taking issue with the stairs and long walks required of elderly prisoners); Curran, *supra* note 13, at 244 (explaining how elderly prisoners do not have access to such items as elevators and wheelchair ramps which they would have in the outside world).

¹³⁴ See Adams I, *supra* note 10, at 475 (indicating that elderly prisoners are "vulnerable to [physical] attacks from younger prisoners"); Curran, *supra* note 13, at 245 (exposing how younger inmates cheat and threaten older inmates).

¹³⁵ See James, *supra* note 20, at 1027. Some state governments, however, provide special accommodations for older prisoners, including Texas (separate residences), Virginia (lighter work assignments), West Virginia ("Old Man's Colony" in the form of an "open setting" for elderly inmates), and the District of Columbia (recreation facilities). See *id.*

¹³⁶ See Adams I, *supra* note 10, at 475.

¹³⁷ See *United States v. Angiulo*, 852 F. Supp. 54, 62 (D. Mass. 1994) (stating that because of the thought that there is so little time left to get things done, the elderly may suffer more than younger inmates for each year of imprisonment (quoting James, *supra* note 20, at 1044)).

¹³⁸ See James, *supra* note 20, at 1038.

¹³⁹ 852 F. Supp. 54 (D. Mass. 1994).

¹⁴⁰ *Id.* at 62.

¹⁴¹ See *id.*

Ultimately, each offender, young or old, has an individualized prison experience based on their different emotional and physical characteristics¹⁴² and their former social role.¹⁴³ Moreover, each prison provides its own unique environment that shapes an inmate's daily living.¹⁴⁴ Any argument that concludes that prison life is necessarily harsher for older inmates because of their age fails to take these factors into account and perpetuates the stereotype of the weak older person. The impossibility of predicting what prison life will be like for each and every criminal makes the best sentencing system one of clarity, a system where sentencing remains constant across a population of similar criminals, regardless of their age.

5. Utilitarian: Contributions to Society

The final argument presented by this Note as supporting the lenient sentencing of elderly evaders is that they have changed since their crimes and that their contributions to society should be used to mitigate their sentences.¹⁴⁵ For instance, Edgar Ray Killen is a Baptist minister.¹⁴⁶ In one of Killen's first trials, the lone holdout for acquittal said that she could not vote guilty

¹⁴² See, e.g., *State v. Green*, 470 S.W.2d 565, 568–69 (Mo. 1971) (Seiler, J., dissenting) (recognizing that nineteen-year-old, 5'9" and 150-pound John Charles Green was repeatedly raped in a medium-security prison); James E. Robertson, *Closing the Circle: When Prior Imprisonment Ought To Mitigate Capital Murder*, 11 KAN. J.L. & PUB. POL'Y 415, 415 (2001) ("When he had first entered prison, his youth, small physique, and passive nature had rendered him fodder for sexual exploitation.").

¹⁴³ See, e.g., Jessica Y. Kim, Note, *In-Prison Day Care: A Correctional Alternative for Women Offenders*, 7 CARDOZO WOMEN'S L.J. 221, 227 (2001) ("The incarceration of mothers . . . presents unique and harsh effects on women as mothers . . .").

¹⁴⁴ See, e.g., William B. Mack III, Note, *Justice for Some: Excessive Force Claims After Porter v. Nussle*, 36 COLUM. J.L. & SOC. PROBS. 265, 265 (2003) (quoting inmate Mark Mckell) (characterizing one prison in upstate New York as a "gladiator school" because of the constant violence that occurs there); J.C. Oleson, *The Punitive Coma*, 90 CAL. L. REV. 829, 850–53 (2002) (describing a direct relationship between increases in prison spatial and social density and increases in inmate aggression, suicide, and psychiatric disorders).

¹⁴⁵ See Russ Bynum, *Captured . . . 46 Years Later Authorities Find Man Who Escaped from GA. Work Camp in 1951. He's at Home*, AKRON BEACON J., Dec. 10, 1997, at A6 (submitting that even the Georgia Corrections Commissioner believed that time could change a person). *But see* *United States v. Carey*, 895 F.2d 318, 321, 326 (7th Cir. 1990) (vacating the district court's downward departure for a sixty-two-year-old, infirm pastor, convicted of defrauding a bank).

¹⁴⁶ See Nichols, *supra* note 6, at 2a.

because he was a preacher.¹⁴⁷ Sam Bowers was a Sunday school teacher.¹⁴⁸ Sam Turner, who escaped from a work camp where he was serving time for voluntary manslaughter, remained at large for forty-six years, during which time he married, became a church deacon, worked, and then retired.¹⁴⁹ According to Georgia Corrections Commissioner Wayne Garner, "[Y]ears have covered [Turner's] past, . . . age and family have made him a different man."¹⁵⁰ Even retributivists who argue that elderly evaders should be judged for who they were at the time of their crimes, and not who they are now, acknowledge that these evaders could be different people than they were several decades ago.¹⁵¹

There are at least two arguments that refute the value of any contributions that an elderly evader has made to society. First, the gravity of the offense outweighs any manner of contribution, especially if the offense involves the killing of innocent victims.¹⁵² Second, other prisoners, who were convicted at the time when the elderly evader should have been, were prevented from making any contributions to society and therefore had to suffer a harsher punishment.¹⁵³ This argument is discussed further in the section on uniformity in sentencing, *infra*.

C. Arguments Against Lenient Sentencing

1. Utilitarian: General Deterrence

A strict sentence underscores the public policy behind the prohibition of the offense,¹⁵⁴ and deters others from committing

¹⁴⁷ See *Time Can't Quench Thirst for Justice*, *supra* note 4, at 14a.

¹⁴⁸ See *Newsome*, *supra* note 6, at 10.

¹⁴⁹ See *Bynum*, *supra* note 145, at A6.

¹⁵⁰ *Id.* (quoting Garner as he granted an emergency special leave for Turner, which allows him to go free until the parole board considers him for clemency).

¹⁵¹ Asking the jury to consider who the person was at the time of the crime, rather than who he or she is at the time of the trial, only serves a purpose if change is possible.

¹⁵² See *State v. Stenzel*, 688 N.W.2d 20, 25–26 (Wis. Ct. App. 2004) (declining to allow the defendant's "long history of being a productive and abiding member of . . . society" to overcome the gravity of his offense—two counts of homicide by use of a vehicle while intoxicated). *But see* *United States v. Willis*, 322 F. Supp. 2d 76, 85 (D. Mass. 2004) (pronouncing that retribution did not justify the incarceration of an elderly defendant when the offense was not violent).

¹⁵³ *Cf. supra* text accompanying note 141.

¹⁵⁴ See *Stenzel*, 688 N.W.2d at 26–27 (upholding fourteen-year sentence for seventy-eight-year-old man in order to reinforce the public policy against drunk

similar crimes.¹⁵⁵ "Through the imposition of a penal sentence, a judge expresses the considered and reflective views of the society of which the judicial system is a part."¹⁵⁶ For example, in *Angiulo*, four convicted mafia leaders in their seventies contended that their sentences amounted to life imprisonment without parole.¹⁵⁷ The court denied the defendants' motions to have their sentences reduced, stating that the sentences continued to be "justified and necessary to vindicate the important public policy concerns which undergird our criminal laws and ensure the domestic tranquility of our society."¹⁵⁸ In *People v. Eshelman*,¹⁵⁹ a sixty-four-year-old defendant was convicted of second-degree murder and sentenced to seventeen years in prison.¹⁶⁰ The California Second District Court of Appeal held that his age, health, and other mitigating factors did not outweigh the seriousness of his crime.¹⁶¹ Other courts have held the same under similar circumstances.¹⁶²

Jurors often fail to understand the social effects of failing to punish criminal behavior as warranted.¹⁶³ Being more lenient on elderly evaders because they almost got away with it gives others incentive to evade the law and suggests that their crimes are not that serious.¹⁶⁴ "I don't think . . . that if one commits a heinous

driving).

¹⁵⁵ See *State v. Baker*, 644 P.2d 365, 369 (Idaho Ct. App. 1982) (acknowledging that general deterrence is an important goal of sentencing).

¹⁵⁶ *United States v. Angiulo*, 852 F. Supp. 54, 57 (D. Mass. 1994).

¹⁵⁷ See *Angiulo*, 852 F. Supp. at 60.

¹⁵⁸ *Id.* at 62.

¹⁵⁹ 275 Cal. Rptr. 810 (Cal. Ct. App. 1990).

¹⁶⁰ See *id.* at 811, 816.

¹⁶¹ See *id.* at 816.

¹⁶² See *United States v. Guajardo*, 950 F.2d 203, 208 (5th Cir. 1991) (preventing a downward departure despite the defendant's age of fifty-five and poor health, which included such ailments as cancer in remission, an amputated leg, and a drug addiction); *Watkins v. State*, 225 S.E.2d 739, 740 (Ga. Ct. App. 1976) (turning down request to vacate sentence of a seventy-four-year-old diabetic with an amputated leg when the jury had heard evidence of his age and physical condition as well as his previous crimes).

¹⁶³ See *Linder*, *supra* note 43, at 888 ("Jurors may over-identify with defendants and therefore fail to give weight to the social costs of excusing or insufficiently punishing criminal conduct.").

¹⁶⁴ See *Nichols*, *supra* note 6, at 2a (stating that Edgar Ray Killen's release on appeal "sends the wrong message" (quoting James Prince, editor of the NESHOBIA DEMOCRAT (Miss.))). Depreciating the wrongfulness of a crime may have a particularly strong effect on the children of an evader, who follow their parent's example. See, e.g., Angela Phillips, *Like Father, Like Son*, NEW STATESMAN & SOC'Y, Nov. 19, 1993, at 32 ("One of the most powerful factors predicting criminality in a

crime you can forget it with passage of time. It sends a wrong message for the current generation."¹⁶⁵ Punishing elderly evaders sends the "vital message that some crimes cannot go unpunished."¹⁶⁶ Moreover, leniency does not make sense when elderly evaders have flouted the law for decades, sometimes up to and including their trials, as when evaders fake illnesses to get leniency.¹⁶⁷

Furthermore, pursuing old cases through sentencing keeps faith in the justice system by showing the public that a crime will eventually be solved.¹⁶⁸ In the case of civil rights murders, "[it] helps erase a very unfair period of time in our history."¹⁶⁹ It also prompts others to re-open cases and continue the pursuit of justice.¹⁷⁰

A counterargument to strict sentencing for deterrence purposes is that sentencing is an opportunity to show mercy. The question posed is: "How do we balance our nation's concern for public safety with the nation's 200-year history of compassion and care for the weak and helpless?"¹⁷¹ With elderly evaders who have eluded the law for decades without remorse, and who did not show mercy to their victims or their families, this rebuttal is unconvincing. If we are to show mercy, it should be with the youth who could change for the better rather than a person who lived his or her life disrespecting our legal system.¹⁷²

child is the presence of a criminal parent."); Martin Piquart & Rainer K. Silbereisen, *Transmission of Values from Adolescents to Their Parents: The Role of Value Content and Authoritative Parenting*, 39 ADOLESCENCE 83, 83-84 (2004) (citing studies about value transmission from parents to children).

¹⁶⁵ Reske, *supra* note 4, at 31 (quoting Circuit Judge D'Army Bailey).

¹⁶⁶ *Time Can't Quench Thirst for Justice*, *supra* note 4, at 14a.

¹⁶⁷ See *United States v. Gigante*, 166 F.3d 75, 84 (2d Cir. 1999) (letting Vincent Gigante know that his feigning of insanity at trial did not fool the court); *Ex-Klansman Killer Headed Back to Prison After Bail Is Revoked*, STAR-LEDGER (Newark, N.J.), Sept. 10, 2005, at 19 (depicting how a court revoked Edgar Ray Killen's bail after finding out that he was in better health than he had let on).

¹⁶⁸ See *Time Can't Quench Thirst for Justice*, *supra* note 4, at 14a ("[Pursuing old cases is] necessary to keep faith with those who fought for civil rights—and to bring to justice those who used violence to thwart it.").

¹⁶⁹ Crittendon, *supra* note 6, at 6 (quoting Myrlie Evers, widow of Medgar Evers); see *Civil Rights: Justice, of a Sort*, *supra* note 4, at 85 ("Hence the trial now, to salve Mississippi's conscience.").

¹⁷⁰ See Newsome, *supra* note 6, at 9 (reporting that Vernon Dahmer's family was inspired to pursue Sam Bowers, his killer, after learning of Byron de la Beckwith's conviction for the killing of Medgar Evers).

¹⁷¹ Lundstrom, *supra* note 82, at 159.

¹⁷² See Elsa Brenner, *Trying To Avoid Giving Up on Young Offenders*, N.Y.

2: Retributivist: Punishment Must Fit the Crime

For a sentence to actually be punishment, the government must inflict pain upon a defendant or cause the defendant to suffer an unpleasant consequence.¹⁷³ “[E]ach sentence must [however] navigate the fine line between what is clearly too much time behind bars and what may not be enough.”¹⁷⁴ One argument for the strict sentencing of elderly evaders is that the punishment should reflect the gravity of the offense. Advanced age should not prevent someone convicted of a violent crime from serving a punishment fit for that crime.¹⁷⁵ For example, the court in *Baker*, upholding a six-year sentence and denying probation for voluntary manslaughter, agreed with the district court that “probation would not ‘measure up . . . to the gravity of the offense.’”¹⁷⁶

Advocating that punishment should fit an elderly evader’s crime raises a related issue that has been alluded to throughout this Note—should evasion of the law be added as a factor in the sentencing of elderly evaders? This addition would penalize elderly evaders for not taking responsibility for their crimes. Theoretically, protective retribution, a type of retributivism, would take into account the evader’s long disregard for the law because it argues that punishment is a means of securing moral balance in society.¹⁷⁷ Punishment for the protective retributivist prevents an unfair distribution of benefits and burdens; by violating the law, criminals renounce their obligations to society and become “free rider[s],” accepting the benefits of society but not the burdens.¹⁷⁸ Punishment is a way for the elderly evader to repay his or her total debt to society.¹⁷⁹ Because evaders have, in addition to their initial crime, evaded the law for many years,

TIMES, Aug. 3, 1997, at 13WC1 (“We believe in the treatability of almost all youngsters, . . . even though they sometimes look angry and mean and make us want to punish them.” (quoting Dr. Alan Siskind, Director of the Jewish Board of Family Services)); Jenifer Warren, *Spare the Rod, Save the Child*, L.A. TIMES, July 1, 2004, at A1 (noting the success of Missouri’s rehabilitation-centered approach to juvenile offenders).

¹⁷³ See DRESSLER, *supra* note 9, at 12.

¹⁷⁴ *State v. Stenzel*, 688 N.W.2d 20, 28 (Wis. Ct. App. 2004) (quoting *State v. Ramuta*, 661 N.W.2d 483, 490 (Wis. Ct. App. 2003)).

¹⁷⁵ See *Brown*, *supra* note 18, at 271.

¹⁷⁶ *State v. Baker*, 644 P.2d 365, 369 (Idaho Ct. App. 1982).

¹⁷⁷ See DRESSLER, *supra* note 9, at 17–18.

¹⁷⁸ See *id.* at 18.

¹⁷⁹ See *id.*

they have shown more disrespect for our laws than non-evaders and ought to be punished more harshly as a result.

In our current justice system, fugitives can be prosecuted for the crime of escape in addition to those crimes for which they were, or should have been, serving time.¹⁸⁰ Although not turning yourself in when you are not yet formally charged with a crime is not itself a crime, there is systemic recognition of incentives for people to come forward with the truth. For example, an offender's acceptance of responsibility¹⁸¹ and his or her cooperation in an investigation¹⁸² act as mitigating factors in sentencing. The converse of these incentives might be that offenders just receive no incentives for not turning themselves in. More likely is that although evasion is not charged as a separate crime, it will be factored against them in the sentencing for their initial crimes. Their lack of cooperation delayed justice, and "flight suggests consciousness of guilt" to the both a judge and jury.¹⁸³

3. Retributivist: Uniformity in Sentencing

Through contributions to society, an elderly evader may not be the same person he or she was thirty years ago; asking the judge or jury to consider only who the criminal was thirty or so years ago acknowledges that fact.¹⁸⁴ Lenient sentences, however, would create inequity between evaders and those individuals

¹⁸⁰ See, e.g., ALA. CODE § 13A-10-31 (2005) (making escape from custody after a felony conviction the crime of escape in the first degree); CAL. PENAL CODE § 836.6 (Deering 1998) (listing elements of the crime of escape); N.Y. PENAL LAW §§ 205.05-.15 (McKinney 1999) (detailing various classes of escape).

¹⁸¹ See *Commonwealth v. Frazier*, 500 A.2d 158, 160 (Pa. Super. Ct. 1985) ("Among those factors used to determine a defendant's potential for rehabilitation is his or her manifestation of social conscience and responsibility through contrition, repentance, and cooperation with law enforcement agencies."); Joy Anne Boyd, *Power, Policy, and Practice: The Department of Justice's Plea Bargain Policy as Applied to the Federal Prosecutor's Power Under the United States Sentencing Guidelines*, 56 ALA. L. REV. 591, 594 (2004) (discussing how, under the now defunct Federal Sentencing Guidelines, "acceptance of responsibility" by the defendant was a mitigating factor).

¹⁸² *Johnson v. State*, 336 A.2d 113, 115-16 (Md. 1975) ("[A judge may consider his or her] perceptions . . . derived from the evidence presented at the trial . . . as well as the data acquired from such other sources as the *presentence investigation* or any personal knowledge the judge may have gained from living in the same community as the offender.") (emphasis added).

¹⁸³ *Bussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994).

¹⁸⁴ See *supra* text accompanying notes 145-151.

from the same generation who committed the same or similar crimes, but who were actually brought to justice near or at the time of their crimes. These criminals were incarcerated during the time that the evader was free and never had the same opportunities to participate in families and create wealth for themselves and their loved ones.¹⁸⁵ Contrast these criminals, sentenced at the time of commission, with the seventy-two-year-old former Nazi commander who was "quite wealthy" from becoming an engineer and was able to build a "nest egg for his old age" before being arrested.¹⁸⁶ A court cannot justify a more lenient sentence for evaders when their freedom has already given them so much more than they would have had if they had been incarcerated.¹⁸⁷

4. Retributivist: Victims' Rights

The fact that nothing can bring back a murder victim or compensate a victim who has suffered a similar horror may suggest that less stringent punishments for elderly evaders can be sufficient. But, "the passage of time [should not] diminish the need for justice."¹⁸⁸ Victims and their families and friends are profoundly affected by the actions of the elderly evader.¹⁸⁹ Take for example, the comments of the son of Bonnie Petrie, who was raped and killed by Adolph Theodore Laudenberg more than

¹⁸⁵ See *supra* text accompanying note 141.

¹⁸⁶ See Santiago, *supra* note 7, at 1D (detailing that the "nest egg" included \$300,000 in certificates of deposit, two luxury condominiums, and two homes).

¹⁸⁷ A suggested punishment is the seizure of personal assets, even those not derived from the crime, in order to bring the evaders back to where they would have been had they been punished. In some states, this practice is expressly prohibited. See, e.g., N.Y. CIV. RIGHTS LAW § 79-b (McKinney 1992) (abolishing forfeiture in criminal cases). In others, the assets subject to forfeiture must be sufficiently related to the criminal action. See LAFAYETTE ET AL., *supra* note 28, at 1258 (using such examples as proceeds of the crime or those assets used to facilitate the crime). The transfer of a convict's assets to his or her victim might also be unconstitutional under the Fifth Amendment Takings Clause. See *Kelo v. City of New London*, 545 U.S.469, 477 (2005), *reh'g denied*, 545 U.S. 1158 (2005) ("[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B.").

¹⁸⁸ *Time Can't Quench Thirst for Justice*, *supra* note 4, at 14a.

¹⁸⁹ See, e.g., *Deliverance*, PEOPLE, Feb. 21, 1994, at 60 (giving an account of how Medgar Evers' widow remembered the night of her husband's murder "like a movie that is on replay every day"); Julia Preston, *32 Years Later, Rape Victim Confronts Attack Suspect in Court Again*, N.Y. TIMES, Nov. 4, 2005, at B4 ("I haven't had a good night's sleep in 32 years . . . I had to leave New York, which I loved, because I was frightened. I had my life stolen from me." (quoting Kathleen Ham, rape victim)).

thirty years before his capture: "She missed everything. He's gotten by with this for 30 years. He should have been in jail for 30 years."¹⁹⁰ Conviction brings closure,¹⁹¹ as does arrest. A brother of one of Laudenberg's other victims expressed his relief at learning of Laudenberg's arrest: "I've been praying for 30 years for some kind of closure and for also some closure for my sister I never did give up. I figured justice [would] be done somewhere."¹⁹² Sentencing also brings closure. With a punishment less severe than prison, however, victims' families may not feel that a convict is getting what he or she really deserves.¹⁹³

Theoretical support for the defense of victims' rights is grounded in both utilitarianism and retributivism, though primarily in retributivism. A utilitarian argument for the protection of victims' rights is that proper punishment deters private revenge.¹⁹⁴ The retributivist theory that supports victims' rights is known as victim-vindication. In victim-vindication, punishment of an offender reaffirms the value of victim by sending a message to the criminal that he or she is not more valuable than the victim.¹⁹⁵ Properly punishing elderly evaders confirms that no matter their age, they are not more valuable than those they have harmed.

D. Outcome

The essential question is whether elderly evaders' low risk to the public, high cost of incarceration, short life expectancy, inability to adapt to prison life, and contributions to society outweigh the need for general deterrence, proportionality between the crime and the punishment, uniformity in sentencing, and vindication of victims' rights. The answer is no.

¹⁹⁰ Altman & Nix, *supra* note 8, at A3 (quoting Ralph David Pickard, victim's son); see Preston, *supra* note 2, at A1 ("He's been out there for 32 years . . . [a]nd I've been in my own private jail." (quoting Kathleen Ham, rape victim)).

¹⁹¹ See Nichols, *supra* note 6, at 2a ("Closure seemed so imminent . . . after the manslaughter conviction . . ." (quoting James Prince, editor of the NESHOPA DEMOCRAT)).

¹⁹² Altman & Nix, *supra* note 8, at, A3 (quoting Frank Brooks, victim's brother).

¹⁹³ See George, *supra* note 98, at 1E ("To the Bullock family, an unrepentant and undeserving convict is not paying for his crime.").

¹⁹⁴ See DRESSLER, *supra* note 9, at 17.

¹⁹⁵ See *id.* at 18.

The arguments for lenient sentencing are just not strong enough. Releasing a once violent criminal who successfully evaded the law for decades based on the fact he or she can no longer hurt anyone gives others incentive to evade the law the best they can. In the case of a murderer, especially, the cost of incarceration is not outweighed by the gravity of this "most heinous" offense.¹⁹⁶ In addition, requiring courts to estimate an evader's life expectancy in sentencing would be impractical, inequitable, and not that useful, considering that any day could be anyone's last. Moreover, there is no proof that the prison environment is necessarily harsher on older criminals than on younger criminals; the opposite might be true. Finally, it is unjust to use the elderly evaders' contributions to society to reduce their sentences; people from their generation who were actually caught and imprisoned never had that opportunity and for that reason were shown no such leniency.

The arguments against lenient sentencing are more convincing. Incarcerating an elderly evader sends the message to others who evade the law that although it might be delayed, justice will be done. Also, time behind bars reflects the gravity of the offense. Additionally, imprisonment of the elderly evader is the least that can be done to strive toward uniformity in sentencing. Ultimately, not sufficiently punishing an elderly evader continues the injustice that the evader has done to victims and their families.

CONCLUSION

Courtroom sympathy toward "elderly evaders," those who committed violent crimes, including murder, decades before being brought to justice, is misdirected when it results in lenient sentences. Such sympathy can only be re-directed by exploring its foundations in the utilitarian and retributivist theories of punishment. An examination of both utilitarian and retributivist arguments in favor and against the lenient sentencing of elderly evaders, through the use of American legal jurisprudence and public policy, yields a clear result: Arguments against lenient sentencing prevail over those in favor. Criminals should never be rewarded for evading the law, especially by a court.

¹⁹⁶ *Id.* at 53.