California Prison Reform
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Elderly Prisoners Are Literally Dying For Reform

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Introduction

Helen Loheac is eighty-two years old. At five feet tall and ninety pounds she is hardly a threat. Nonetheless, three times a week she is shackled and placed in waist chains for a forty-mile drive to the Riverside County Medical Center where she receives dialysis for chronic kidney failure. Two $24.75-an-hour armed corrections officers accompany her. This all day trip is exhausting and often leaves Helen with severe bruising on her hands and feet from the shackles and chains. The stress of these trips compounds the severity of her kidney problems, but without them she would die. She is a non-violent, non-serious offender, convicted of passive participation in a conspiracy with her son. Helen will likely die behind bars.[1]

In the last twenty years, the number of older prisoners has increased by 750 percent nationwide.[2] Unfortunately, the prison system's ability to deal with an increasingly geriatric population has not adapted at a similar rate. The current conditions that many older prisoners now face are appalling. Some of them are diabetic but are fed the same food as other prisoners; many do not receive the medicine they need for heart or kidney conditions; others are confined to wheelchairs yet assigned to top bunks. Growing old in prison has become a unique form of punishment. Part I of this paper will examine the characteristics of the aging population within the California prison system, the specific problems the population faces, the rising cost of maintaining this population in the absence of reform, and finally, the level of risk these prisoners pose. Part II will examine possible solutions for dealing with the graying of the prison population,

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[1] *See California's Aging Prisoner: Demographics, Costs, and Recommendations Before the Subcomm. On Aging and Long Term Care* 58 (2003) [hereinafter *California's Aging Prisoner*] (statement of Ms. Gloria Killian); Sandra Kobrin, *Dying On Our Dime – California's Prisons Are Teeming with Older Inmates Who Run Up Staggering Medical Costs*, L.A. TIMES, June 26, 2005.

[2] *California's Aging Prisoner*, *supra* note 1, at 18 (statement of Professor Jonathan Turley).

including solutions currently implemented in other states. Part III will suggest certain policies for implementation within the California system.

Part I: The Graying Prison Population in California

The adoption of three-strikes laws, sentence enhancements, and reduced parole opportunities means that prisoners spend more and more time behind bars and more inmates will grow old in prison. As of 2003,[3] there were approximately 6400 elderly inmates[4] in California—approximately four percent of the prison population. In its analysis of the 2003-04 Budget Bill, the Legislative Analyst's Office predicted that this number would increase to 30,200 by the year 2022, approximately sixteen percent of the population.[5] Other analysts predict that this number will increase to over 50,000—approximately a third of the prison population—by 2025.[6] But who are these prisoners and what are they costing California?

A. Demographics of Elderly Prisoners in California

Of the 6400 prisoners mentioned above, fifty-five percent are between fifty-five and fifty-nine years of age; twenty-five percent between sixty and sixty-four; twenty percent are sixty-five years or older.[7] Only 300 of these prisoners are female.

Elderly criminals are typically broken down into three categories: (1) those who are incarcerated for the first time at an elderly age; (2) those with long criminal histories marked by periods of freedom and periods of incarceration; and (3) those who are aging

[3] I encountered significant difficulties finding analysis of 2004 data. As such, this paper discusses and utilizes 2003 data.
[4] Defined as 55 or older. The need for a uniform classification system will be discussed later in this paper.
[5] LEGISLATIVE ANALYST'S OFFICE, ANALYSIS OF THE 2003-04 BUDGET BILL, [hereinafter LAO ANALYSIS] http://www.lao.ca.gov/analysis_2003/crim_justice/cj_04_5240_anl03.htm#_Toc32742721 (last visited Dec. 23, 2005).
[6] *California's Aging Prisoner*, supra note 1, at 18 (statement of Jonathan Turley).
[7] CALIFORNIA DEP'T OF CORRECTIONS AND REHABILITATION, CALIFORNIA PRISONERS & PAROLEES 2003 (2005), http://www.cya.ca.gov/ReportsResearch/docs/Annual/CalPris/CALPRISd2003.pdf (last visited Jan. 17, 2006).

in the prison system as they serve long sentences for crimes they committed when they were much younger.[8] Certainly these differing categories raise questions as to whether all elderly prisoners should be treated the same. The first group often commits serious crimes, has adjustment problems, and is at the highest risk for being victimized by other inmates. The second group adjusts better to prison life but may still have substance abuse problems and may lack skills to help them cope in the community. The third group has adjusted well to institutional life but may be difficult to place in the community.[9]

Of the 6400 total prisoners in the California system, thirty-five percent have been sentenced for non-serious, non-violent crimes.[10] Within this subset, approximately fifty percent have been incarcerated for drug related offenses, nine percent for driving under the influence, and about eighteen percent for petty theft and burglary.[11]

B. Problems Faced by the Elderly

Aging inmates have similar needs to those of the aging population in the general community. For example, many people will need eye glasses, hearing aids, walkers, bath rails and other accommodations as they age. Some people will need heart surgery or treatment for neurological diseases like Alzheimer's. Others will need near constant supervision as they age. Inmates are no different in this regard. On the other hand,

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[8] William E. Adams, The Incarceration of Older Criminals: Balancing Safety, Cost, and Humanitarian Concerns, 19 NOVA L. REV. 465, 482 (1995). *See also* CALIFORNIA DEPARTMENT OF CORRECTIONS, OLDER INMATES: THE IMPACT OF AN AGING INMATE POPULATION ON THE CORRECTIONAL SYSTEM; AN INTERNAL PLANNING DOCUMENT 17 (1999) [hereinafter IMPACT OF AN AGING INMATE POPULATION].
Some people include a fourth category—the chronic offender. These are offenders with a propensity for criminal activity but who have never been incarcerated before. *See* Nadine Curran, *Blue Hairs in the Bighouse: The Rise of the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 NEW ENG. J. IN CRIM. & CIV. CONFINEMENT 225, 239 (2000).

[9] JOAN B. MORTON, U.S. DEP'T OF JUSTICE, AN ADMINISTRATIVE OVERVIEW OF THE OLDER INMATE 1, 11 (1992).

[10] *California's Aging Prisoner*, supra note 1, at 3 (statement of Mr. Stan Neal).

[11] I could not find information on the percentage of the elderly convicted for sex offenses. In 1997, an estimated 19.21% of the elderly were convicted for sex crimes involving children. *See* IMPACT OF AN AGING INMATE POPULATION, *supra* note 8, at H-2.

inmates have unique needs due to the characteristics of their lives before they entered prison. Research shows that, on average, prisoners are roughly seven to ten years older physiologically than they are chronologically.[12] This is partly due to poor dietary history, chemical abuse and the stress of being in prison. Stanford University Professor Philip Zimbardo, an expert on the psychology of imprisonment and violence, has said:

> [O]lder inmates tend to be sicker than other people their age when they enter prison, typically because of drug and alcohol abuse earlier in life, and there is every reason to expect that the stresses of prison life will impact on the already greater vulnerability of the aged. We can expect them to suffer from more vascular, neurological, respiratory and endocrine disorders than their non-institutionalized peers . . . they will have more extensive vision and hearing problems, more problems with walking, require special diets and ultimately are more prone to Alzheimer's and Parkinson's diseases.[13]

Other commonly mentioned illnesses among elderly men in prison are diabetes and Hepatitis C. Some are on dialysis machines, receive oxygen, or have cancer.[14] Female prisoners are often even more at risk due to their distinct needs. Richard Aday, author of the book *Aging Prisoners: Crisis in American Corrections*, has said, "Older females, oftentimes grandmothers, have special health care needs that are very distinct from men. Necessary health programs like therapeutic services, cervical and breast cancer screenings and nutritional meals containing calcium and fresh vegetables are not widely available."[15] Also, because female prisoners are such a small percentage of the prison population at this time, their needs are most neglected

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[12] *California's Aging Prisoner*, supra note 1, at 18 (statement of Jonathan Turley). Florida recently concluded that their prisoners are 11.7 years older than their chronological age. *Id.* at 19.
[13] *Elderly Prisoners to Pose Major Problems Under Three-Strikes Law*, STAN. UNIV. NEWS SERV., Nov. 2, 1994, at 3.
[14] Stephanie Pfeffer, *On the Docket: One Strike Against the Elderly: Growing Old in Prison*, MEDILL NEWS SERV., Aug. 2002, at 2.
[15] *Id.* at 1.

Apart from healthcare issues, elderly prisoners also face victimization from younger inmates. Jonathan Turley, one of the nation's foremost experts on geriatric prisoners, has said, "We all know grandparents who complain they're afraid to walk at night because of crime. Imagine being a geriatric in a neighborhood where everyone is certifiably violent."[16] As a general matter, leaving older prisoners in conventional prisons leads to inefficient healthcare administration, victimization, and a system that is simply untailored to the needs of a clearly non-homogenous population.

C. Costs of Maintaining Elderly Prisoners

The impact that the increase of elderly prisoners will have on California's budget is staggering. Right now, the national average for housing an inmate is around $22,000.[17] The average cost of housing an elderly inmate is closer to $70,000, more than three times the cost of housing a younger inmate.[18] Most of the added costs of imprisoning elderly prisoners are healthcare related. Inmates have a right to healthcare under the Eighth Amendment. In *Estelle v. Gamble*,[19] the Court held that inmates have a right to be free of "deliberate indifference to their serious health care needs." Since this case, three basic rights have emerged: (1) right of access to care; (2) right to the care that is ordered, and (3) right to a professional medical judgment.[20] Despite this constitutional guarantee, prisons are just not equipped to take care of elderly prisoners. Rarely are there systems in place to monitor chronic problems or to implement preventative measures. As a whole, doctors, nurses, and correctional officers are not trained to deal with age-related illnesses.

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[16] *California's Aging Prisoner*, *supra* note 1 (statement of Jonathan Turley).
[17] Pfeffer, *supra* note 14, at 4.
[18] *See id.*; *California's Aging Prisoner*, *supra* note 1, at 21 (statement of Jonathan Turley).
[19] 429 U.S. 97, 104 (1976).
[20] WILLIAM J. ROLD, *Legal Considerations in the Delivery of Health Care Services in Prisons and Jails* (2001).

California currently has no institutions exclusively dedicated to the care of elderly inmates. In fact, most anecdotal evidence reveals that elderly prisoners are simply left to fend for themselves.[21]

For those that do receive care, the cost can be high. For example, one inmate in the Vacaville prison has survived four types of cancer and a stroke. He currently takes twelve pills a day that cost approximately $1800 per month.[22] One seventy-two year old woman suffers from emphysema, COPD, heart disease, and arthritis. She is unable to walk more than fifty feet without stopping to catch her breath. Her doctors estimate that her cardiac care alone has cost three quarters of a million dollars.[23] There are costs incurred from preparing special diets or constructing jail cells that can accommodate people in wheelchairs. Or consider that every time an inmate needs to be transported to an offsite medical facility for hospitalization, dialysis, or other medical purposes, he must be accompanied by two correctional officers. This is an expensive proposition.

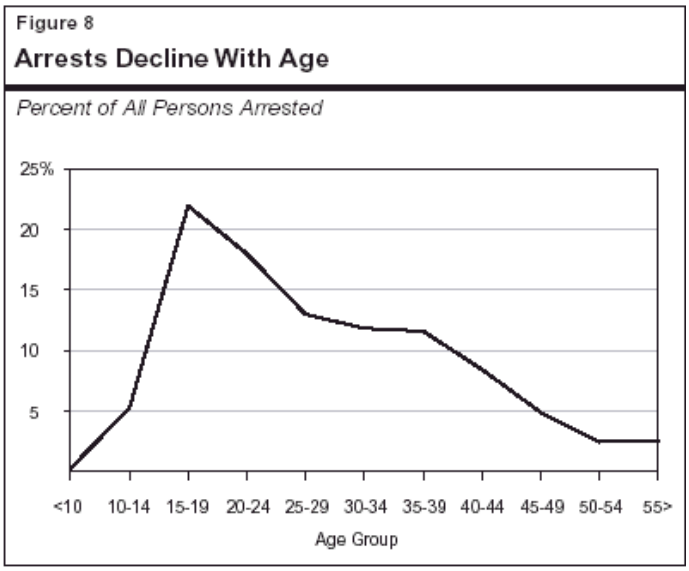
If it is expensive now to take care of elderly prisoners, one can only imagine what effect the burgeoning elderly population will have on California's budget. Using conservative calculations, Jonathan Turley estimates that California will be looking at a $4 billion budget just for elderly prisoners by 2025.[24] This is the equivalent of the entire correctional budget today. The implications of these calculations are grave.

D. Are Elderly Prisoners High Risk?

Certainly elderly inmates are high cost, but research reveals that they are not high-risk. Indeed, the view that criminal behavior declines with age is a well-accepted

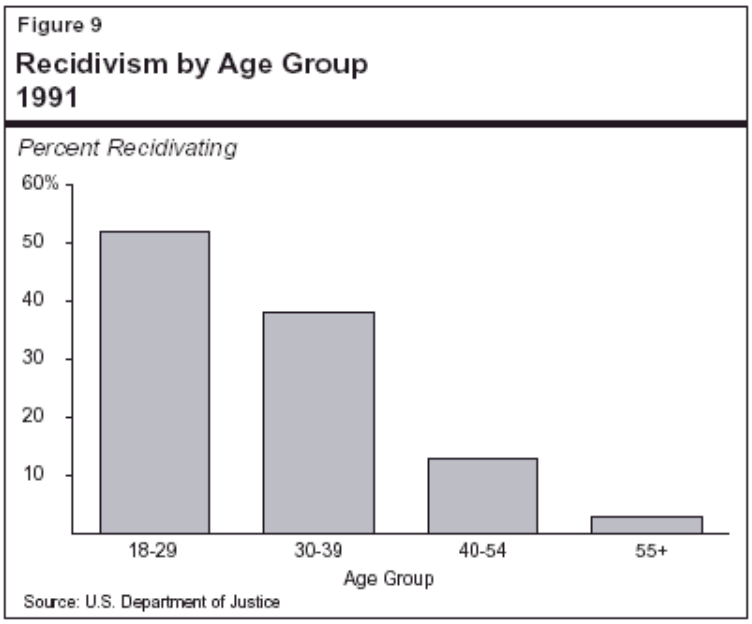
[21] *California's Aging Prisoner*, *supra* note 1, at 6 (statement of Stan Neal).
[22] *California Struggling with Growing Numbers of Elderly Prisoners*, ASSOCIATED PRESS, June 9, 2002, at 1.
[23] *California's Aging Prisoner*, *supra* note 1, at 59 (statement of Gloria Killian).
[24] *Id.* at 22-23 (statement of Jonathan Turley).

principle. Figure 8 shows that nationwide, arrests were fewer than five percent among individuals fifty years of age and older.[25]



Additionally, numerous studies reveal that age is one of the most reliable predictors of recidivism.[26] As Figure 9 shows, older parolees are only reincarcerated approximately 1.4 percent of the time.[27]

[25] LAO ANALYSIS, *supra* note 5.
[26] *California's Aging Prisoner*, *supra* note 1, at 27 (statement of Jonathan Turley).
[27] LAO ANALYSIS, *supra* note 5.



Ironically this means that as the costs of imprisonment go up, the benefits of imprisonment, in terms of public safety, go down.

For this reason, any wholesale reform of California's prison and sentencing system must incorporate reform for treatment of elderly prisoners. If properly managed and supervised, early release into the general population is a feasible way to cut costs without increasing risk. Additionally, California should look to other states that have begun to successfully deal with the problem of aging prisoners. The next section will explore these options.

Part II: Suggested Reforms for the Elderly

The first part of this section will discuss the need for uniform classification systems. Having uniform classification systems in place will make it significantly easier to evaluate the effectiveness and applicability of other reform programs. The rest of this section will focus on steps other states are taking to deal with the aging of their prison population, divided by risk group. These programs include the development of

preventative monitoring systems, early release, and the creation of separate geriatric facilities. The most glaring omission is that only two of these states, Florida and South Carolina, have specifically addressed the needs of aging female inmates.[28] Other steps that would improve the elderly prison problem would include sentencing reform and changes to current compassionate release programs.

A. Classification

i. Age

Developing a uniform age classification system is a necessary first step to implementing effective reforms for the elderly. At present, it is virtually impossible to determine how many elderly are incarcerated nationwide because scholars and correction officials differ as to what age is an appropriate cut off to label someone as elderly. Some characterize the elderly prison population as those prisoners who are sixty-five years old or older, while others start counting as low as age fifty. Without a uniform classification system it is virtually impossible to track costs, identify trends, or determine statistics about elderly care within the prison system. Without a classification system "you can't take advantage of opportunities to combine people in institutions . . . [you can't] take advantage of economies of scale. You just don't know where these costs are coming from. You're not tracking them."[29]

The National Institute of Corrections recommends that correctional agencies nationwide adopt age fifty as the starting point for determining who qualifies as an "older" offender.[30] Choosing age fifty would properly account for at least some of the differences between the chronological and physiological ages of prisoners. As discussed

[28] IMPACT OF AN AGING INMATE POPULATION, *supra* note 8, at 14.
[29] *California's Aging Prisoner*, *supra* note 1, at 7 (statement of Stan Neal).
[30] IMPACT OF AN AGING INMATE POPULATION, *supra* note 8, at 4.

in Part I, it is almost universally acknowledged that prisoners are between seven and ten years older physiologically than they are chronologically, which makes it important that the chronological starting point be at a young enough age. This would more effectively allow for early health care, intervention, and prevention programs to minimize some of the long-term medical costs and other problems associated with older offenders.

ii. Risk Level

It is also vitally important to develop a uniform classification system to define the risk level of each prisoner. There are three basic categories of inmates: low-risk, mid-risk, and high-risk prisoners. Being able to accurately identify which category each prisoner falls into is critical in evaluating which one of the following programs is most suited to any given prisoner.

B. Solutions for Low-Risk Prisoners

The Legislative Analyst's Office estimates that approximately thirty-five percent of the elderly population were sentenced for non-violent and non-serious offenses.[31]

i. Early Release

One of the most commonly suggested approaches to dealing with the elderly prison population, and often the most controversial, is the implementation of early release programs. Those who oppose early release programs mainly do so for retributive reasons—they believe that "if you do the crime, you do the time" and you should not be released simply because you are old. This is especially true in California where the predominant view is that prisoners cannot be meaningfully rehabilitated. Legislators also worry that if they advocate releasing convicted killers—even if they are old and sick—they will be viewed as soft on crime.

[31] *California's Aging Prisoner*, *supra* note 1, at 3 (statement of Stan Neal).

Others who oppose early release do so for public safety reasons. It is important to remember, however, that most people advocating for early release do not support release that does not adequately take into consideration risk to the public. Only those prisoners classified as low-risk would be considered for such a program. At least one program, Projects for Older Prisoners, has been designed with this in mind.

a. POPS

Founded in 1990 by Jonathan Turley, Projects for Older Prisoners (POPS) was the first legal organization in the nation to focus exclusively on older and geriatric prisoners. POPS has developed a system for the identification of low-risk older prisoners for alternative forms of incarceration or special release programs. All POPS offices are run out of neighboring law schools and are staffed by volunteer students with a staff of attorneys and a supervising law professor.[32]

When a state enlists POPS services, the first step is for POPS to gather the prisoners together in their facility and explain the program. This includes the program's one rule: If a prisoner lies to someone in the course of his or her POPS evaluation, they will be disqualified for the program and never considered for POPS again.[33] This is true if a single fact is misrepresented, manipulated, augmented or changed. A prisoner must also meet the minimum eligibility requirements. In order to qualify, a prisoner must be at least fifty-five and have already served the average time for his or her offense. Inmates convicted of first-degree murder or sex offenses are automatically disqualified from participation in the program.

[32] *California's Aging Prisoner*, *supra* note 1, at 25 (statement of Jonathan Turley).
[33] *Id.* at 25-26 (statement of Jonathan Turley).

Once an inmate is deemed eligible for POPS, he or she is assigned a caseworker. This caseworker is usually a law student who is in charge of conducting interviews with the prisoner and looking at his criminal history, medical history, pattern of criminality, health, employment, and family background, as well as any sort of chemical dependency history. The caseworker reads the court and news files that are publicly available,[34] talks to the correctional staff regarding the prisoner, looks at the prison files, and examines any disciplinary accounts and/or hearings. At this stage, all the gathered information is then used to conduct two separate recidivism analyses.[35] The use of computers has aided significantly in the accuracy of recidivism predictions.[36] POPS then uses these recidivism evaluations to determine prisoners who are low-risk on both tests. These are the only prisoners that will eventually be recommended for release. But, this by no means ends the process.

At this stage, the caseworker goes back out into the field to consult with the victim or the victim's family. Victim consultation has been a requirement since the program began in 1990—the first program to have any such requirement. An interview with the victim, or victim's family, can reveal inconsistencies in information obtained from the prisoners, as well as violence or aggression not evident from the written record. POPS has turned people down on the basis of these victim consultations, even though the prisoner was statistically low risk.[37] If the victim has no additional information about the prisoner, and does not oppose release, the caseworker will advocate on the prisoner's

[34] LexisNexis and Westlaw are good sources for this type of information. Law students have free access to these research sites while enrolled in law school.
[35] I tried to contact Jonathan Turley to obtain specific information on these recidivism analyses. Unfortunately, Professor Turley did not return my emails or phone calls.
[36] *California's Aging Prisoner*, *supra* note 1, at 25 (statement of Jonathan Turley).
[37] *Id.*

behalf to the POPS members. After taking a vote, the POPS members will decide whether to recommend the prisoner for parole, probation, or pardon, depending on what mechanism the state has set up.

When presenting information to the appropriate board about their findings, POPS also includes information about where a prisoner will live after release—including how much space they will have, who owns the house, whether or not it is accessible to an older person—and the source of money that the prisoner will live on, including whether the prisoner will qualify for social benefits. Many of these prisoners have family and friends that can bear the cost of their care upon their release. But even if such prisoners require care or assistance from the federal government, state, or county, it is far cheaper to provide medical care, assistance, and any necessary treatment outside of the correctional setting. Not to mention the benefits of spreading the costs between the differing levels of government.

This post-release plan is arguably one of the most important parts of POPS. In the words of Jonathan Turley:

> The reason POPS has been successful is because we sweat the specifics . . . It's called a soft landing. And a soft landing requires you to set up the older prisoner with some regiment. Older individuals actually prefer regiment . . . They tend to gravitate towards regiments in terms of taking their pills, in terms of their movements. Regiments are good. If you setup a regiment for a geriatric prisoner, the prisoner will stick with that regiment and will not divert.[38]

At this point, POPS has chapters at law schools in Virginia, Maryland, Louisiana, North Carolina, Michigan, Florida, Illinois, and the District of Columbia and has secured

[38] *Id.* at 29 (statement of Jonathan Turley).

the release of hundreds of prisoners.[39] So far, not a single person that POPS has recommended for release has been reincarcerated. A zero recidivism rate is an astonishing accomplishment, one that Jonathan Turley is especially proud of. Part III will discuss the requirements to implement such a program in California.

b. Compassionate Release

Compassionate release programs call for the early release of prisoners with terminal illnesses that are expected to die within six months and whose release poses no risk to society. Although this is not a program for the exclusive use of the elderly, a vast number of people qualifying for this program are in fact elderly. Unfortunately, most compassionate release programs are virtually unused.[40] In California, compassionate release is only responsible for releasing an average of twelve people a year since 1997.[41] Many prisoners and family members are unaware of an inmate's right to release under the program. For those that are aware of the program, it is often nearly impossible to effectively wade through all the paperwork without help. For an elderly inmate serving a life sentence the process is especially complicated. First, a prison doctor needs to verify that death is expected within six months. Then, the application goes from the warden, to the director of the corrections department, to the Board of Prison Terms, and finally to the original sentencing judge for final approval.[42] The application process is so long that many inmates die before any decision is reached.[43] In 2003, of the forty-eight inmates

[39] *See* Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 ELDER L.J. 173, 196 (1996); *California's Aging Prisoner*, *supra* note 1.
[40] *California's Aging Prisoner*, *supra* note 1, at 27 (statement of Jonathan Turley).
[41] Kobrin, *supra* note 1.
[42] Non-lifer applicants do not require the approval of the Board of Prison Terms. *Id.*
[43] *Id.*

who sought compassionate release, only sixteen received the required board recommendations, and only ten were eventually released.[44]

c. Medical Reprieve Parole

Medical reprieve parole programs resemble compassionate release programs but are not always limited to those who are terminally ill. For example, the Georgia Department of Corrections has hired a full-time registered nurse to survey the state looking for inmates that are candidates for medical reprieve parole. This nurse looks for those prisoners who have high medical costs or who may have been admitted to prison infirmaries multiple times but are unaware that they are eligible for medical parole. After identifying such prisoners and determining whether they are low-risk, the nurse will recommend medical reprieve parole. According to Bob Kissell, Director of Health Services, using this more proactive approach has successfully resulted in an increase of parolees. Because these prisoners typically cost the state more money than the average prisoner, if the nurse finds even a single inmate that is eligible for medical reprieve parole, the position has arguably paid for itself.[45]

In Maryland, medical parole is used to buffer costs. The Department of Public Safety and Correctional Services requests medical parole for individuals who no longer pose a threat to society and whose medical and physical care needs fit the medical parole requirements.

The Texas version of this was just amended so that inmates with advanced Hepatitis C and other serious medical problems now qualify for special needs parole. These inmates are either released to a long-term care facility outside the prison, a halfway

[44] Kobrin, *supra* note 1.
[45] SHERRY AGNOS, SENATE OFFICE OF RESEARCH, TREATMENT OF ELDERLY INMATES 2 (2003).

house, community residential facility, or to be cared for by a family member. They are also required to wear electronic monitoring devices.[46]

d. Community Based Nursing Homes and Hospices

In combination with the three above-listed solutions for low-risk prisoners, the development of community based nursing homes and hospices would aid in the care of the elderly. The California Department of Corrections (CDC) staff recommends that such community-based correctional nursing homes and hospices be placed near contract hospitals and prison hospital facilities as CDC out-based units. These facilities would provide secure basic care and assisted-living for selected inmates and parolees that pose no serious risk to the community. They would be staffed with minimal correctional officers, a Medical Technical Assistant, and a Certified Nursing Assistant. Physicians from the nearest CDC prison facility would conduct regular sick-call rounds (much like standard nursing homes and hospices). Anyone requiring routine or emergency hospital admission would be handled through CDC contract arrangements.[47]

Currently, about half the states now offer hospice care within the prison for their frailest inmates.[48] Other organizations like the GRACE project and the National Prison Hospice Association are working to create community-based hospice programs. The ultimate goal of the GRACE Project is to achieve community hospice standards in end-of life care for inmates.[49]

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[46] *Id.* at 4.
[47] IMPACT OF AN AGING INMATE POPULATION, *supra* note 8, at G-4.
[48] Patrik Jonsson, As Prisoners Age Should They Go Free?, CHRISTIAN SCIENCE MONITOR, Sept. 5, 2003, at 2.
[49] Interview with Margaret Ratcliffe, Vice President of Services for Volunteers of America, available at http://www.mrltc.com/interviews-margaret-ratclifffe.html (last visited Jan. 18, 2006)

Some people may view the implementation of such programs as "criminal welfare" or "convict Medi-Cal." In order to combat this perception, it would be necessary to conduct preparatory and ongoing education for people in the community.

C. Solutions for Mid-Risk Prisoners

i. Alternative Forms of Release

For those prisoners characterized as mid-risk,[50] out-right early release may not be appropriate option. Instead, other alternative forms of release are suggested. This would include electronic bracelet programs, intense parole supervision, and home detention. These types of programs could reduce costs from $70 a day, down to $8.[51] Since many of these prisoners are barely mobile, these are cost effective means of protecting the public.

Historically, judges and probation officers have exhibited "a tendency to disregard the older offender, not necessarily because . . . her crimes are not serious or needs are not real, but simple because . . . she is older."[52] Increasing the number of older offenders in the parole system will, therefore, challenge the Parole and Community Services Division in the following ways:

- Older parolees are less likely to have family support systems able to provide housing and care.
- Older parolees will have a harder time obtaining employment, which will make self-support substantially more difficult. If a parolee does not qualify

[50] POPS usually errs on the side of being conservative. As such, the prisoners that POPS considers mid-risk prisoners would likely be viewed as low-risk by most states.
[51] *California's Aging Prisoner*, *supra* note 1, at 30 (statement of Jonathan Turley).
[52] Belinda R. McCarthy & Robert H. Langworthy, *Older Offenders on Probation and Parole*, 13 J. OFFENDER COUNSELING, SERVICES & REHABILITATION 1, 23 (1987).

for Social Security, he will need to be set up for welfare, food stamps, and feeding assistance systems.

- Older parolees have an increased probability of having chronic illnesses that require monitoring. Since most of these parolees will have no private insurance, they will need to be set up to obtain and maintain Medi-Cal coverage.
- Older parolees are likely to experience difficulty in getting around. For example, getting to and from medical appointments, picking up prescriptions, getting to the welfare office, obtaining monthly food stamps, getting to the parole office, etc. As such, these parolees may need to be set up with services and organizations that provide transportation.
- Older parolees may require additional health monitoring to avoid malnutrition and dehydration that could lead to increased medical problems, hospitalizations, or death.
- Older parolees without families or community ties may die while on parole. Parole Agents will need to acquaint themselves with funeral and burial processes and be aware of living wills and "do not resuscitate" orders.
- Older parolees may suffer from Alzheimer's disease and other dementias. Parole Agents will need to be trained specifically to deal with these types of parolees.
- Older parolees may willingly violate parole if they are unable to find adequate and safe housing, lack access to medical care and socialization, or cannot take care of themselves

There are certainly ways to offset some of these problems. First, and foremost, Parole Agents supervising older parolees must receive training in geriatrics, including a focus on dealing with dementias. One author has suggested that a possible solution may be to have a specialized Parole Agent who monitors all elderly offenders on probation within a given jurisdiction.[53] There are some problems with such a solution. Namely, providing special training to a specific agent means the other probation officers will remain ignorant on dealing with the problems of the elderly. Also, such a position may not be justifiable in many communities because there may not be enough elderly criminals to necessitate a full-time special Parole Agent.[54]

Parole Agents should be made aware of available community resources that focus on caring for the elderly. Informational meetings used to educate probation officers as to these services could mirror similar programs conducted for volunteer organizations designed to help elderly crime victims.[55] For example, one volunteer organization was briefed by psychologists, geriatric specialists, business organizations, and other professionals regarding the specialized needs of the elderly in a forty-hour program. These volunteers were also given a directory of relevant local social service agencies, including, "hospital emergency rooms, the domestic violence safehouse, the local social security office, crisis hotlines, local senior assistance agencies, the State's department of social services, and many others."[56] Parole Agents could benefit from similar training.

[53] 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, 279 (1998).
[54] *Id.* at 279-80.
[55] *See* Lynne Bliss, *Police Practice: Assisting Senior Victims*, F.B.I. L. ENFORCEMENT BULL., Feb.-Mar. 1996, at 6-7.
[56] *Id*. at 7.

Parole decisions may need to begin factoring in where an older parolee's needs can be met, which may mean they are ultimately paroled in a different location than normal.[57]

Finally, one author suggests a unique solution called Joint Effort which is meant to bridge the gap between current programs and an elderly offender's needs. Although it is outside the scope of this paper to discuss this program in detail, Joint Effort is comprised of three basic stages. The first stage encourages police officers and courts to take initiative in admitting elderly offenders into the program. The second stage calls for revised risk-need assessments conducted by medical, psychological, and correctional professionals. The third stage combines the supervisory function of probation with the service-oriented, individualized attention found in diversion programs.[58] The main idea behind this program would be to encourage agency cooperation between health care providers, counselors, and volunteer coordinators to help monitor such lower-risk offenders and thus provide more adequately for their needs, while at the same time freeing probation officers to deal with higher priority probationers.[59]

D. Solutions for High-Risk Prisoners

i. Geriatric units

Release in any form is obviously inappropriate for high-risk offenders. For this category of prisoners, reform is still needed. So far, Florida, Georgia, Illinois, Indiana, Minnesota, Mississippi, North Carolina, Ohio, South Carolina, Texas, and Wyoming have dealt with this category of offenders by creating special geriatric units. Other states, such as Arkansas, Kentucky, Louisiana, Maryland, Missouri, New Jersey, Tennessee,

[57] IMPACT OF AN AGING INMATE POPULATION, *supra* note 8, at E-1, E-2.
[58] Brown, *supra* note 53, at 287-88.
[59] *Id.*

Virginia, Washington, West Virginia, and Wisconsin, don't have specific "geriatric" policies or facilities, but have "chronically infirm" or "chronic disease" beds that can house older offenders or are currently in the process of designing and building separate geriatric facilities.

Mississippi has a geriatric facility that is modeled after typical nursing homes and offers twenty-four hour nursing assistance and provides a case manager to work with the inmates.[60]

Federal geriatric facilities have also surfaced such as one in Fort Worth, Texas that specifically addresses the mobility and sanitation concerns of the elderly.[61] Like many state facilities, admission to such federal facilities is limited based on security classification and need—not every inmate that would benefit from such treatment will qualify for transfer to such a facility.

The benefits of separate geriatric facilities are many. First, some studies reveal that older prisoners prefer segregation from the general population for reasons of safety and improved care.[62] Being with fellow elderly prisoners could enhance self-respect and reduce loneliness by increasing social interaction. Segregating older prisoners from the younger, more violent prisoners would mean that, at minimum, fewer elderly prisoners would suffer from the stress-related illnesses that accompany living in such an environment.

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[60] Ronald H. Aday, *GoldenYears Behind Bars: Special Programs and Facilities for Elderly Inmates* , FED. PROBATION, June 1994, at 49.
[61] Peter C. Kratcoski & George A. Pownall, *Federal Bureau of Prisons Programming for Older Inmates*, FED. PROBATION, June 1989, at 33-34.
[62] Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. OF L.A. L. REV. 101 (2004).

Second, there are significant cost savings that could result from the consolidation of needed special services. For example, transferring older prisoners to a facility that is conducive to those using wheelchairs or walkers would mean that not all prisons need to be made wheelchair friendly. It is unclear whether it will be more expensive to build separate geriatric facilities than to modify every single prison to be elderly friendly, but it is important to realize that the savings don't come from mere construction costs, but from other areas, as discussed below.

There would be vast savings in terms of security costs. As Jonathan Turley says of these prisoners:

> [T]he good thing about geriatric units is that most of these geriatrics who are high-risk are not high-risk for escape. They may be high-risk for embezzlement because they went in at 56 and you can hardly say at 60, is a new man. So the prisoner is going to have to stay in, but it does not make him a high-risk for escape, which means you can use a higher percentage of minimum security facilities which dramatically reduce your costs because of guard costs.[63]

This would also result in reducing medical transportation costs. Most prisons currently transport people out of the prison for most medical purposes. This becomes an expensive proposition when you realize that each prisoner must be accompanied by correctional officers for custody and security purposes. To the extent these services can be consolidated into one facility, the reduction in transportation costs would be considerable.[64] Pennsylvania has built a state-of-the-art geriatric care facility for its infirm prisoners.[65] North Carolina converted an old tuberculosis hospital into a facility that caters to inmates with special medical needs, such as older offenders. This facility reduces the cost of incarceration by localizing healthcare, protecting inmates from

[63] *California's Aging Prisoner*, *supra* note 1, at 52 (statement of Jonathan Turley).
[64] *Id.* at 35 (statement of Senator Presley).
[65] Jonsson, *supra* note 48.

victimization, and reducing the number of required security personnel.[66] In Virginia, the creation of a separate facility to tailor to the needs of the elderly and terminally ill has produced significant cost savings. Although the exact amount of savings is unavailable, the average per capita operating cost at this geriatric facility is $22,299—only slightly higher than the average of $21,079 at all other Virginia facilities.[67] In fact, of the twenty-six correctional facilities in Virginia, the new geriatric facility has one of the lowest overall medical expense budgets.[68]

Third, training a small staff of doctors and nurses to be specialists in elderly care could aid in implementation of preventative monitoring systems, discussed in more detail below, to prevent minor illnesses from becoming chronic and expensive disorders. In a 1991 study of thirty-nine states, only six states reported having specialized training for staff working with older inmates.[69] More current data is not readily available on this issue.

Other good news is that there are plenty of buildings that can easily be converted at low cost. For example, some states are converting old TB hospitals and other structures into minimum security prisons for low mobility inmates.

There are some arguments against housing elderly prisoners in segregated geriatric facilities. For example, it may be harder to find appropriate work assignments and programs on this scale. On the other hand, housing the elderly all together may make it *easier* to develop programs specifically tailored for the needs of the elderly. For

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[66] Nadine Curran, *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. JCCC 225, 262 (2000).
[67] AGNOS, *supra* note 45, at 5.
[68] *Id.*
[69] MORTON, *supra* note 9, at 5.

example, in Georgia, the geriatric institution has special programs just for the elderly, such as gardening, special exercise classes, and access to talking books.[70]

A number of prison officials maintain that having older prisoners spread throughout the prisons counters the aggression of younger inmates by creating a calming effect. On the other hand, elderly inmates may be too weak and passive to command the respect necessary to influence the behavior of younger prisoners or to protect themselves against violence.

A more salient concern with consolidating elderly prisoners into geriatric units is that it may place them at a greater distance from their family. Prisoners do better when they have access to family, but this is especially true of older prisoners who have a higher incidence of depression when removed from their families.[71]

E. Solutions Across Risk Groups

i. Preventative Monitoring Systems

A simple way to begin reform for all prisoners would be to implement procedures and plans for preventative care. The idea behind this is that if you do a better job of treating prisoners initially, there will be a decrease in health care costs later in life. As Richard Aday posits that, "The most immediate step is to increase preventive care and educate prisoners to eat better, exercise and monitor their own health. It's important that they receive the necessary medical treatment, whether it be special meals or proper cancer screenings."[72]

Such systems would require that a prisoner undergo a thorough head-to-toe examination upon entering prison. This includes checking their vision, hearing, thyroid,

[70] IMPACT OF AN AGING INMATE POPULATION, *supra* note 8, at 15.
[71] *California's Aging Prisoner*, *supra* note 1, at 30 (statement of Jonathan Turley).
[72] Pfeffer, *supra* note 14, at 4.

heart, lungs, etc., and making an assessment of the overall functional status of the prisoner (e.g. Is the prisoner able to perform the activities of daily living?). After discovering whether the prisoner has had preventative services in the past, what medications he or she has taken, any previous hospitalizations, etc., it is important to determine a treatment plan that takes into consideration "housing needs, adaptive devices, any kind of medications, and any other sorts of services and whether they need to be enrolled in the chronic care program."[73]

California actually instituted a chronic care delivery system a few years ago on a seven-year rollout plan.[74] The goal of this system is to set up procedures and protocols, no matter a prisoner's age, that will start when a prisoner enters the system and follow them throughout. As Michael Pickett, Deputy Director for Health Care Services for the Department of Corrections explains, "If there are specific needs, be they aged or for some other chronic medical problem, or psychiatric problem, we then place the inmate within one of the 33 prisons we have commensurate with what that need is where we can best provide the service, be it medical or psychiatric."[75] The chronic care program currently has eight different clinics: diabetes, hypertension and other cardiovascular conditions, asthma, emphysema and other lung conditions, HIV, gynecology, tuberculosis, and general medicine.[76]

Other states, such as Ohio, have begun implementing preventative care programs by creating created fitness-in-prison programs for older inmates.[77]

ii. Inmates taking care of Inmates

[73] *California's Aging Prisoner*, *supra* note 1, at 50 (statement of Dr. Renee Kanan).
[74] *Id.* at 36 (statement of Michael Pickett).
[75] *Id.* at 37 (statement of Michael Pickett).
[76] *Id.* at 50-51 (statement of Dr. Renee Kanan).
[77] Jonsson, *supra* note 48, at 2.

Many states have begun using younger inmates to provide the necessary work force in their geriatric prisons. Louisiana and Oregon are some of the first states to begin training inmates to deal specifically with elderly prisoners. Jonathan Turley has said of this approach: "There are issues of confidentiality and there's only so much you can do, but states like Louisiana and other states actually do train their inmates to deal [with] the rudimentary issues. And generally, those don't violate privacy laws."[78] The other positive aspect of this burgeoning area is that if you have an inmate go through a nurse certification program to help deal with the elderly, he is also obtaining a useful form of job training. This results in a reduction of costs at the same time it teaches a useful skill for future use.

iii. Reform of Sentencing Laws

Although this topic is outside the scope of this paper, it is important to note that in the long run, the only real way to stop the rapid increase in the aging prison population is to reinstate softer sentencing laws and restore sentencing discretion to the judges.[79]

California would do well to follow in the footsteps of states like Virginia. When Virginia recently eliminated parole, it allowed one loophole. Inmates sixty years old or older who have served at least ten years of their sentence, or those sixty-five years old or older who have served at least five years, may seek geriatric release.[80]

North Carolina created a sentencing commission in 1990 that has been making successful recommendations to the legislature.[81] One of its main changes was to vastly increase the use of intermediate punishment programs—community punishment at a level

[78] *California's Aging Prisoner*, *supra* note 1, at 53 (statement of Professor Turley).
[79] Pfeffer, *supra* note 14, at 4.
[80] Older inmates: Making Some Dollars and Sense, IOWA CITY PRESS-CITIZEN, Oct. 4, 2004, at 1.
[81] Vitiello & Kelso, *supra* note 62, at 960-61.

of intensity that exceeds traditional probation. After implementation of the guidelines, intermediate punishment increased by fifty percent.[82] This serves to free up significant prison space for more violent and serious offenders. California might want to consider examining North Carolina's scheme and planning a trial run for a similar program.

The next section will discuss methods and barriers to implementing the above programs.

Part III: Solutions For California

The plight of the elderly in the increasingly overpopulated prisons of California can no longer be ignored. There are many alternatives, suggested by well-known gerontologists, researchers, professors, and sociologists. To ignore the suggestions of these experts is expensive, foolish, and arguably, inhumane. Not to mention that the more money we sink into the prison system, the less money we have for other services. As Senator Gloria Romero, chairwoman of a select committee overseeing the correctional system has said, "We are locking up the elderly at the expense of building schools for students and keeping university fees down, and we can't pretend that it's not happening."[83]

There are a number of solutions listed above that would be easily implemented in California allowing the state to save millions of dollars. The most important of these would be bringing Jonathan Turley's POPS to California.

A. Bringing POPS in California

[82] Vitiello & Kelso, *supra* note 62, at 962.
[83] Kobrin, *supra* note 1.

Given the expense associated with keeping the elderly incarcerated, the release of non-violent, non-serious elderly offenders in California could result in an estimated budget savings of anywhere from nine million[84] to twenty million dollars.[85]

When Senator Vasconcellos asked Professor Turley at the Senate Subcommittee Hearing on Aging and Long Term Care what it would take to get California involved in POPS, Jonathan Turley replied:

> Basically, if you want a POPS office, the two things you have to do is that the executive and legislative components have to essentially say, yes, we want to participate. It's really of no risk to the state. . . it doesn't cost really anything except maybe some rudimentary costs. And then you just have to give access in the sense that you don't have POPS go through the usual attorney/client interview system. [T]he prisoners are simply told that there is a POPS pilot program . . . and usually access to prison jackets can be done with an approval of the prisoner.[86]

Because California has so many law schools, it is in a great position to take advantage of POPS. Jonathan Turley would provide everything California would need to get a POPS program going: computer data, forms, training. He is careful to make sure law students realize they are not prisoner advocates, but rather public advocates. Their job is to work as a liaison between the inmates, the correctional system, and the state.[87] More importantly, their job is to get their evaluations right. Once law students working as caseworkers compile enough data on a given prisoner, they bring their findings to the POPS board and then to the state parole board. At that point, it's obviously up to the state to trust the data or to ask for whatever else they need.

There are some caveats to the early release solution. First, some of the money saved on early release will need to be used to implement and maintain post-release plans.

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[84] *California's Aging Prisoner*, *supra* note 1, at 7 (statement of Stan Neal).
[85] *Id.* at 28 (statement of Jonathan Turley).
[86] *Id.* at 54 (statement of Jonathan Turley).
[87] *Id.*

POPS has been successful in large part because of its focus on a soft landing. If money is not invested in post-release plans you create a situation where some elderly will reoffend to be placed back in the security of the prison setting.

Second, many people zealously oppose the release of prisoners, no matter their age. Therefore, it is vitally important to educate California citizens about programs such as POPS that only work with non-violent, non-serious offenders. Californians must be educated about how much money they could save that could go into other programs within the state.

It is also important to note that although POPS should certainly be initiated in California, and early release made a vital part of reform for elderly prisoners, it should not be the only solution. Jonathan Turley has said:

> [I]f you just do early release, you're going to have that problem that they describe in the military, that if you only have a hammer, everything looks like a nail. So if you only have release, everything gets put into terms of can we release them, that's a dangerous thing because if that's your only valve, you're going to release people that you shouldn't release.[88]

But, if done correctly, early release will not only save California money but it will also alleviate overcrowding. By identifying low-risk candidates for parole, California can "open up thousands of cells while actually lowering the risk currently imposed on society by unguided court-ordered releases."[89]

B. Expansion of Compassionate Release Program

In 2004, legislators attempted to modify the compassionate release program by extending the period of release from six months to a year, and extending the rights to

[88] *California's Aging Prisoner*, *supra* note 1, at 26-27 (statement of Jonathan Turley).
[89] Ornduff, *supra* note 39, at 197.

permanently incapacitated prisoners (e.g. quadriplegic prisoners).[90] The new bill would also have required that families and dying prisoners be notified of their rights to early release. Alice do Valle, the campaign coordinator for Justice Now, estimates that making compassionate release more readily available could result in a savings of $52 million over the next ten years.[91] Unfortunately, Governor Schwarzenegger ultimately vetoed the bill arguing that the legislation lacked "any mechanism to return these prisoners to custody" if they either recovered or later posed a threat to public safety.[92]

Because making this program more accessible and easier to navigate would be a useful reform, this bill should be reintroduced in California, modified to address Governor Schwarzenegger's concerns.

C. Separate Geriatric Facilities in California

Even with implementation of early release programs and expansion of compassionate release, California will still face problems with how to deal with the remainder of the elderly prison population. The creation of separate geriatric facilities, as many other states have done, is a vital step.

In order to avoid placing prisoners in prisons too far from their families, Jonathan Turley proposes California create a "series of smaller [geriatric facilities] between 3- and 500 units preferably, that will put them in rough geographic proximity to their families."[93] Former Secretary of the California Youth & Adult Correctional Agency,

[90] Assembly Bill 1946 (2004).
[91] Jeff Gillenkirk, *Compassionate Release Could Save Lives, Money*, ACLU NEWS, Spring 2004, at 4.
[92] Kobrin, *supra* note 1.
[93] *California's Aging Prisoner*, *supra* note 1, at 31 (statement of Jonathan Turley).

Robert Presley, has suggested placing a geriatric prison at San Luis Obispo because there is already a 100-bed hospital there.[94]

California has recently closed some of its CYA prisons. These facilities could be converted to low-security housing for elderly prisoners. Another idea would be to utilize civic commitment centers. Either way, California will be wise to begin planning ahead for its burgeoning elderly population.

D. Solutions for Elderly Women Prisoners

As mentioned in the previous section, most states have thus far failed to implement reform for elderly women prisoners. The two exceptions to this are the State Park Correctional Center in South Carolina which provides for elderly male *and* female inmates[95] and the Florida Department of Corrections that has a special unit for older female offenders. Overall, however, the failure to provide specific solutions for elderly women prisoners is an unfortunate omission. Gloria Killian has said of female prisoners:

> Eighty percent of all female inmates have been abused either physically, sexually, or emotionally, during their lives. And when you combine that factor with the horrific stress of long-term incarceration, you have physical manifestation of chronic illness by a minimum of age 40. . .[96]

Elderly women inmates will be in one of three stages of menopause: perimenopause, menopause, or postmenopause. Most women in the perimenopausal or menopausal phases will require more frequent access to bathroom facilities and feminine products. They may need their clothing and linens changed more frequently and need increased medical monitoring and hormone replacement therapy. Older female inmates will also be at higher risk of contracting cancers of the breast, ovaries, uterus, or cervix, in

[94] *California's Aging Prisoner*, *supra* note 1, at 35 (statement of Robert Presley).
[95] Aday, *supra* note 60, at 49.
[96] *California's Aging Prisoner*, *supra* note 1, at 58 (statement of Gloria Killian).

addition to other common cancers. In order to screen for this increased cancer risk, these women will require more frequent mammograms and gynecological exams.[97]

Many of the problems unique to women can be solved by making sure medical staff are qualified to deal with the unique needs of each individual woman. They will benefit from all the above listed programs that so far have only been tailored for men, including early release, hospice care, and placement in geriatric prisons.

Conclusion

California's prisons will come to resemble high-security nursing homes as the elderly prison population continues to expand. It is vital that California take steps now to create separate geriatric facilities, modify its compassionate release program, implement early release programs, and more, if it wants to avoid the overburdening of its prison system. Luckily, California has the benefit of observing other state's pioneering efforts. It would be wise to consider and implement some of these reforms.

[97] IMPACT OF AN AGING INMATE POPULATION, *supra* note 8, at 6.