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THE GROWING PROBLEM OF ELDER ABUSE

Introduction by Bridget O’Brien Swartz, CELA

In this edition of NAELA Journal, there are two unique articles on elder abuse. They represent two totally different approaches to analyzing this growing problem, but collectively outline a potential path where attorneys, especially NAELA members, can help to reverse the deleterious effects of elder abuse on individual victims and on our collective society.

The first article is “Beyond Bedsores: Investigating Suspicious Deaths, Self-Inflicted Injuries, and Science in a Coroner System” (hereinafter “Beyond Bedsores”), by Clarissa Bryan, and the second article is “Study Finds Certified Guardians with Legal Work Experience are at Greater Risk for Elder Abuse than Certified Guardians with Other Work Experience” (hereinafter “Certified Guardians”), by Professor Winsor C. Schmidt, Professor Fevzi Akinci, and Sarah Magill, MHPA.

Both articles begin in such a way so as to ensure they have the reader’s attention. “Beyond Bedsores” grabs the reader’s attention at the outset and intermittently throughout with shocking real-life stories of elder abuse that are surprisingly not recognized as such and are instead attributed to self-inflicted injuries or natural causes. “Certified Guardians” begins by highlighting the sustained media attention given to guardians and the guardianship system over the years, making its empirical study relevant to the reader. The articles coincidentally cite the same quote which states that “little is known about [the] characteristics, causes, or consequences [of elder abuse] or about effective means of prevention or management.”1 In its own unique way, each article attempts to shed some light on the foregoing, offering some explanation as to the why and how while also making suggestions as to what should follow so as to reduce the incidence of elder abuse.

The articles highlight varying contexts within which elder abuse is evident and suggest very different avenues to ameliorate the problem. “Beyond Bedsores” suggests that a universal definition of elder abuse is crucial and approaches the matter from the perspective of identifying incidents of elder abuse at time of death. The article critiques the reliance on a lay coroner system to investigate suspicious deaths and self-inflicted injuries, and urges conversion to a more scientific method as is utilized in the medical examiner system. Where “Beyond Bedsores” focuses on abuse and neglect of the person at home versus in institutional settings, “Certified Guardians” is an empirical study, the first of its kind, of sanctions of private or professional guardians and the relationship of such sanctions to types of work experience guardians may have. The sanctions referenced primarily relate to the management of the property and financial affairs of individuals who are incapacitated and for whom a guardian is appointed. In “Certified Guardians,” sanctions equate to abuse, specifically, elder abuse, without elder abuse being “universally” defined as is stressed in “Beyond Bedsores.” “Certified Guardians” suggests that the primary culprit behind sanctions of certified guardians is lack of accountability and judicial oversight.

Bridget O’Brien Swartz, Phoenix, Ariz., is a member of the NAELA Journal Editorial Board.

1 Arlene D. Luu & Bryan A. Liang, Clinical Case Management: A Strategy to Coordinate Detection, Reporting, and Prosecution of Elder Abuse, 15 Cornell J. OL. & Publ. Policy 165, 168 (Fall 2005).
Surprisingly, the results of the study suggest that certified guardians with legal experience as compared to other work experience are more apt to be sanctioned and to be sanctioned more severely. What follows is not only the question “why” but what can we do about it.

Both articles cite state variance as a major contributing factor in the rise of elder abuse and the failure to report such abuse. As discussed earlier, “Beyond Bedsores” points to the fact that each state defines elder abuse differently and provides for either a lay coroner or medical examiner system, the former of which, in the opinion of the article’s author, is unable to consistently and reliably distinguish injuries and death caused by elder abuse from those that are self-inflicted or the result of natural causes. “Certified Guardians” takes issue with the fact that certification of guardians is not required across the board, and even when certified, accountability and judicial oversight of guardians is lacking.

The articles both touch on the Elder Justice Act (EJA), enacted as part of the Affordable Care Act, as a basis to direct federal resources toward improving upon education and training. “Beyond Bedsores” relies on the broad mandate of the EJA to make a case for further directing federal resources toward the creation of a universal medical examiner system in all states. The foregoing is the remedy prescribed in “Beyond Bedsores,” whereas “Certified Guardians” recognizes that its research, while unique in what it addressed and its results, raises additional questions and necessitates additional research, not just for the sake of research but to aid some of our most vulnerable, the elderly.
STUDY FINDS CERTIFIED GUARDIANS WITH LEGAL WORK EXPERIENCE ARE AT GREATER RISK FOR ELDER ABUSE THAN CERTIFIED GUARDIANS WITH OTHER WORK EXPERIENCE

By Professor Winsor C. Schmidt, Professor Fevzi Akinci, and Sarah Magill, MHPA

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Professor Winsor C. Schmidt, Endowed Chair/Distinguished Scholar in Urban Health Policy, Professor of Psychiatry and Behavioral Sciences, and Professor of Family and Geriatric Medicine, University of Louisville School of Medicine, and Professor of Health Management and Systems Sciences, School of Public Health and Information Sciences. AB, Harvard University; JD, The American University; LLM, University of Virginia. Professor Schmidt is a member of the Board of Directors, National Committee for the Prevention of Elder Abuse and the Certified Professional Guardian Board, Washington Courts.
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The purpose of this article is to present research regarding the relationship between types of professional guardian experience and guardian sanctioning, and to address the extent to which information about the relationship may help reduce the risk of elder abuse by guardians. The research reports information about the distribution of Certified Professional Guardians by county in the state of Washington, the distribution of Certified Professional Guardians without sanctions by county, and the likelihood of sanctions for Certified Professional Guardians by type of guardian work experience.

A. Guardians and Guardianship

State courts exercise a parens patriae responsibility of government to take care of people who cannot take care of themselves by adjudicating legal incapacity and appointing guardians for legally incapacitated persons. The guardian is an agent of the...
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court, a surrogate decision-maker, and a services broker who lives the decisional life of the incapacitated person, the “ward.” Guardians are fiduciaries with duties to maintain and manage the person and property of the incapacitated person, including prevention of abuse and neglect. Guardianship is cost effective by preventing inappropriate institutionalization, facilitating appropriate deinstitutionalization, and accomplishing timely and appropriate medical care.3 Many guardians serve at the highest level of fiduciary professionalism, but some do not.

B. Newspaper Reports Regarding Guardians


8 E.g., Ken Armstrong, Justin Mayo & Steve Miletich, “It’s a New Day” as Secrecy Fades, Seattle Times (Apr. 14, 2010) (266 guardianship cases sealed “restricting awareness of an obscure legal field meant
the April-October 2010 Omaha World-Herald revelation of shoddy guardian oversight of incapacitated persons’ health and property (“Guardian Faces Theft Counts”), guardians and the guardianship system have been challenged to perform their duties better in order to merit greater public and legal confidence.

C. Research Highlights Regarding Guardians

The media accounts confirm and put a more visible face on research regarding guardianship quality, including insufficient guardian accountability and judicial oversight. A 1972 New York study of 400 guardianships concluded that guardianships were poorly monitored. Annual accountings or financial records, the principal means of guardian accountability, were incomplete in 82 percent of the cases sampled. A 1982 Dade County Grand Jury investigation of 200 randomly selected guardianship files found that personal annual reports were not up to date 87 percent of the time, 75 percent of guardianship cases did not have timely financial reports, and required physical examination reports were absent from 91 percent of the cases. A Leon County, Florida study of probate court records for 1977–1982 found that financial reviews were almost nonexistent. A 1985 Connecticut report identified a similar discrepancy with financial reviews. The 1987 Associated Press national investigation of 2,200 randomly selected guardianship court files found 48 percent missing at least annual accountings, only 16 percent had personal status reports, and 13 percent of the files were empty except for the initiation of the guardianship. A 1991 study of the guardianship report process in Missouri found that while financial re-

11 Id.
ports were filed and thoroughly reviewed, 52 of 318 personal status reports were not filed and the filed status reports were not reviewed.\textsuperscript{16}

More recently, a 2009-2010 preannounced random audit of Certified Professional Guardians’ cases in Washington found 60 of 260 guardians with at least one late filing of such reports as the inventory, personal care plan, or annual report during the audit period; 49 guardians had more than one late filing during the audit period.\textsuperscript{17} A Guardianship Task Force in Washington found that “Court oversight of guardianships varies dramatically among counties, with virtually no active monitoring — proactive, court-initiated oversight of guardians — occurring in most places.”\textsuperscript{18} Further, “[s]erious guardianship problems, such as fraud and neglect, have been uncovered and remedied in counties where courts actively monitor guardianship cases.”\textsuperscript{19}

D. Guardianship Reform Highlights

Such media attention and research stimulate guardianship reform efforts. Following the 1987 Associated Press six-part national series, and a United States House Select Committee on Aging hearing,\textsuperscript{20} the American Bar Association sponsored the 1988 National Guardianship Symposium at Wingspread in Wisconsin, which produced recommendations regarding capacity assessment, procedural issues, and guardian accountability.\textsuperscript{21}

19 Guardianship Task Force, \textit{supra} n. 18, at 3.
The National Academy of Elder Law Attorneys (NAELA), Stetson University College of Law, and the Borchart Center on Law and Aging were the primary sponsors of the Second National Guardianship Conference (“Wingspan”) in 2001, which assembled second-generation reform recommendations.\textsuperscript{22} Federal legislative hearings held in 2003\textsuperscript{23} and in 2006,\textsuperscript{24} and United States Government Accountability Office (GAO) reports published in 2004\textsuperscript{25} and in 2006\textsuperscript{26} followed. The Elder Justice Act of 2009 establishes a federal Advisory Board on Elder Abuse, Neglect, and Exploitation with responsibility to prepare an annual report containing recommendations regarding guardianship activities for the Elder Justice Coordinating Council, the Senate Finance Committee, and the House Ways and Means, and Energy and Commerce Committees.\textsuperscript{27}

1. GAO Report on Guardianship Abuse, Neglect, and Exploitation of Seniors

Most recently, the GAO reported hundreds of allegations of physical abuse, neglect, and financial exploitation of wards by guardians in 45 states and the District of Columbia, between 1990 and 2010.\textsuperscript{28} In 20 selected closed cases from 15 states and the District of Columbia, GAO found that guardians stole or improperly obtained $5.4 million from 158 incapacitated victims, many of them seniors. GAO’s in-depth examination of these 20 closed cases identified three common themes: 1) state courts failed to adequately screen the criminal and financial backgrounds of potential guardians; 2) state courts failed to adequately monitor guardians after appointment, allowing the continued abuse of vulnerable seniors and their assets; and 3) state courts failed to communicate ongoing abuse by guardians to appropriate federal agencies like the Social Security Administration (SSA), the Department of Veterans Affairs (VA), and the Office of Personnel Management (OPM), which manages federal employee retirement programs. Guardians serve as federal representative payees on one percent of SSA cases, 13 percent of VA cases, and 34 percent of OPM cases.\textsuperscript{29} The VA relies on local-court accounting reports by guardians and OPM relies on local courts to monitor guardian payees.

In order to test state guardian certification processes, GAO used fictitious identities of an applicant with bad credit and an applicant with the Social Security number of a deceased.
ceuased person to obtain guardianship certification in New York and North Carolina, and to meet guardian certification requirements for Illinois and Nevada. The United States Senate Special Committee on Aging, which requested the GAO investigation, will reportedly consider legislation to help state court systems improve training of guardians, judges, and legal personnel in adult guardianship, to help reduce fraud by unscrupulous guardians who receive Social Security and VA benefits, and to help states improve guardian screening and detect rogue guardians.30

2. Professional Guardian Licensing, Certification, and Registration

On the subject of guardian standards, the 2001 Wingspan Conference recommended that “Professional guardians — those who receive fees for serving two or more unrelated wards — should be licensed, certified, or registered.”31 As a follow-up to such recommendations, NAELA, the National Guardianship Association, and the National College of Probate Judges convened a Wingspan Implementation Session at their joint conference in 2004 to identify implementation action steps, including the following steps relating to guardian certification: “[t]he supreme court of each state should promulgate rules[,] and/or the state legislature of each state should enact a statutory framework[,] to require education and certification of guardians as well as continuing education within the appointment process to ensure that all (i.e., professional and family) guardians meet core competencies.”32 Also, “NGF [National Guardianship Foundation; renamed Center for Guardianship Certification] should facilitate the discussion of and act as a resource for [s]tates to establish, at minimum, a requirement for statewide registration of professional guardians. This discussion should include:…[p]roviding models for certification, re-certification, and de-certification.”33

3. Center for Guardianship Certification

The private Center for Guardianship Certification (CGC) and some states have begun to require certification of individual professional guardians in an attempt to improve the quality of guardians and guardian performance. The private Council on Accreditation has promulgated adult guardianship standards34 for organization accreditation. The CGC certifies guardians who meet eligibility requirements and pass examinations as a “National Master

31 Wingspan, supra n. 22, at 604.
33 Id., at 8-9.
Guardian’’ (previously ‘‘Master Guardian’’). The minimum education requirements for CGC certification as a National Certified Guardian include a) high school graduation or GED (General Equivalency Diploma) equivalent, and b) ‘‘one year of relevant work experience related to guardianship,’’ or a degree or completion of an approved course curriculum.

GAO reported that CGC did not require Social Security numbers or other identifying information, did not verify educational or professional credentials, and did not conduct background or credit checks for fictitious certification applicants. The fictitious applicants passed the National Certified Guardian Examination and ‘‘were listed on the organization’s website as nationally certified guardians.’’

4. Guardian Certification in States

The GAO found that 13 states offer guardian certification, including 11 states that require certification of certain professional guardians but generally exempt family members. Two states have optional certification for all guardians. Five states require certification applicants to complete guardianship training, and nine others mandate completion of a national guardianship exam, state exam, or both. Three states require completion of guardianship training and a competency exam. Six states use fingerprints to conduct background checks. Three states conduct credit checks. There are 15 states with some provision for guardian licensing, certification or registration if New Jersey and Georgia, unrecognized by GAO, are counted.

For example, Nevada requires certification of all private professional guardians by CGC or any successor. Nevada was one of the states where a fictitious GAO applicant met guardianship certification requirements. New Hampshire requires certification of

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35 See http://www.guardianshipcert.org/index.cfm. See also Quinn, supra n. 2, at 168-170 (regarding standards, licensing, and certification).
37 See also Winsor Schmidt, Kent Miller, William Bell, & Elaine New, Public Guardianship and the Elderly, at 169 (Ballinger 1981) (in a 1981 national study of public guardianship, public guardians tended to be either social workers or attorneys); and Pamela Teaster, Erica Wood, Naomi Karp, Susan Lawrence, Winsor Schmidt & Marta Mendiondo, Wards of the State: A National Study of Public Guardianship, at 73-89 (April 2005), http://www.canhr.org/reports/2005/Wardsofthestate.pdf (in a 2005 national study of public guardianship three out of four (75 percent) of the independent state office models of public guardianship had public guardians with at least a bachelor’s degree or master’s degree, 26 out of 36 (72 percent) of the responding division of a social service agency models of public guardianship had public guardians with at least a bachelor’s degree or master’s degree, and five out of six (83 percent) of the responding county model models of public guardianship had public guardians with at least a bachelor’s degree or master’s degree).
38 GAO, supra n. 28, at 25.
39 Id., at 26.
41 GAO, supra n. 28, at 24.
professional guardians with CGC.\textsuperscript{42} Illinois requires a national exam for all politically appointed guardians, and had a fictitious GAO applicant meet guardianship certification requirements.\textsuperscript{43} Nearly all staff members (95 percent) of the Illinois Office of the State Guardian were certified as “Registered Guardians.”\textsuperscript{44}

Oregon has voluntary joint certification between the Guardian/Conservator Association of Oregon and CGC, and required experience in the field of legal, health, social, or financial services to be a professional guardian.\textsuperscript{45} North Carolina offers voluntary certification through the North Carolina Guardianship Association, and provided guardianship certification to a fictitious GAO applicant.\textsuperscript{46}

Texas established a Guardianship Certification Board requiring state examination and certification for professional guardians effective September 2007, as well as experience related to guardianship or a four-year degree.\textsuperscript{47} Alaska has certification “by a nationally recognized organization in the field of guardianships” as one part of the requirements to obtain a guardian license to practice as a private professional guardian, including professional client casework or financial management experience, or an associate’s degree.\textsuperscript{48}

California created the Professional Fiduciaries Bureau in 2007 to regulate non-family professional fiduciaries including guardians, conservators, trustees, and agents under durable power of attorney, and requires an associate’s degree or experience working with substantive fiduciary responsibilities for licensure as a fiduciary.\textsuperscript{49} California conducts a credit check on applicants, along with Arizona and Florida.\textsuperscript{50} Florida requires registration and regulation of professional guardians through the Statewide Public Guardianship Office, Department of Elderly Affairs.\textsuperscript{51} New York requires a six-hour training course for certification of professional and nonprofessional guardians, and provided certification to a fictitious GAO applicant.\textsuperscript{52} Utah mandates that a specialized care professional must be certified as a guardianship services provider by a nationally recognized guardianship accrediting organization and licensed as a health care provider.\textsuperscript{53}

\textsuperscript{42} Id., at 49.

\textsuperscript{43} Id., at 24, 48.

\textsuperscript{44} Pamela Teaster, Winsor Schmidt, Erica Wood, Susan Lawrence & Marta Mendiondo, Public Guardianship: In the Best Interests of Incapacitated People? (ABC-CLIO, LLC 2010), at 45.

\textsuperscript{45} See GAO, supra n. 28, at 51, 53; http://www.guardianshipcert.org/index.cfm and http://www.gcaoregon.org/.

\textsuperscript{46} GAO, supra n. 28, at 24, 50, 53.

\textsuperscript{47} Texas Gov’t Code § 111.042 (2006), http://www.courts.state.tx.us/geb/gebhome.asp. GAO, supra n. 28, at 52. See also, Olsen, supra n. 30 (Texas has 280 individuals certified as professional guardians serving 4,500 incapacitated persons. Certification is not required for the family, friends, attorneys, and volunteers who serve most wards in Texas. Harris County (Houston) has 5,000 people under guardianship. Texas does not mandate credit checks for guardians.) Texas, with 280 certified guardians reported for a state population of 24,782,302, has one certified guardian per 88,508 population statewide.


\textsuperscript{50} GAO, supra n. 28, at 46-48.


\textsuperscript{52} GAO, supra n. 28, at 24, 50.

\textsuperscript{53} Id., at 52.
New Jersey requires the Office of the Public Guardian for Elderly Affairs to maintain a statewide registry of professional guardians, but was unrecognized by the GAO review. Georgia statutorily provides for eligibility and registration of public guardians with maintenance of a master list of registered public guardians in the Division of Aging Services, Department of Human Resources. However, there were no appropriated funds as of 2009, and the GAO did not recognize Georgia.

Arizona requires certification and licensing of all fiduciaries, except family members, who meet eligibility requirements, including a high school degree or experience as a guardian, conservator, or personal representative. As part of the fiduciary certification program, the Arizona Supreme Court established the Fiduciary Compliance Audit Authority, whose five most common fiduciary audit findings are 1) late required court case filings; 2) inaccurate required court case filings; 3) undocumented fiduciary actions and decision making; 4) business and fiduciary certification number is not used on court documents; and 5) incompetent fiduciary management of client caseload.

The state of Washington (which will serve as the data source for the study herein) has a guardian certification program for professional guardians established in 1997 that includes certification requirements, practice standards, and disciplinary procedures, as well as public disciplinary actions for guardians and guardian agencies. Washington requires a fingerprint background check, along with Alaska, Arizona, California, Florida, and Texas.

E. Recommendations Regarding Guardianship Research

Wingspan recommended that “Research be undertaken to measure practices and to examine how the guardianship process is enhancing the well-being of persons with diminished capacity…. The research should examine how the system is working.” A Panel to Review Risk and Prevalence of Elder Abuse and Neglect from the National Academy of Sciences observed that “little is known about [elder mistreatment’s] characteristics, causes, or consequences, or about effective means of prevention,” and concluded that “[a] substantial commitment to research is needed to inform and guide a caring society as it aims to cope with the challenges ahead.”

56 Teaster, et al., supra n. 44, at 218.
62 GAO, supra n. 28, at 45-48, 52.
63 Wingspan, supra n. 22, at 597.
64 Panel to Review Risk and Prevalence of Elder Abuse and Neglect & National Research Council, Elder
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services subsequently supported the inclusion of questions about cases in which a guardian was the alleged abuse perpetrator in the National Center of Elder Abuse’s annual survey of state adult protective services agencies.65

F. Research Regarding Professional Guardian Education and Guardian Sanctions

One study measuring guardianship practices and examining how the guardianship system is working was the first empirical analysis of the relationship between guardian certification requirements for education and for experience, and guardian sanctioning.66 The review of 377 files in Washington found that while guardians with more education have a higher likelihood of being sanctioned, guardians with a high school diploma or equivalency (GED) are more likely to have more severe sanctions compared with guardians having undergraduate or higher education, and compared with guardians having an Associate of Arts or technical degree.67 A sanction indicates a violation of guardianship duties, so the results of that study indicate that by isolating all such certified guardians who were sanctioned, those with a lower education statistically received more severe sanctions. That particular study, however, does not indicate whether guardians with a higher education actually perform their guardianship duties better than lower-educated guardians (albeit not perfectly) or if they simply have a better understanding of how to hide the extent to which they violated their duties. Further, there was no statistically significant association between years of experience and the likelihood and severity of sanctions.68 However, the research did not analyze the relationship between types of work experience and the likelihood and severity of sanctions.

The authors recommended that the state of Washington, and other states and entities (e.g., Center for Guardianship Certification) that certify or license guardians, should consider raising guardian certification education requirements above the high school or GED level to reduce the likelihood of guardian performance generating the imposition of more severe guardian certification sanctions.69 The state of Washington Supreme Court subsequently raised the minimum education requirement for a Certified Professional Guardian from a high school diploma or equivalency (GED) to requiring possession of at least an associate’s degree from an accredited institution as an education minimum.70


GAO, supra n. 28, at 9.
66 Schmidt, et al., supra n. 1.
67 Id.
68 Id. at 648.
69 Id. at 649.
II. BACKGOUND TO THE STUDY

The research reported in this article presents descriptive profile information about the certified professional guardians in the state of Washington by county and measures the extent to which there is a relationship between the type of work experience (legal, financial, social service, or health care) and guardian certification sanctions. As in the prior research regarding guardian education and guardian sanctions, the words “sanction,” “sanctioned,” and “sanctioning” for purposes of this study mean penalty, penalized, and penalizing.

The education and experience requirements for certified professional guardians in Washington at the time of this study were:

Possess a high school diploma or equivalency (GED) and five years of experience working in a discipline pertinent to the provision of guardianship services, such as legal, financial, social service, or health care; or an Associate of Arts degree and three years experience working in a discipline pertinent to the provision of guardianship services, such as legal, financial, social service, or health care; or a Bachelors of Arts degree and one year of experience working in a discipline pertinent to the provision of guardianship services, such as legal, financial, social service, or health care.71

The sanctions, or penalties, for certified professional guardians in Washington at the time of this study included decertification, suspension, a prohibition against taking new cases, a letter of reprimand, letter of admonishment, and administrative recourse.72 Administrative sanctions, or penalties, included: settlement; dues non-compliance; education hours non-compliance; voluntary revocation of certification; first, second, and third late fees assessments (dues); and voluntary inactive status. The sanctions, or penalties, of first, second, and third late fees assessments (dues), and of voluntary inactive status, are considered less severe because these sanctions, or penalties, did not result either in decertification or in formally sanctioned professional misconduct incompatible with specified standards of practice.73 The detailed operational definitions and severity classification of all study measures (developed by using the legal definitions at the time) are found in the Appendix.

Nonpayment of dues is related to guardian performance for several reasons.74 Nonpayment of dues results in nonvoluntary decertification. Among other things, the wards of such guardians no longer have a certified guardian, with consequences that include: a) the decertified guardian violating mandates of certification in order to practice;75 b) the need to find successor certified guardians for all wards of the decertified guardian; c) disruption of continuity of guardianship care; and d) the implicit risks that nonpayment of dues sug-

71 Schmidt, et al., supra n. 1, at 644.
72 Id. at 644-645.
73 Id. at 645.
74 Id.
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gests such guardians may be performing other fiduciary responsibilities, such as making payments and meeting deadlines, in similarly careless ways. Also, nonpayment may be a precursor for such financial concerns as undercapitalization or uninsurability of a guardian business, especially in the absence of a required credit check (not required by Washington). Better judges in guardianship cases are quite intolerant of missed deadlines and noncomplying, nonconforming guardian performance both for wards and for accountability measures to the court. The GAO recently criticized such guardian behaviors as irregularities in guardians’ annual accountings, failure to file any interim financial reports for three years, failure to pay a ward’s taxes, failure to visit a ward for eight months and nine months delinquency in filing a personal care plan and ward asset inventory, failure to file an annual accounting for ten years, and “persistent and repeated” guardianship reporting violations. Voluntary revocation of certification is as severe a sanction, or penalty, as decertification for dues noncompliance because the result in both situations is guardian decertification. The end result is decertification in almost a “strict liability, no-fault liability” sense. Whether the decertification is fault-based (dues noncompliance), or voluntary (voluntary revocation), the decertification is still something presumably to be avoided regardless of reason for the decertification. From a regulatory standpoint, it is in the interest of Washington’s Certified Professional Guardian Board, wards, and the public to maximize certification continuity, and to minimize decertification, certified guardian turnover, and unnecessary guardian successorships. If the Board can predict risk of decertification, regardless of cause, and reduce decertifications by such measures as increasing education requirements, or identifying the most relevant guardian applicant work experience, then the Board should be interested in whether there is any relationship between guardian certification requirements, such as education and experience, and guardian certification sanctions or penalties.

III. DESCRIPTION OF THE RESEARCH

The overall goal of the research is to present descriptive profile information of the certified professional guardians in the state of Washington by county and to assess the relationship between the type of work experience (legal, financial, social service, or health care) reported by certified professional guardians and guardian certification sanctions in the state of Washington.

The study consists of the following specific research aims:

1. To develop a descriptive profile of certified professional guardians for each county by a) the ratio of county population to active guardians, and b) the percentage of guardians in each county without a sanction.

2. To examine the extent to which type of work experience reported by certified professional guardians is related to guardian certification sanctions.


GAO, supra n. 28, at 8, 10, 12, 15, 37, 44.

Schmidt, et al., supra n. 1, at 645.
professional guardians is associated with the likelihood and severity of guardian certification sanctions.

The two central hypotheses tested in this research are that the likelihood and severity of sanctions are negatively associated with legal work experience. Guardianship, a legal process and phenomenon. Many professional guardians are attorneys, and previous research found that guardians with a high school diploma or equivalency (GED) are more likely to have more severe sanctions compared with guardians having undergraduate or higher education, and compared with guardians having an Associate of Arts or technical degree. Therefore, a supposition can be that guardians with legal experience are less likely to be sanctioned in the first place.

IV. Method

A. Study Design and Data Source

This research represents a cross-sectional analysis of secondary data obtained from the Administrative Office of the Courts for the state of Washington. The cross-sectional design is attributed to the data collection occurring at a point in time. Prior to the initiation of data collection, the study protocol was reviewed and approved by both the Public Records Officer of the Courts for the state of Washington and the Washington State University Institutional Review Board in March 2006. The data were collected from the Administrative Office of the Courts between April and June 2006. Of the available records with work experience information, a total of 375 (97.2 percent) files were examined to gather data regarding work experience information for all certified professional guardians and sanctions information for all sanctioned guardians.

B. Measures

With regard to the second specific research aim, the dependent variables in this research are the likelihood and severity of guardian certification sanctions. The key independent variable is the type of work experience reported by certified professional guardians, i.e., “experience working in a discipline pertinent to the provision of guardianship services such as legal, financial, social service, or health care.” The detailed operational definitions (developed by using the legal definitions) of all study measures are found in the Appendix.

C. Statistical Analysis Procedures

Both descriptive and bivariate statistical analyses were performed using the SPSS software program version 14.0 and Microsoft Office Excel 2003. Chi-square analysis
Table 1. Ratios of Guardians to County Populations and Percentages of Guardians Without a Sanction by County

<table>
<thead>
<tr>
<th>County</th>
<th>Freq of Guard</th>
<th>Sanction Guard</th>
<th>Non-Sanct Guard</th>
<th>2005 County Pop</th>
<th>Ratio Co Pop/Guard</th>
<th>Percent Non-Sanct Guard/Guards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adams</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>16,803</td>
<td>16,803</td>
<td>0%</td>
</tr>
<tr>
<td>Asotin</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>21,178</td>
<td>10,589</td>
<td>100%</td>
</tr>
<tr>
<td>Benton</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>157,950</td>
<td>52,650</td>
<td>33%</td>
</tr>
<tr>
<td>Chelan</td>
<td>4</td>
<td>2</td>
<td>2</td>
<td>69,791</td>
<td>17,447</td>
<td>50%</td>
</tr>
<tr>
<td>Clallam</td>
<td>6</td>
<td>2</td>
<td>4</td>
<td>69,689</td>
<td>11,614</td>
<td>67%</td>
</tr>
<tr>
<td>Clark</td>
<td>12</td>
<td>7</td>
<td>5</td>
<td>403,766</td>
<td>33,647</td>
<td>42%</td>
</tr>
<tr>
<td>Cowlitz</td>
<td>10</td>
<td>1</td>
<td>9</td>
<td>97,325</td>
<td>9,732</td>
<td>90%</td>
</tr>
<tr>
<td>Douglas</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>34,977</td>
<td>34,977</td>
<td>0%</td>
</tr>
<tr>
<td>Grays Harbor</td>
<td>8</td>
<td>2</td>
<td>6</td>
<td>70,900</td>
<td>8,862</td>
<td>75%</td>
</tr>
<tr>
<td>Island</td>
<td>4</td>
<td>0</td>
<td>4</td>
<td>79,252</td>
<td>19,813</td>
<td>100%</td>
</tr>
<tr>
<td>Jefferson</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>28,666</td>
<td>9,555</td>
<td>67%</td>
</tr>
<tr>
<td>King</td>
<td>121</td>
<td>66</td>
<td>55</td>
<td>1,793,583</td>
<td>14,823</td>
<td>45%</td>
</tr>
<tr>
<td>Kitsap</td>
<td>24</td>
<td>12</td>
<td>12</td>
<td>240,661</td>
<td>10,027</td>
<td>50%</td>
</tr>
<tr>
<td>Kittitas</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>36,841</td>
<td>36,841</td>
<td>0%</td>
</tr>
<tr>
<td>Lewis</td>
<td>4</td>
<td>4</td>
<td>0</td>
<td>72,449</td>
<td>18,112</td>
<td>0%</td>
</tr>
<tr>
<td>Mason</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>54,359</td>
<td>54,359</td>
<td>0%</td>
</tr>
<tr>
<td>Okanogan</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>39,782</td>
<td>39,782</td>
<td>0%</td>
</tr>
<tr>
<td>Pierce</td>
<td>43</td>
<td>17</td>
<td>26</td>
<td>753,787</td>
<td>17,530</td>
<td>60%</td>
</tr>
<tr>
<td>Skagit</td>
<td>8</td>
<td>3</td>
<td>5</td>
<td>113,171</td>
<td>14,146</td>
<td>63%</td>
</tr>
<tr>
<td>Snohomish</td>
<td>19</td>
<td>15</td>
<td>4</td>
<td>655,944</td>
<td>34,523</td>
<td>21%</td>
</tr>
<tr>
<td>Spokane</td>
<td>40</td>
<td>11</td>
<td>29</td>
<td>440,706</td>
<td>11,017</td>
<td>73%</td>
</tr>
<tr>
<td>Thurston</td>
<td>21</td>
<td>13</td>
<td>8</td>
<td>228,867</td>
<td>10,898</td>
<td>38%</td>
</tr>
<tr>
<td>Walla Walla</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>57,558</td>
<td>19,186</td>
<td>33%</td>
</tr>
<tr>
<td>Whatcom</td>
<td>7</td>
<td>3</td>
<td>4</td>
<td>183,471</td>
<td>26,210</td>
<td>57%</td>
</tr>
<tr>
<td>Whitman</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>40,170</td>
<td>13,390</td>
<td>33%</td>
</tr>
<tr>
<td>Yakima</td>
<td>6</td>
<td>3</td>
<td>3</td>
<td>231,586</td>
<td>38,597</td>
<td>50%</td>
</tr>
<tr>
<td>Total</td>
<td>356</td>
<td>173</td>
<td>183</td>
<td>5,993,232</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
was used to statistically test the associations between the likelihood and severity of sanctions and type of work experience. Simple binary logistic regression analysis was used to estimate the odds ratios (ORs) and 95 percent confidence intervals (CI) for the key independent variable. Findings were considered statistically significant at $\alpha = 0.05$ level.

V. RESULTS

Table 1 reports the results of the descriptive profile of certified professional guardians for each Washington county with a certified professional guardian by the ratio of county population to active guardians, and the percentage of guardians in each county without a sanction. While 26 of the 39 counties in Washington have at least one Certified Professional Guardian (CPG), 13 counties do not have a CPG. The 13 counties without a CPG are located primarily in the less populated northeast (Ferry, Stevens, Pend Oreille), southeast (Franklin, Columbia, Garfield), eastern central (Lincoln, Grant), south central (Skamania, Klickitat), southwest (Pacific, Wahkiakum), and northwest (San Juan) regions of Washington. These counties without a CPG are boundary counties, except for Lincoln and Grant counties.

King (121 CPGs), Pierce (43 CPGs), and Spokane (40 CPGs) counties have the most CPGs, with one CPG per 14,823 population in King (Seattle), one CPG per 17,530 in Pierce (Tacoma), and one CPG per 11,017 in Spokane (includes city of Spokane). Cowlitz (southwest boundary), and Grays Harbor and Jefferson counties (west coast) have the most per capita CPGs, with one CPG per 9,733 population in Cowlitz, one CPG per 8,863 in Gray’s Harbor, and one CPG per 9,555 in Jefferson.85

<table>
<thead>
<tr>
<th>Study Variables</th>
<th>Sample Size and Frequency n (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sanction</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>181 (48.3 %)</td>
</tr>
<tr>
<td>No</td>
<td>194 (51.7 %)</td>
</tr>
<tr>
<td>Total</td>
<td>377 (100 %)</td>
</tr>
<tr>
<td>Experience Type</td>
<td></td>
</tr>
<tr>
<td>Legal</td>
<td>77 (20.5 %)</td>
</tr>
<tr>
<td>Financial</td>
<td>50 (13.3 %)</td>
</tr>
<tr>
<td>Social Services</td>
<td>215 (57.3 %)</td>
</tr>
<tr>
<td>Health Care</td>
<td>33 (8.8 %)</td>
</tr>
<tr>
<td>Total</td>
<td>375 (100%)</td>
</tr>
</tbody>
</table>

Table 2. Descriptive Statistics on Study Variables for 375 Guardian Certification Records

84 The 13 Washington counties without a certified professional guardian in 2006 were Columbia, Ferry, Franklin, Garfield, Grant, Klickitat, Lincoln, Pacific, Pend Oreille, San Juan, Skamania, Stevens, and Wahkiakum.

85 As of 2010, CPGs in Washington have approximately 3,440 guardianship cases. Memorandum, supra n. 17. More than 16,000 Washington residents are estimated to have a guardian. Guardianship Task Force,
Study Finds Certified Guardians with Legal Work Experience Are at Greater Risk for Elder Abuse Than Certified Guardians with Other Work Experience

Table 3. Results of Chi-Square Analysis: Type of Guardian Work Experience and Likelihood of Sanctions

<table>
<thead>
<tr>
<th>Experience</th>
<th>Legal</th>
<th>Financial</th>
<th>Social Services</th>
<th>Health Care</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sanction Status</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-Sanction</td>
<td>25</td>
<td>29</td>
<td>125</td>
<td>15</td>
<td>194</td>
</tr>
<tr>
<td>Frequency (%)</td>
<td>32.5%</td>
<td>58.0%</td>
<td>58.1%</td>
<td>45.5%</td>
<td>51.7%</td>
</tr>
<tr>
<td>Sanction</td>
<td>52</td>
<td>21</td>
<td>90</td>
<td>18</td>
<td>181</td>
</tr>
<tr>
<td>Frequency (%)</td>
<td>67.5%</td>
<td>42.0%</td>
<td>41.9%</td>
<td>54.5%</td>
<td>48.3%</td>
</tr>
<tr>
<td>Total</td>
<td>77</td>
<td>50</td>
<td>215</td>
<td>33</td>
<td>375</td>
</tr>
<tr>
<td>Frequency (%)</td>
<td>100.0%</td>
<td>100.0%</td>
<td>100.0%</td>
<td>100.0%</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Pearson Chi-Square = 16.287, P < 0.001

The 26 Washington counties with a CPG have an average of 44 percent of their CPGs in each county without a sanction. All of the combined nine CPGs in the small counties of Adams, Douglas, Kittatas, Lewis, Mason, and Okanogan have a sanction. Other than these six small counties, the county with the next lowest percentage of CPGs without a sanction is Snohomish (21 percent).

Of the Washington counties with a CPG, the small counties of Asotin and Island have no CPGs with a sanction. Other than Asotin and Island counties, the counties with the highest percentages of CPGs without a sanction are Cowlitz (90 percent), Grays Harbor (75 percent), and Spokane (73 percent). Spokane has a well-established Guardianship Monitoring Program to actively monitor guardian management of care and financial affairs for incapacitated citizens.86

86 Cf. Hurme & Wood, supra n. 18, at 908-909 (nn. 295-296); Guardianship Monitoring Program (Spo-
Table 2 reports the results of the descriptive statistics for the main variables of interest in this study. Approximately 48 percent \((n=181)\) of the professional guardians had received sanctions since the 2001 initiation of the guardian certification program in Washington. The majority of the guardians (57.3 percent) had pertinent guardianship work experience in social services; 20.5 percent had experience in legal work; 13.3 percent had experience in financial work; and 8.8 percent had experience in health care.

One of the central study hypotheses focuses on the potential association between type of work experience (legal, financial, social service, or health care) and likelihood of sanctions. The results of the first Chi-square test reported in Table 3 indicate that there is a statistically significant association \((X^2 = 16.29, p < 0.001)\) between type of work experience and likelihood of sanctions. Findings show that 67.5 percent of guardians with legal work experience are likely to be sanctioned compared to 54.5 percent with health care experience, 42.0 percent with financial experience, and 41.9 percent with social services experience, respectively. In addition, the results of the binary logistic regression analysis in Table 4 indicate that guardians with financial work experience \([OR = .348; 95\% CI = 0.167-0.727; p < 0.005]\) and social services work experience \([OR = .346; 95\% CI = 0.200-0.599; p < 0.000]\) are approximately 65 percent less likely to be sanctioned compared to those guardians with legal work experience. Although guardians with work experience in a health care discipline are approximately 42 percent less likely to be sanctioned compared to those with legal work experience, that relationship is not statistically significant.

While the related second central hypothesis concerning the potential association between type of work experience and the severity of sanctions was tested, there is no statistically significant association between type of work experience and the severity of sanctions based on the results of the additional Chi-square and binary logistic analyses.

Table 4. Results of Binary Logistic Regression Analysis: Type of Guardian Work Experience and Likelihood of Sanctions

<table>
<thead>
<tr>
<th>Study Variables</th>
<th>Sample Size and Frequency n (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sanction</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>181 (48.3%)</td>
</tr>
<tr>
<td>No</td>
<td>194 (51.7%)</td>
</tr>
<tr>
<td>Total</td>
<td>375 (100%)</td>
</tr>
<tr>
<td>Experience Type</td>
<td>Odds Ratios and 95% Confidence Intervals</td>
</tr>
<tr>
<td>Financial</td>
<td>.348 (.167-.727)</td>
</tr>
<tr>
<td>Social Services</td>
<td>.346 (.200-.599)</td>
</tr>
<tr>
<td>Health Care</td>
<td>.577 (.250-1.330)</td>
</tr>
<tr>
<td>Total</td>
<td>375 (100%)</td>
</tr>
</tbody>
</table>

VI. DISCUSSION

To the best of our knowledge, this study represents the first empirical research presenting a descriptive profile of certified professional guardians for each county by the ratio of active guardians to county population, and the percentage of guardians in each county without a sanction. This study also adds to the current body of research on guardian quality by generating new empirical information about the relationship between type of guardian certification work experience and guardian certification sanctions, or penalties. While not predicted, the observed positive relationship between the likelihood of sanctions or penalties, and having legal work experience is interesting and is potentially explained by considerations regarding the higher risk profile of professional guardians with legal work experience.

A. Very Limited Rural Access to Certified Guardian Services

This research demonstrates that rural counties have very limited access to certified guardian services. Thirteen of 39 counties in Washington did not have a Certified Professional Guardian at the time of the study. The Office of Public Guardianship (OPG) was established in 2007 with pilot programs in Clallam, Grays Harbor, Okanogan, Pierce, and Spokane Counties.87 While part of the intent of the OPG is to meet such unmet needs as rural guardian service, since the OPG contracts with CPGs to provide public guardian services for indigents and public long-term care service recipients, counties without a CPG continued without CPG service. Expansion of OPG services to rural counties is one option to increase rural access.

Washington recently increased CPG training requirements to include completion of a three-course Guardianship Certificate Program offered by the University of Washington Extension, consisting of 56 classroom hours and 34 online distance education hours. The online and weekend format is designed to increase access, along with occasional classroom offerings in Spokane (rural eastern Washington). Since the Spokane training inconveniently attracted many western Washington applicants, rural CPG service remains a challenge. Expansion of OPG service to rural counties may be the most direct approach to addressing unmet rural need.

B. Uneven Distribution of Certified Guardian Services

This research demonstrates an uneven distribution of certified guardian services. Not only did 13 of 39 counties in Washington lack even one CPG, but the distribution in counties with CPGs ranged from one CPG per 8,863 in Gray’s Harbor to one CPG per 17,350 in Pierce (Tacoma). A limitation of this study is the extent to which demographic county population factors like age, extent of disability, and wealth might explain the uneven distribution. Future studies should identify such additional factors and explore potential associations with the uneven distribution.

Nonetheless, an uneven distribution of certified guardian services is a challenge. This phenomenon is not unique to the state of Washington. For example, Texas has 280

certified guardians for a state population of 24,782,302 (one certified guardian per 88,508 population statewide)\(^{88}\) and 254 counties. The unmet need for public guardian services throughout the country is clearly documented.\(^{89}\) This research suggests that there is an unmet need for certified guardian services, a need that probably faces rapid exacerbation as the population ages, especially the population with incapacitating disabilities, and continues to disperse from willing and responsible family members and friends. If the market for certified guardian services is unable to meet the need, this is another challenge for which expanded public guardianship may be necessary. The unmet needs also place a premium on the challenges of timely promulgation of advance directives to prevent or minimize manifestation of the needs for certified guardian and public guardian services, as well as placing a premium on the willingness and availability of family members and friends to help and provide service.

C. Uneven Distribution of Certified Guardians without Sanctions

This research found an uneven distribution of guardians without sanctions. Of the Washington counties with a CPG, two small counties had no CPGs with a sanction and the counties with the highest percentages of CPGs without a sanction are Cowlitz (90 percent), Grays Harbor (75 percent), and Spokane (73 percent). The 26 Washington counties with a CPG have an average of only 44 percent of their CPGs in each county without a sanction. The nine CPGs in six small counties all have a sanction, and Snohomish has only 21 percent of its CPGs without a sanction. This research shows variation by county in the percentage of CPGs with and without sanctions. The results suggest some variation in guardian service quality by county. A limitation of this study is the extent to which factors not explored explain this variation, for example, the nature and extent of judicial oversight. Future studies should identify such additional factors and explore potential associations with the uneven distribution.

Nevertheless, counties with higher percentages of CPGs with sanctions than peer counties might view the information as an opportunity to consider the feasibility of more active and urgent judicial oversight and monitoring of their CPGs. Spokane, for example, has the well-established Guardianship Monitoring Program to actively monitor guardian management of care and financial affairs for incapacitated citizens.\(^{90}\) The Certified Professional Guardian Board might view the information as an opportunity for audit\(^{91}\) and investigation of counties with higher percentages of CPGs with sanctions than peer counties. Arizona and Washington have established statewide audit capabilities.\(^{92}\)

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88 Cf. Olsen, supra n. 47; http://www.courts.state.tx.us/geb/gebhome.asp.
90 See supra text accompanying nn. 18, 86.
91 See supra text accompanying nn. 17, 58-59.
92 Id.
Study Finds Certified Guardians with Legal Work Experience Are at Greater Risk for Elder Abuse Than Certified Guardians with Other Work Experience

D. Increased Likelihood of Sanctions for Certified Guardians with Legal Experience

This research finds that 67.5 percent of guardians with legal work experience are likely to be sanctioned compared to 54.5 percent with health care experience, 42.0 percent with financial experience, and 41.9 percent with social services experience, respectively. The research also finds that guardians with financial work experience and social services work experience are 65 percent less likely to be sanctioned compared to those guardians with legal work experience. The likelihood of sanctions for certified guardians is positively associated with legal work experience, and certified guardians with financial work experience and social services work experience are significantly less likely to be sanctioned than certified guardians with legal work experience.

Previous research found that certified guardians with an undergraduate degree or higher education have a higher likelihood of sanctions than certified guardians with an Associate of Arts (AA) or Technical (Tech) degree, and than certified guardians with a high school diploma or GED equivalency. However, certified guardians with an AA or tech degree are less likely to have more severe sanctions than guardians with an undergraduate degree or higher education. Of the 20 selected closed cases of abuse, neglect, and financial exploitation of seniors by guardians highlighted in the recent 2010 GAO Report, seven of the 20 (35 percent) involved attorney-guardians. The June 2003 Washington Post documented exploitation and neglect by attorney-guardians.

This research shows that type of work experience is an important guardian certification requirement in assessing the likelihood of sanctions by a certified guardian, and that legal work experience is higher risk than social services work experience and financial work experience. Guardian certification boards, courts, legislatures, and similar entities might use such information for targeted or enhanced screening, education and continuing education, audit and investigation, or oversight and monitoring of certified guardians with legal work experience. Oregon’s voluntary certification has almost identical required experience in legal, health, social, or financial services. States like Alaska, Arizona, California, and Texas, and the Center for Guardianship Certification have some provision for work experience for which these findings are potentially informative, relevant, and helpful. Texas may want to reconsider exempting attorneys from certification. Based on this research, the state of Washington, and other states and entities (e.g. Center for Guardianship Certification) that certify or license guardians should consider changing guardian certification experience requirements to reduce credit given for legal experience.

Causes and explanations for the association of legal work experience and increased likelihood of sanctions are unknown. Guardian work may approximate social services work and financial work more than legal work. The only published studies of the nature of guardianship work document its breadth and intricacy. Guardian work, living the

93 Schmidt, et al., supra n. 1.
94 GAO, supra n. 28, at 12-14, 36-38, 43.
95 See supra text accompanying n. 5.
96 See supra text accompanying n. 45.
97 See supra text accompanying nn. 36, 47-49, 57.
98 Cf. supra n. 47.
99 Winsor Schmidt, Kent Miller, Roger Peters & David Loewenstein, A Descriptive Analysis of Professional and Volunteer Programs for the Delivery of Guardianship Services, 8 Prob. L. J. 125, 141–145
decisional life of another, includes addressing a legally incapacitated person’s living situation, functional status, social support, finances, physical environment, activities of daily living (ADLs, e.g., bathing, dressing, walking, urinary and bowel continence), instrumental activities of daily living (IADLs, e.g., laundry, using a telephone, home maintenance, money management, transportation), assisted devices, medical care/health, nutrition, cognitive/emotional, caregiver support, and employment. Guardians with legal work experience may not be as well suited for such work as guardians with other work experience.

Guardians with legal work experience may have misplaced confidence in their experience, education, or knowledge. Guardians with legal experience may think they can get away with more than guardians with other work experience. From their experience with law, such guardians may take more risks with legal lines and boundaries in guardianship law, or take legal requirements in guardianship less seriously. Guardians with legal experience are potentially less deterred or intimidated by guardianship law, judges, or courts. There are anecdotal reports of sanctioned guardians who say that they provide reports, accountings, and other filings to their attorneys on time and that their attorneys are late or neglectful about timeliness and accuracy in filing such documents with the courts.100

Future research should explore causes and explanations for the association of legal work experience and increased likelihood of sanctions.

The state of Washington’s guardian certification scheme requires increasing levels of years of experience in legal, financial, social service, or health care to counterbalance decreasing levels of formal education.101 Despite the emphasis on the role of increasing levels of years of experience in guardian certification requirements, no empirical support was provided in previous research for the potential association between years of experience and the likelihood and severity of sanctions.102 This research does provide empirical support for the association of the type of work experience and the likelihood of sanctions. Based on the previous research, the state of Washington and other states and entities (e.g., CGC) that certify or license guardians should not require increasing levels of years of experience as a certification condition with an expectation that there is an association between years of experience and the likelihood and severity of sanctions. Based on this research, they should consider changing guardian certification experience requirements to reduce credit given for legal experience. Licensing and certification authorities for other professions should consider that years of experience might not be associated with the likelihood and severity of sanctions in these professions. However, types of work experience might be associated with the likelihood and severity of sanctions in other professions.

E. Implications for Licensing, Certification, and Registration Outside Guardianship

This study is also important because the relationship between registration, licens-
ing, or certification qualifications and sanctions is not limited to guardianship. In the health care system, for example, while unsolicited patient complaints, and the filing of a malpractice claim against a physician, are predictive of future claims, states vary widely in rates of physician license discipline. This guardianship research is important not only for the quality of guardians accomplished through certification, but also for the quality of other licensees in administrative and regulatory government. The methodology is similar to the design and framework for predicting the likelihood of future behavior, present behavior, and past behavior in other legal and policy contexts. In certification and licensing, including guardian certification and licensing, such information has possible utility for activities such as predicting the likelihood and severity of future sanctions, prioritizing investigation of present conduct, and providing contexts or social frameworks in determining past facts in a specific case.

There may be some perception that sanctions for such behaviors as nonpayment or even late payment of dues are not really related to guardian performance. However, in other areas of the law, seemingly innocuous behavior such as unsolicited patient complaints or just the filing of a claim without even judgment or settlement in medical malpractice, or broken windows as felony crime precursors; or the proxies, precursors, and the less serious predictors associated with bail jumping, parole violation, capital punishment, and tort liability for future dangerousness, are directly relevant to physician stewardship of patients, police stewardship of neighborhoods, and bail, parole, capital punishment, and tortfeasor stewardship of victims. Guardian certification requirements for education and for types of work experience (legal, financial, social service, or health care) are directly relevant to guardian stewardship of incapacitated persons.


104 See, e.g., Marc Law & Zeynep Hansen, Medical Licensing Board Characteristics and Physician Discipline, 35 J. Health Pol., Pol’y & L. 63 (2010); James Morrison & Peter Wickersham, Physicians Disciplined by a State Medical Boards, 279 J. Am. Med. Ass’n 1889 (1998); and Sidney Wolfe & Kate Resnevic, Ranking of the Rate of State Medical Boards’ Serious Disciplinary Actions: 2006-2008 (2009). See also Mich. C.L.A. § 333.16231 (requires medical board to investigate physicians who experience “[three] or more malpractice settlements, awards, or judgments … in a period of [five] consecutive years or [one] or more malpractice settlements, awards, or judgments … totaling more than $200,000.00 in a period of [five] consecutive years”).


106 Bovbjerg & Petronis; Hickson, et al.; Sloan, Mengenhagen, Burfield, Bovbjerg & Hassan; and Schmidt, Heckert, & Mercer, supra n. 103.

107 See generally Monahan & Walker, and Walker & Monahan, supra n. 105.
F. Guardian Impact on Elder Quality of Life and Escalating Need for Guardians

This study adds to the current body of research on guardian quality by generating additional new empirical information about the relationship between guardian certification requirements and guardian certification sanctions. The results enable the tailoring of guardian certification requirements to reduce the likelihood of sanctions and poor guardian performance. The potential negative impact of guardianship on quality of life for the elderly is not only summarized in the reports and literature cited above, but is also well documented in the available empirical research. The available research suggesting the need for more effective guardian certification standards is rendered more compelling by accelerating changes in the number and demographics of elderly populations. For example, “Unless cures or means of prevention are found for the common causes of dementia, 7.4 million Americans will be affected by the year 2040 — five times as many as [in 1987].” Converging trends are escalating the need for guardianship and guardians: “the ‘graying’ of the population…; the aging of individuals with disabilities; the advancements in medical technologies affording new choices for chronic conditions and end-of-life-care; the rising incidence of elder abuse; and the growing mobility that has pulled families apart.”

G. Future Research

The latest efforts to increase guardian quality and performance have included self-regulation of private professional guardians through examination, certification, and review by such entities as the CGC, and increasing state regulation. Such states as Alaska, California, Florida, Illinois, Nevada, Oregon, and Texas appear to rely on CGC to a significant extent for regulation of professional guardians. No published research has been available regarding the relationship between guardian certification requirements for types of work experience (legal, financial, social service, or health care) and the extent of sanctioning by CGC or by state guardian regulators. This study on the relationship between guardian certification requirements for types of work experience and guardian sanctioning in the state of Washington provides a research design and framework for the conduct of additional studies regarding CGC guardian certification and guardian certification and licensing by other states.

108 See discussion supra at text accompanying nn. 6-33. See also Salzman, supra n. 2.
109 See Raymond Berger & Irving Piliavin, The Effect of Casework: A Research Note, 21 Soc. Work 205 (1976); Margaret Blenkner, Martin Bloom & Margaret Nielsen, A Research and Demonstration Project of Protective Services, 52 Soc. Casework 483 (1971); Mark Lachs, Christianna Williams, Shelley O’Brien & Karl Pillemer, Adult Protective Service Use and Nursing Home Placement, 42 The Gerontologist 734 (2002); and Margaret Blenkner, Martin Bloom, Margaret Nielsen & Ruth Weber, Final Report: Protective Services for Older People, Findings from the Benjamin Rose Institute Study (The Benjamin Rose Institute on Aging, 1974). See generally, e.g., Schmidt, supra note 2; Schmidt, et al., supra n. 36; and Teaster, et al., supra n. 44.
110 Office of Technology Assessment, Losing a Million Minds: Confronting the Tragedy of Alzheimer’s Disease and Other Dementias (U. Press of the Pacific, 2002), at 3.
111 Teaster, et al., supra n. 44, at 2.
H. Limitations

The findings of this study are interpreted in light of a number of limitations. First, the cross sectional nature of this study does not allow any type of causal interpretation of the associations reported. Second, factors other than type of work experience may be associated with the likelihood and severity of guardian sanctions. These factors may include, for example: the nature and extent of the professional guardian-training program; the nature and extent of continuing education; professional guardian practice characteristics such as staff to ward ratios;\(^\text{112}\) the availability and aggressiveness of investigators and investigations for complaints about guardians; the availability and aggressiveness of auditors and audits of guardian practices; and, the availability and results of criminal background checks and credit checks. Future research studies should identify such additional factors and explore potential associations with the likelihood and severity of functions using multivariate-modeling techniques. Third, the results presented in this research may have limited generalizability beyond the state of Washington. Therefore, replication of the findings in other states with comparable guardian certification programs is needed. Such research may help guardians and the guardianship system to merit greater public and legal confidence.

VII. Conclusion

This article presents research regarding the relationship between professional guardian experience and guardian sanctioning, addressing the extent to which information about the relationship may help reduce risk of elder abuse by guardians. The research reports information about the distribution of Certified Professional Guardians by county in the state of Washington, the distribution of Certified Professional Guardians without sanctions by county, and the likelihood of sanctions for Certified Professional Guardians by type of guardian work experience.

\(^{112}\) See Schmidt, et al., supra n. 36, at 174, 193 (“No office of public guardian shall assume responsibility for any wards beyond a ratio of [30] wards per professional staff member.”); Teaster, et al., supra n. 44, at 162 (“No office of public guardians shall assume responsibility for any IPs beyond a ratio of 20 IPs per one paid professional staff.”); Winsor Schmidt, Pamela Teaster, Hillel Abramson & Richard Almeida, Second Year Evaluation of the Virginia Guardian of Last Resort and Guardianship Alternatives Demonstration Project, at 23 (Virginia Department for the Aging 1997) (“The ward to guardian ratio should be 20:1.”); Council on Accreditation Adult Guardianship Service Standards, http://www.coastandards.org/standards.php?navView=private&core_id=1270, (“Generally speaking, the staff to client ratio should not exceed 1:20 to eliminate situations in which there is little to no service being provided to the individual.”); and Wash. Rev. Code § 2.72.030 (Washington’s office of public guardianship is prohibited from authorizing payment for guardianship services “for any entity that is serving more than [20] incapacitated persons per certified professional guardian.”). Adopted in many states, the Uniform Veterans’ Guardianship Act provides that no person may be a guardian for more than five wards at one time.

Whether such information reduces the risk of elder abuse by guardians will depend on its use. While the following quotation may have reached the status of *shibboleth*, it nevertheless captures a concluding aspiration: “It was once said that the moral test of government is how it treats those who are in the dawn of life, the children; those who are in the twilight of life, the aged; and those in the shadows of life — the sick, the needy and the handicapped.”\(^{113}\) This quotation well articulates the *parens patriae* duty of government with guardianship and guardians.

APPENDIX

Detailed Operational Definitions of Study Variables

**Likelihood of Sanctions (Dependent Variable)**
1. Sanctioned
2. Not Sanctioned

**Severity of Sanctions (Dependent Variable)**
1. *Decertification:* Knowingly engages in professional misconduct incompatible with the Standards of Practice with the intent to benefit the Guardian or another, or to deceive the court, and cause serious injury to a party, the public, or the legal system, or causes serious or potentially serious interference with a legal proceeding. Engages in felonious criminal conduct. Engages in any other intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the Guardian’s fitness to practice.
2. *Suspension:* Knowingly engaging in professional conduct incompatible with the Standards of Practice and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding. Engages in criminal conduct that seriously reflects on the Guardian’s fitness to practice law.
3. *Prohibition Against Taking New Cases:* Knowingly engaging in professional conduct incompatible with the Standards of Practice and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding. Engages in criminal conduct that seriously reflects on the Guardian’s fitness to practice law.
4. *Letter of Reprimand:* Negligently engages in professional misconduct incompatible with the Standards of Practice and causes injury or potential injury to a party, the public, or the legal system, or causes interference with a legal proceeding. Engages in any other misconduct that involves dishonesty, fraud, deceit, or other misrepresentation and that adversely reflects on the Guardian’s fitness to practice.
5. *Letter of Admonishment:* Engages in professional misconduct incompatible with the standards of practice but not rising to the level justifying a reprimand.
6. *Settlement*

113 Hubert H. Humphrey Jr., former Vice President of the United States (in his speech at the dedication of the Hubert H. Humphrey building in Washington, D.C., on Nov. 4, 1977).
Study Finds Certified Guardians with Legal Work Experience Are at Greater Risk for Elder Abuse Than Certified Guardians with Other Work Experience

7. Administrative: Dues noncompliance.
8. Administrative: Education hours noncompliance.
10. First Late Fee Assessment (dues)
11. Second Late Fee Assessment (dues)
12. Third Late Fee Assessment (dues)
13. Voluntary Inactive Status

Reclassified: Severity of Sanctions (Dependent Variable)
1. More Severe: Sanctions 1-9
2. Less Severe: Sanctions 10-13

Certification Requirements (Independent Variables)
1. Type of Experience
   a. Legal experience
   b. Financial experience
   c. Social services experience
   d. Health care experience
Beyond Bedsores: Investigating Suspicious Deaths, Self-Inflicted Injuries, and Science in a Coroner System

By Clarissa Bryan

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I. Introduction

Robert Heitzman died on December 3, 1990, while in the care of one of his adult sons.\(^1\) When the police were summoned to the residence, they found the deceased in the bedroom, lying on a mattress that was rotted through from constant wetness, exposing the metal springs.\(^2\) He was 67 years old. The stench of urine and feces filled the entire house.\(^3\) The police reported that “his bathroom was filthy, and the bathtub contained fetid green-colored water that appeared to have been there for some time.”\(^4\)

The explanation offered by Mr. Heitzman’s son was that he was expecting company for dinner and because he did not want his father to soil himself and cause the house to smell further, he withheld food and water from his father for three days.\(^5\) The decedent had large, decubitus ulcers on one-sixth of his body and a yeast infection in his mouth at the time of death.\(^6\)

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\(^1\) People v. Heitzman, 886 P.2d 1229, 1231 (Cal. 1994).
\(^2\) Id.
\(^3\) Id.
\(^4\) Id.
\(^5\) Id.

Clarissa Bryan is a third year law student at Georgia State University’s College of Law. The focus of this article was also the topic of the author’s presentation at BIT’s First Annual World Conference in Forensics, hosted in Dalian, China, in October 2010. Ms. Bryan’s article, Behind Closed Doors: The Use of Pre-Dispute Arbitration Agreements in Nursing Home Admission Contracts, was the first-place winning essay in the 2010 NAELA Student Writing Competition. The author would like to offer sincere thanks and gratitude to her professor, Jessica Gabel, and her advisor, Mary Radford, for their indispensable guidance in preparing this article for publication.
Although an autopsy revealed that Mr. Heitzman had suffered from congestive heart failure, bronchial pneumonia, and hepatitis, the forensic pathologist who performed the autopsy cited the cause of death as septic shock from the sores. The pathologist concluded that the ulcers were the result of dehydration, malnutrition, and severe neglect.7

Unfortunately, this horrific story of Mr. Heitzman’s demise is not an anomaly. The National Council on Elder Abuse’s (NCEA) Administration on Aging performed a survey in 2000 in an attempt to quantify the incidence rates of elder abuse.8 Previous studies estimate that between 1 million and 1.5 million elderly are abused or severely neglected each year.9 One study by the NCEA estimates that only one in 14 incidents of elder abuse is reported.10 The report from the NCEA’s Administration on Aging found evidence that for each report made on an abused elder incident, five more incidents go unreported.11

While the situation described in the Heitzman case raises several poignant issues, this paper addresses one in particular: What would have happened if no medical examiner or forensic pathologist had examined Mr. Heitzman’s body? Based on the deceased’s medical history, would a coroner have been content to find the death to be of natural causes resulting from numerous health conditions? The case of Mr. Heitzman presents evidence of such severe neglect that even a layperson could conclude the deceased was a victim of abuse. Other cases, however, are not so clear.12

This paper addresses the problem of detecting elder abuse and neglect in cases of suspected natural death and self-inflicted injury under the lay coroner system. The coroner system is distinctly contrasted from the medical examiner system by the lack of scientific methodology that coroners employ in their work (as discussed, infra, at Section II A). Coroners are almost never trained medical professionals, while most medical examiners are doctors, pathologists, or forensic pathologists. The Congressionally mandated report on forensic methodology compiled in 2009 by the National Academy of Sciences (NAS) will be used as a guide in structuring medicolegal investigations to ensure that incidents of elder abuse and neglect do not go undetected.13

Section I presents the various interpretations of what defines elder abuse, a discussion of when and how abuse occurs, and an analysis of the crucial role that reporting has beyond the immediate health care and welfare contexts. The issue of reporting elder abuse as it relates to the coroner system is specifically addressed. Section II provides an analysis of the current death investigation systems that are in place. The predominant focus is a call for the elimination of the lay coroner system from the medicolegal construct and replacement

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6 Id. at 1232.
7 Id.
10 National Council on Elder Abuse: Administration on Aging, Trends in Elder Abuse in the Domestic Setting, supra n. 8.
11 Id.
by systems that use medically trained professionals. Finally, Section III will present policy recommendations, such as educating investigators, opening channels of reporting, and requiring that all states provide resources and institute systems to ensure that the examination of deceased persons will be conducted unilaterally by medical professionals.

A. Background

Public awareness of elder abuse and neglect, while now largely recognized, has nonetheless come more slowly than the related offenses of domestic abuse and child abuse.14 Studies conducted in Great Britain and the United States in the 1970s promulgated this recognition by identifying elder abuse as a significant problem.15 This awareness came in the face of a growing population of the elderly.16 Between 1960 and 1980, the population of persons aged 65 or older increased from nine percent to 11 percent in the United States.17 This number has steadily increased over recent years and continues to climb. In 1994, the age 65 and older population exceeded 33 million and just two years later, in 1996, the elder population’s growth swelled to 44 million.18 It is estimated that the year 2020 will show the most drastic population increase in this subset to date with an increase of about 20 million senior citizens as compared to 1996.19 This would mean that one in every six Americans will be 65 or older at that time.20

Despite the gradual increase in public and governmental awareness of the problem of elder abuse, the incidence and prevalence of elder abuse continue to rise.21 Because aging invariably leads to problems with chronic illness, disability, and cognitive changes for a number of the elderly, many then become vulnerable to abuse and mistreatment. Unfortunately, current reports estimate that “between one and two million Americans age 65 or older have been injured, exploited, or mistreated by someone on whom they depended for care or protection.”22 However, there is an apparent lack of interest on the part of researchers and agencies that provide research funding. As a result, “little is known about [the] characteristics, causes, or consequences [of elder abuse] or about effective means of prevention or management.”23 According to a National Institute on Aging report, there are fewer than 50 peer-reviewed studies appearing in scientific literature, and no common definitions of the terms “elders,” “abuse,” “neglect,” or “exploitation” exist.24

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14 Frolik, supra n. 9, at 607.
15 Id.
16 Id.
18 Susan Levine, Aging Baby Boomers Pose Challenge: Preparations Needed for Coming Strain on Services, Census Report Says, Wash. Post A9 (May 21, 1996) (commenting that the increased number of older Americans will likely put great stress on the various specialized elder services and programs).
19 Id.
20 Id.
22 Id. at 166.
23 Id. at 168.
24 See Luu, supra n. 21 at 167 (citing the Natl. Adult Protective Services Ass’n, White House Conference
issue of what constitutes “elder abuse” and how it is currently defined (both legally and medically) is therefore a substantial hurdle to eradicating this epidemic. Subsection A, 1 addresses this semantic challenge. Subsection A, 2 will contextualize abuse perpetrated both in the home and in a long-term care facility setting. Finally, Subsection A, 3 will delineate the relationship of the coroner system to an apparent lack of elder abuse reporting.

1. Elder Abuse — Defining the Problem

A universal definition of “elder abuse” is crucial for education, detection, and prevention. “Acceptance of a definition should be followed by research to accurately quantify the extent of the problem. Agreement on a definition is essential in order to compare various research studies and to fashion responses.” Setting forth a universal definition of elder abuse presents some difficulty because significant variance exists from state to state in how elder abuse is defined.

While definitions of elder abuse vary greatly from state to state, they typically include neglect and physical, psychological, fiduciary, and sexual abuse or exploitation. However, the definitions within the respective categories of abuse vary widely. All states include physical harm in their definitions of abuse, but may distinguish between willful infliction of abuse and negligent infliction or failure to prevent the physical abuse. A balancing test is at play in the statutory language. While overly narrow definitions could fail to recognize certain specific abusive behaviors, definitions that are overly broad may lead to programs that are more intrusive than necessary and that unconstitutionally invade the elderly person’s independence.

The typical categories of elder abuse give way to a spectrum of action (and inaction) that could constitute abuse. Physical abuse spans the range from assault to “murder and mayhem.” One reported case of significant physical abuse involved a 100-year-old resident in a nursing facility. The resident’s daughter had on several occasions found her mother “in a dreadful state” while at the facility, with severe bruises about her eye, mouth, hands, and wrists.

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25 Faulkner, Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults, 16 Fam. L.Q. 69, 71 (1982).
29 Garfield, supra n. 26, at 870.
30 Id. at 874.
Neglect\textsuperscript{33} can include the withholding of food, personal care, and necessary medication and medical treatment.\textsuperscript{34} A recent case from a nursing home in Albany, N.Y., demonstrates the foregoing.\textsuperscript{35} Staff at the facility left residents in the same position for an entire shift, failed to administer medication and treat bed sores, and failed to check for incontinence or change undergarments for long periods of time.\textsuperscript{36} The staff also falsified medical records to conceal their neglect, including one physician’s assistant who created a phony record of an annual medical exam that was never performed.\textsuperscript{37}

Severe neglect rises to a level of unconscionability. In a suit in California that produced a $2 million jury verdict against a nursing home after a resident died from bedsores that were the result of severe neglect, the judge affirmed the award and stated that “we should never cease to be shocked by Man’s inhumanity to Man, no matter the circumstances.”\textsuperscript{38} Another case from that state details the plight of nine nursing home residents who were victims of bedsores, filth, dehydration, and malnutrition.\textsuperscript{39} One resident’s body had been overtaken by enormous bedsores and he was described as “stuporous, unresponsive, and semi-comatose.”\textsuperscript{40} Another patient suffered from such gross negligence that a licensed vocational nurse found maggots in the patient’s vagina and anus.\textsuperscript{41}

\textsuperscript{33} Elder Abuse, \textit{supra} n. 27. (While not as widely accepted as other categories, some states also recognize self-neglect as a form of elder abuse. It is important to note that these states’ definition of self-neglect does not refer to mentally competent elders who comprehend their decisions and voluntarily decide to engage in acts that threaten their health and safety. Symptoms of self-neglect include poor personal hygiene, dehydration, malnutrition, and hazardous living conditions).

\textsuperscript{34} \textit{Id.}


\textsuperscript{36} \textit{Id.}

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{Beverly Enterprises-Florida, Inc. v. Spilman}, 661 So.2d 867, 874 (Fla. Dist. Ct. App. 1995) (Sharp, J. concurring specially) (confirming a judgment of $720,000 in compensatory damages and $2 million in punitive damages against a nursing home which had so neglected a patient that the patient died from a bedsore). The evidence supported a finding that the acts and omissions by the nursing home warranted a punitive damage award in the amount of $2 million dollars.

\textsuperscript{39} \textit{People v. Casa Blanca Convalescent Homes, Inc.}, 206 Cal. Rptr. 164, 167-71 (Ct. App. 1984) (detailing the specifics of the nine residents’ deficiencies in care that led to severe physical, emotional, and psychological consequences for the patients).

\textsuperscript{40} \textit{Id.} at 168 (detailing Leola Dobbs’ poor quality of care received during her stay at a nursing home). Dobbs was admitted to the nursing home upon discharge from the hospital in July 1976, but returned less than two months later when it was noted that her condition had deteriorated. In those two months back at the nursing home, Dobbs suffered from dehydration and constrictures. Her medical plan provided for a catheter to avoid dehydration, which by state law required that the nursing staff record input and output from catheters to prevent dehydration; this record keeping was woefully inadequate. Dobbs’ medical plan also called for her to be turned frequently to prevent the bedsore. The records reflect that these turns were either not made or made on inappropriate intervals, and were inadequate in the prevention of the bedsore. Continued investigation indicated that the record keeping was accurate in reflecting the lack of care and attention afforded this patient.

\textsuperscript{41} \textit{Id.} at 170. When this information was presented to supervisors at the facility, no corrective action was taken for either this particular patient or to prevent recurrence. Several months later at the same facility, it was noted that failure to provide clean linens to the patients, especially those with incontinence prob-
Sexual abuse is defined by the National Center on Elder Abuse (Center) as nonconsensual contact of any kind with an elderly person or person incapable of giving consent. In Texas, nurse’s aide Johnny Gordon was allowed to care for nursing home resident Dorothy Cooper. On July 20, 1993, Gordon brutally raped 64-year-old Cooper not once, but twice with a shower head during an unsupervised female patient shower. Gordon returned Cooper to her bed and proceeded to masturbate, discharging semen across her body. Two nurse’s aides reported the suspected sexual assault to their supervisor after discovering a semen-like substance in Cooper’s vaginal area. The charge nurse discounted the semen-like substance as a vaginal infection. After the attacks, Cooper became permanently withdrawn and refused care by staff, and would be found terrified at night with her legs locked in the bed rails and often screaming. After much urging from the two nurse’s aides, the director of nursing called the police and Cooper was admitted to the emergency room. Completion of a sexual assault examination uncovered bruises on Cooper’s left thigh and vaginal area and brown mucous discharge. Had the nurses not been persistent in urging that Cooper receive a medical exam, Gordon’s actions could have gone undetected.

Financial abuse and psychological abuse, while regarded as types of elder abuse,
are beyond the scope of this paper as these types of abuse are not typically connected to the medicolegal framework.

2. Abuse at Home and in “The Home”

Elder abuse occurs in both domestic and institutional environments. Most elder abuse and neglect is caused by caregivers, typically family members or long-term care facility employees.\(^{53}\) This is due in part because elder abuse and neglect are usually defined as repeated physical assault or neglect or ongoing psychological abuse.\(^{54}\) According to the Center, the persons most likely to abuse an elderly person are adult children, other family members, and spouses.\(^{55}\)

In domestic settings, a major precipitating factor to abuse is family stress. The burden of care gives rise to despair, anger, or resentment. Abusers often have alcohol or drug problems and a significant portion of abuse occurs when the abuser is drunk or on drugs.\(^{56}\) Elder abuse may also come in the form of retaliation and revenge. Many of those who abuse elders were themselves abused as children.\(^{57}\) Only about one in 400 children reared nonviolently later attacks his parents, while one in two abused children will.\(^{58}\) Domestic elder abuse can range from simple name-calling to the type of severe neglect experienced by Mr. Heitzman in the deplorable home of his son, (discussed supra at Introduction).\(^{59}\)

Institutional abuse, such as in a nursing home, is correlated with too few staff, low wages, inadequate training, and the hiring of individuals without conducting criminal background checks.\(^{60}\) Abuse may be intended as a means of gaining control of the insti-
tution’s residents. The most frequent type of abuse committed by nursing home staff is physical restraint beyond that which is legitimately needed to control the patient. Staff members at nursing homes are typically ill-trained, grossly overworked, and very poorly paid. Nurse’s aide positions, which entail specific skills and a certain amount of patience and compassion, are also poorly paid; the average wage for this position is less than the average wage for unskilled janitors. These facilities also see high nurse’s aide turnover, which may further cultivate detachment between nurse’s aides and patients.

3. The Dysfunctional Relationship of Abuse Reporting and the Coroner System

Reports of instances of elder abuse are important beyond the need for our society to understand and approach the social problem as it exists. Reporting is particularly crucial in distinguishing between self-inflicted injury and abuse, and natural and suspicious (or abuse precipitated) death. Under the coroner system, a cause of death determination is made based on specific observations coupled with the deceased’s medical history. If instances of abuse have not been documented, this may lead a coroner to determine that a victim merely died of “old age” or as a direct result of a chronic illness. Thus, while the coroner system is still in place, reporting by family members, health care and long-term care facility staff, and social workers is absolutely necessary to provide a holistic view of the life (and death) of the elderly individual.

Significant problems with reporting, detection, and investigation exist in the domestic setting. The abused are often reluctant to report the abuse because the abuser is their caregiver. They may fear retaliation or the transition to another caregiver (often a nursing home), or they may think that reporting will not stop the abuse. Other elderly persons may diminish the severity of the abuse because the abuser is a family member. It is therefore crucial that avenues of reporting be made more available and effective to encourage those who are abused to come forward. Forensic nurses (discussed infra at Section II, B) should be employed to determine the level and extent of abuse, and should

61 See Frolik, supra n. 9, at 618.
62 Phan, supra n. 17, citing H.R. Rep. No. 102-810, at 7 (describing staffing problems including substance abuse and language barriers where the residents spoke one language and the staff another; relating that only 20 percent of nursing homes have a registered nurse on duty at all hours and that one registered nurse may be in charge of up to 100 patients; and providing examples of tasks that aides are not trained to perform such as medication preparation, catheter application, and other tasks).
63 Id. citing H.R. Rep. No. 102-810, at 6 (comparing an average nurse’s aide’s wage of $251 week to an average janitor’s wage of $280 per week in 2002).
64 Id. citing H.R. Rep. No. 102-810, at 7 (indicating that turnover rates average 110 percent each year for nurse’s aides).
65 National Council on Elder Abuse: Administration on Aging, Trends in Elder Abuse in the Domestic Setting, supra n. 8.
66 Id.
work with a team of social workers and other health care professionals to exact a plan to remove the senior from the abusive environment.

The same problems that are associated with the detection of elder abuse in the domestic setting also present themselves in the institutional setting. Here, however, the elderly are at the mercy of their caregivers, with whom they have no familial attachment. Especially in advanced age, reports of abuse by residents may be dismissed by staff members as delusional and stemming from the patient’s dementia or diminished capacity. Long-term care facilities should implement open-door policies of anonymous abuse reporting and provide training to staff members on signs of abuse. This measure would help ensure that staff members do not fear retaliation by the facility or other staff members if they make reports of suspected abuse, and it would educate the staff on what to look for. Local ombudsmen should also work in conjunction with forensic nurses to better detect elder abuse in the long-term care facility setting.87 These policies would address the broad problem of detecting elder abuse and would also have the specific effect of making any abuse allegation a part of the resident’s care record. In instances of suspicious death, this prior information is crucial under a lay coroner system since, as noted above, coroners rely heavily on the medical history of the deceased in making cause of death determinations.

II. A REPORT CARD FOR DEATH INVESTIGATORS

The National Academy of Sciences (NAS) has a long history of reviewing death investigation standards and procedures.68 The NAS first addressed the state of death investigation in 1928 in a report entitled The Coroner and the Medical Examiner in which the NAS gave a blistering critique of the coroner system as “anachronistic” and called for its replacement with a medical examiner’s office.69 In 1954, the National Conference of Commissioners on Uniform State Laws issued the Model Post-Mortem Examinations Act (Model Act), which prompted a number of states to implement the proposed outline.70

67 The State Long-Term Care Ombudsman program was established in 1978 and is now codified as 42 U.S.C. § 3058g (2002). The program was established under 42 U.S.C. § 3001, popularly known as the Older Americans Act of 1965. Title 42 U.S.C. § 3027 (2002) now requires states to enact Ombudsman programs in order to maintain eligibility for federal grants under the Older Americans Act. The Ombudsman functions in a regulatory capacity by visiting nursing homes for inspection of facility conditions and to investigate allegations of abuse or neglect.


69 Id. In its first four recommendations, the 1928 committee suggested the following: “1) That the office of coroner be abolished. It is an anachronistic institution which has conclusively demonstrated its incapacity to perform the functions customarily required of it; 2) That the medical duties of the coroner’s office be vested in the office of medical examiner; 3) That the office of medical examiner be headed by a scientifically trained and competent pathologist, selected and retained under civil service, and compensated by a salary which will attract men of genuine scientific training and ability; and 4) That the office of medical examiner be provided with the services of a staff competent in toxicology, bacteriology and other sciences necessary in the scientific investigation of causes of death, and with adequate scientific equipment.”

70 Id. In its prefatory note, the Model Act stated the following: “The purpose of the Post-Mortem Examinations Act is to provide a means whereby greater competence can be assured in determining causes of death where criminal liability may be involved. Experience has shown that many elected coroners are not well trained in the field of pathology, and the Act should set up in each state an Office headed by a trained
In recent decades, however, progress has slowed in updating death investigation organizations.\textsuperscript{71} Between 1980 and 1999, only three states converted from coroner to medical examiner systems, and since then 11 states with coroners have remained unchanged.\textsuperscript{72} Furthermore, several of the coroner states have constitutional provisions that require that coroners be elected, making amendment (or removal) something that requires political backing.\textsuperscript{73} The provisions that apply to coroners do not, however, prohibit the addition of appointed medical examiners.\textsuperscript{74} The state of Kentucky has constitutional provisions for coroners, but also implements medical examiners to serve at the state and district levels.\textsuperscript{75}

Nearly a century since the original death investigation report done by the NAS, the United States still operates to a large degree under a coroner system. According to the NAS report, as of 2004, 16 states had a centralized statewide medical examiner system, 14 had a county coroner system, seven had a county medical examiner system, and 13 had a mixed county Medical Examiner/Coroner system.\textsuperscript{76} Eight states had hybrid arrangements, with coroners and a state medical examiner office that performed medicolegal duties.\textsuperscript{77}

Of all medicolegal death investigation offices in the country, 80 percent are run by county coroners.\textsuperscript{78} In 2004, roughly 2,350 medical examiner and coroner offices provided death investigation services across the United States.\textsuperscript{79} While the offices’ jurisdiction varies depending on state law, most generally extend to deaths that are sudden and unexpected, deaths that have no attending physician, and all suspicious and violent deaths.\textsuperscript{80} Other situations that may fall under a medicolegal death investigation office’s jurisdiction include deaths resulting from injury, such as by violence or poisoning; by circumstance, such as related to fire or under anesthesia; by decedent status, such as prisoners or mental health patients; or by timeframe, such as deaths that occur within 24 hours of admission to a hospital.\textsuperscript{81}

Even when an office assumes jurisdiction to investigate a case, no standardization between (or within) states exists as to what services are to be performed and by whom.\textsuperscript{82} A state’s individual statutes determine whether a medical examiner or coroner delivers death investigation services.\textsuperscript{83} These services could include death scene investigations, medical investigations, reviews of medical records, medicolegal autopsies, determination

\textsuperscript{71} Id. at 9-2.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 9-4.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 9-3.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 9-5.
\textsuperscript{83} Id.
of the cause and manner of death, and completion of the certificate of death.\textsuperscript{84} Furthermore, as discussed in Section II, A, the skill and education level of medical examiners when compared to coroners varies greatly. As Sections II, B and C will describe, difficulties arise when coroners are called to sites that involve an elderly person and evidence of abuse or suspicious death.

\textbf{A. Coroner versus Medical Examiner — Resurrecting the Scientific Method}

Recently in Indiana, a 17-year-old high school senior successfully completed the coroner’s examination and was appointed deputy coroner.\textsuperscript{85} In another state, justices of the peace are not medical death investigators but are nonetheless charged with determining cause and manner of death.\textsuperscript{86} As elected officials, coroners fulfill requirements for residency, minimum age, and any other qualifications required by statute, but there are no requirements that coroners be physicians, have medical training, or perform autopsies.\textsuperscript{87} Despite this lack of medical qualification, some are solely responsible for decisions regarding the cause and manner of death.\textsuperscript{88}

In contrast, medical examiners are appointed, are almost always physicians, and are often pathologists or forensic pathologists.\textsuperscript{89} When assessing the history and physical findings and deciding on the appropriate laboratory studies needed to determine the cause and manner of death, medical examiners bring scientific expertise to the investigation that is simply not possible under the lay coroner construct. Under the “frayed patchwork” of the medicolegal death investigation system that loosely covers our current landscape, only approximately half of the population of this country is served by systems with forensic pathologists.\textsuperscript{90} The unfortunate result of this patchwork system is that the quality of the medicolegal death investigation is very much predicated on where that death occurs.\textsuperscript{91}

The medicolegal death investigation systems are the interface between law and medicine, and require high levels of competence, professionalism and ethics.\textsuperscript{92} These systems most obviously impact the criminal and civil justice systems.\textsuperscript{93} Beyond these direct im-

\textsuperscript{84} \textit{Id. But see} the National Association of Medical Examiners, \textit{Preliminary Report on America’s Medicolegal Offices} (2004), 23, http://www.ncjrs.gov/pdffiles1/nij/grants/213421.pdf (accessed March 10, 2011) (“In 1998, the National Institute of Justice (NIJ) sponsored the development of \textit{National Guidelines for Death Scene Investigation}, which contains 29 identified investigative tasks to be performed at every death scene, ‘Every scene — Every time.’ These guidelines are voluntary but have been incorporated into the standard office practices of a number of law enforcement and [Medical Examiner/Coroner] offices”). It is unclear how many counties and/or states have adopted these “voluntary” investigative tasks into their standard practices.

\textsuperscript{85} NAS Report, \textit{supra} n. 13, at 9-7.

\textsuperscript{86} \textit{Id.} at 9-6.

\textsuperscript{87} \textit{Id.} at 9-9.

\textsuperscript{88} \textit{Id.} at 9-6.

\textsuperscript{89} \textit{Id.} at 9-9.

\textsuperscript{90} The National Association of Medical Examiners, \textit{supra} n. 84, at iv.

\textsuperscript{91} \textit{Id.} (“The ‘system’ as it exists today is neither uniform nor complete; it is dominated by county offices (stemming from the old English coroner system that often cannot support full death investigation systems”).

\textsuperscript{92} \textit{Id.}

\textsuperscript{93} \textit{Id.}
Applications are the broader issues concerning families of the deceased, the community, and issues of public health.94 The NAS set forth some recommendations for improving death investigation by coroners.95 These recommendations include replacing coroner systems with medical examiner systems, increasing the statutory requirements for performance of coroners, or infusing funding to improve the capabilities of coroners.96 Lay coroners rely heavily on the external condition of the deceased and any available medical records when determining cause and manner of death. At best, this approach is divorced from the scientific method (which requires a standardization of methods of investigation and the use of reliable modes of testing and inquiry) and relies too heavily on instinct, practical experience, or the completeness of medical records. At worst, it is completely ad hoc and involves a large potential for bias if the county coroner knows the deceased or their family. As a result, the coroner system effectively prevents the detection of elder abuse when coroners are called to death scenes where the deceased is elderly, has a history of health problems, and when no gross external indication of abuse is evident.97 It is particularly interesting in relation to the issue of elder abuse when state provisions dictate that autopsies shall be performed when death occurs in a manner that suggests criminal activity, or when the death is suspicious or unusual.98 What appears “suspicious or unusual” to a lay coroner certainly cannot be expected to be on par with a medical examiner with formal medical training. Although Georgia state legislators abolished the coroner system in 2010 (signaling that the system is under some level of scrutiny), other states still use the “anachronistic” system.99 Without a trained medical eye, the coroner could mistakenly rule a death as natural, when in fact there was abuse that precipitated the death. Another provision that is problematic (and one that Georgia medical examiners follow) is that many death investigation offices do not investigate deaths that occur while under the care of a physician immediately preceding death.100 This broad definition often encompasses hospice care facilities and nursing homes, where causes of death that may be perpetuated by elder abuse are not investigated unless a formal request is made.101

B. Self-Inflicted Injury versus Abuse — Looking Beyond Skin-Deep

In March 1999, Elizabeth Reed, a resident of Mid-South Christian Nursing Home in Shelby County, Tenn., was sexually assaulted by a charge nurse.102 She was 70 years old and had been crippled since birth due to cerebral palsy and was not able to move on her own.103 Ms. Reed reported that on the night of the assault, the defendant entered her

94 Id.
96 Id.
97 See e.g. Sharp, supra n. 12.
101 Id. See also Interview with Pat King, infra n. 113.
103 Id.
bedroom and announced that it was time for bed. He then lifted the victim, placed her in her bed, stripped her of her clothes, climbed on top of her, and digitally penetrated her vagina, causing her to bleed profusely.

At trial the defendant sought to introduce evidence that the victim had caused the injuries herself by “masturbating with the bristol end of a hairbrush.” On appeal, the defendant also stated that the victim often told “wild tales” and that it made it appear that the victim could not walk when she testified from her wheelchair. Petitioner said that the victim could walk, and she “[put] on a good show” at trial.

A forensic sexual assault nurse was called to examine the victim one day after the assault and later testified that she observed an acute, recent hematoma around the vaginal area, bruising on the upper inner thighs, and an acute laceration caused by a sharp object in the inner labia and vulva. The nurse testified that the victim’s injuries were definitely caused by trauma, and were consistent with sexual penetration. She also noted that although the victim was physically limited, she was alert, oriented, cooperative, and able to describe what had happened to her. A doctor who examined the victim further noted that her injuries were not self-inflicted (as the laceration would have been too painful for the victim to inflict upon herself) and could not have been caused by a fall.

Other defenses citing self-inflicted wounds when there are allegations of abuse are not always so far-fetched and so obviously false. According to experts, some tell-tale signs of abuse exist that even a lay person could detect, like extreme weight loss, but most are not so apparent. Bedsores, for instance, could be a sign of neglect or they could be a normal result of lying prone for long periods of time. In making a determination of whether elder abuse has occurred, it is important to consider the totality of the circumstances. When investigating allegations of nursing home abuse, experts advise that the forensic specialist, law enforcement officer, or ombudsman should look for trends, such as fractures of unknown origin, reports of patients falling, and administration of excessive amounts of medication.

The most common type of defense that injuries are self-inflicted involve injuries that could have been sustained by falling down or falling out of bed. In a Florida nurs-

104 Id.
105 Id.
106 Id. at 2.
108 Id.
109 Id. at 2.
110 Id.
111 Id.
112 Id. at 3.
113 Interview with Pat King, Forensic Specialist and Aging Services Coordinator, Georgia Department of Human Resources, Division of Aging Services, on April 5, 2010 (Notes available from author on request).
114 Id.
115 Id.
116 Id.
117 Id.
ing home, a 76-year-old retiree sustained fatal head injuries reportedly induced by a staff member.\textsuperscript{118} The medical examiner discovered that the resident also had a broken arm and weighed a mere 98 pounds.\textsuperscript{119} But for the medical examiner, it is unclear whether the resident’s current (and previous) injury would have been discovered to be the result of elder abuse. Older people lose ambulatory ability and balance, and often are susceptible to falls. Had the resident not been so emaciated and had the medical examiner not conducted an autopsy, his injuries and resulting death could have been ruled accidental.

C. Natural versus Suspicious Death — Calling It

In 2007, Mrs. Sharp, a 92-year-old resident in a Louisiana nursing facility, was dropped by a nurse’s aide and as a result suffered injury to her left knee.\textsuperscript{120} Her daughter, Peggy, witnessed the fall and requested that her mother see her physician as soon as possible.\textsuperscript{121} Mrs. Sharp did not get treatment for her leg until the next day, however, when she was admitted to a hospital.\textsuperscript{122} Mrs. Sharp continued to complain of the pain in her knee and Peggy repeatedly asked for an x-ray on both days.\textsuperscript{123} The x-ray was never given and Mrs. Sharp died of a heart attack that night.\textsuperscript{124} After her mother’s death, doctors still refused to take an x-ray of her mother’s leg.\textsuperscript{125}

In refusing her request, the attending physician informed Peggy that her mother had died of a heart attack, not a leg injury.\textsuperscript{126} Mrs. Sharp’s body was moved to a funeral home and Peggy called the coroner’s office, requesting that someone examine her mother’s body and perform either an x-ray or an autopsy.\textsuperscript{127} The coroner’s office sent an investigator who confirmed that the left knee was bruised and swollen, but refused to take an x-ray or perform an autopsy because the doctor’s report said that she had died of a heart attack.\textsuperscript{128} While Peggy believed that the pain from the knee injury had precipitated the heart attack, neither an x-ray nor autopsy was ever performed on her mother because her death was attended to by a doctor who ruled the cause of death as a heart attack.\textsuperscript{129}

In Washington, D.C., an elderly female nursing home resident suffered from severe burns after a nurse’s aide placed her in scalding bath water.\textsuperscript{130} Afterward, the nurse deliberately attempted to conceal the fatal wounds by wrapping her in sheets.\textsuperscript{131} The resident died several days later.\textsuperscript{132}

These cases are illustrative. In some states, any death that occurs at a long-term

\textsuperscript{118} Phan, \textit{supra} n. 60, at 305.
\textsuperscript{119} Id.
\textsuperscript{120} Sharp, \textit{supra} n. 12, at 167.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 168.
\textsuperscript{130} Phan, \textit{supra} n. 60, at 298.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
care facility is ruled natural and is not investigated unless an investigation is requested by a spouse, family member, or other interested party.\textsuperscript{133} When the patient had a history of illness, plaintiffs in elder abuse suits still have the opportunity to prove a causal relationship between the conduct and the injury, so long as the pre-existing condition is not the \textit{sole} cause of the injury.\textsuperscript{134} Arguably, had an autopsy and x-ray been performed, they could have revealed that Ms. Sharp’s heart attack was precipitated by her knee injury.\textsuperscript{135} When the investigator responsible for calling the manner of death is a lay coroner, the likelihood that precipitating injuries will be detected becomes nil.\textsuperscript{136} In the case of the elderly female nursing home resident in Washington, D.C., discussed above, it is unclear whether her death could have been concealed as natural had the family not insisted on an investigation.\textsuperscript{137}

In 2004, death investigation offices received roughly one million reports of deaths.\textsuperscript{138} This number constituted 30 percent to 40 percent of all United States deaths, and of these, about one half (500,000, or one in six deaths) were accepted by the offices for further investigation and certification.\textsuperscript{139} The NAS report estimates that about 40 percent to 50 percent of deaths referred to the investigators will, after investigation and examination, be attributed to natural causes, 27 percent to 40 percent to accident, 12 percent to 15 percent to suicide, seven percent to 10 percent to homicide, and one percent as undetermined.\textsuperscript{140} These numbers leave a tremendous gap into which deaths resulting from elder abuse may fall. Without an overhaul of the system, the ability of death investigators to effectively distinguish between natural and suspicious deaths will remain crippled.

\textbf{III. Conclusion and Recommendations}

Among the provisions in the Affordable Care Act (ACA) is the Elder Justice Act (EJA).\textsuperscript{141} The EJA allotts funding for the Secretary of Health and Human Services, in consultation with the Departments of Justice and Labor, to “award grants and carry out ac-

\textsuperscript{133} See Georgia Bureau of Investigation, \textit{supra} n. 100; see also Interview with Pat King, \textit{supra} n. 113 (discussion of attended deaths as not requiring autopsies).

\textsuperscript{134} \textit{Valdez v. Lyman-Roberts Hosp., Inc.}, 638 S.W.2d 111, 114-15 (Tex. App. - Corpus Christi 1982, writ ref’d n.r.e.).

\textsuperscript{135} \textit{Sharp, supra} n. 12, at 166.

\textsuperscript{136} NAS Report, \textit{supra} n. 13, at vi (reporting that “of the 465 facilities performing forensic autopsies in this country, only 40 are accredited by NAME (National Association of Medical Examiners), the applicable accrediting body: The majority of offices have not attempted to become accredited or cannot meet accreditation standards because they have inadequate staff, facilities, equipment, funding or a combination of these factors. Many offices do not have such basic equipment as an x-ray machine and at least one-third do not meet the federal government’s minimum safety guidelines. Some do not have available necessary laboratory services such as histology, microbiology, clinical testing, and genetic/metabolic services that are essential to competent and timely death investigation services.”).

\textsuperscript{137} Phan, \textit{supra} n. 60, at 298.

\textsuperscript{138} National Research Council of National Academies, \textit{supra} n. 13, at 1-11.

\textsuperscript{139} Id.

\textsuperscript{140} Id.

tivities that provide greater protection to those individuals in facilities that provide long-term [care] services and supports and provide greater incentives for individuals to train and seek employment at such facilities.\textsuperscript{142} The EJA also mandates immediate reporting of suspected elder abuse to law enforcement officials.\textsuperscript{143} State and local Adult Protective Services (APS) agencies will likely be included in the funding plan, as these agencies play a vital role in the investigation of reports of abuse, neglect, and financial exploitation of elderly and disabled adults, and insure the safety of those proven to have been victimized.\textsuperscript{144} Based on the aforementioned discussion regarding hurdles to the adequate detection, prosecution, and follow-up with reporters of elder abuse, resources should be directed at educating individuals on signs and types of elder abuse, making the reporting process more open and accessible, and creating a universal medical examiner system in all states that is committed to a stringent determination of natural versus suspicious death in cases of elderly individuals.

\textbf{A. Respecting Our Elders: Medicolegal Tools for the Detection of Elder Abuse} 

While it is as common as child abuse, elder abuse is significantly less likely to be reported.\textsuperscript{145} A multitude of potential reasons exist for this lower rate of reporting. The victim may be “embarrassed of the abuse, fearful of future mistreatment, unaware of legal remedies and even protective of the abuser, who is often a family member or a care giver.”\textsuperscript{146} Often the victim feels powerless to stop the abuse or believes that abusive treatment is part of the aging process.\textsuperscript{147}

Physical abuse and neglect are pervasive problems among the elderly, and many elders suffer at the hands of the people upon whom they depend for care.\textsuperscript{148} Elders are often treated as second-class citizens and may have no advocate other than the government to protect their rights.\textsuperscript{149} As a society, it is our duty to protect the rights of the elderly so they may live in dignity and without abuse. The first step to providing this protection is to educate those who work with seniors on the signs and symptoms of abuse. Currently, training for mandated reporters, multi-disciplinary collaboration, and focused attention on the issue of responding to elder abuse reports are lacking.\textsuperscript{150} Moreover, the current system does not promote collaboration between health care providers and law enforcement or other regulatory authorities.\textsuperscript{151}

Furthermore, elder abuse is often difficult to recognize even among professionals.

\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{149} Id. at 410.
\textsuperscript{150} Luu & Liang, \textit{supra} n. 21, at 185.
\textsuperscript{151} Id.
directly responsible for preventing it and even when the conduct is clearly abuse under state definitions.\textsuperscript{152} Health care professionals providing direct patient care can be equally unaware of what constitutes abuse.\textsuperscript{153} This is largely due to the fact that many health care providers receive inadequate training on detection and recognition of the forms and types of elder abuse.\textsuperscript{154} According to a National Elder Abuse Incidence Study, physicians tend to be the least frequent reporters of elder abuse, with only 8.4 percent of all reports to APS programs originating from physicians, nurses, or clinics.\textsuperscript{155}

The current system for reporting is badly fragmented, and as a result those that detect and report abuse often do not receive feedback.\textsuperscript{156} This fragmentation does not promote collaboration between health care providers and law enforcement or other regulatory authorities.\textsuperscript{157} A negative reinforcement structure in the current reporting system also exists, which seeks to penalize anyone with even an intermittent care or custodial relationship with the victim for the failure to report abuse.\textsuperscript{158} To improve the percentage of cases that are reported, the law has expanded the categories of mandated reporters.\textsuperscript{159} This expansion assumes that the number of reports will increase in light of criminal penalties for not reporting.\textsuperscript{160} Threats of sanctions, however, have actually reduced the number of reports and exposure of abuse.\textsuperscript{161}

The reporting system for elder abuse is clearly in need of procedural improvements, and this type of approach is in line with the purpose of the new funding allotted in the ACA.\textsuperscript{162} By instituting training programs for professionals charged with care for the elderly, much of the confusion about what constitutes elder abuse would be eliminated. A more open, confidential, and less punitive system for reporting could alleviate the current fear of retaliation experienced by the elderly and their physicians and caregivers. Receiving and resolving complaints by working with residents, their families, regulatory authorities, and institutions could also encourage reporting. Employer retaliation against long-term care facility staff members that make reports should not be tolerated.\textsuperscript{163} Here,

\begin{footnotesize
\begin{itemize}
\item 152 Id. at 188 (citing that a staff member in charge of an abuse registry at a state board of nursing felt that threats, yelling, and cursing by a nursing home employee to a resident did not constitute abuse; another staff person from a similar agency in another state did not believe that a provider’s actions that resulted in “minor bruises” to a frail resident constituted abuse).
\item 153 Id.
\item 154 Id. (stating that “even providers who know they are mandated reporters are unaware of the legal definitions of abuse, including the responsibility to report any reasonably suspected cases of abuse”).
\item 155 Id. at 187.
\item 156 Id. at 188.
\item 157 Id. at 187 (stating that “once a report is made, the provider, who frequently has valuable information to contribute, is excluded from the investigation or prosecution process and left to wonder about the outcome”).
\item 158 Id at 185.
\item 159 Id. at 187.
\item 160 Id.
\item 161 Id.
\item 162 See Gross, supra n. 144.
\item 163 Fischer v. Lexington Healthcare, Inc., 722 N.E.2d 1115, 1116 (Ill. S.C., 1999). (Former employees of nursing home sued nursing home operator and its director, claiming that they were retaliated against in violation of the Nursing Home Care Act for cooperating with the Department of Public Health’s investigation into the death of a nursing home resident.)
\end{itemize}
\end{footnotesize}
again, providing public education on long-term care and alternatives is crucial. Families should be counseled and provided with information and referrals to services that assist in the process of selecting institutional long-term care or alternatives. The upcoming changes that APS offices will undergo with funding from the ACA should incorporate this type of transition in the approach to elder abuse reporting.

B. Death of the Coroner System

If leading scientists in 1928 deemed the coroner system “anachronistic,” it is difficult to justify its continued operation today. The apparent shortfall of the system to engage medical science in the performance of death investigations is simply unacceptable. Federal incentives are imperative in catalyzing the conversion of state coroner systems to medical examiner systems. The movement has all but halted since the Model Post Mortem Examination Act of 1954. Furthermore, the ACA should be updated to include the elements of a progressive and responsive death investigation law, including standards for administration, staffing, and training.

The NAS Report set forth several recommendations for improvement of medico-legal death investigation. This list includes federal funding to replace and eventually eliminate the coroner system and funding to promote research, education, and training in forensic pathology. The Report also called for the establishment of a Scientific Working Group (SWG) for forensic pathology and medicolegal death investigation. The role of the SWG would be to develop and promote “standards for best practices, administration, staffing, education, training, and continuing education for competent death scene investigation and postmortem examinations.”

The current system is unworkable and grossly inept in regards to the determination of elder abuse and suspicious death in both domestic and institutional settings. A dearth of medical training, methodology, and consistency of approach in investigative methods exists among lay coroners. Returning to the case of Mr. Heitzman (discussed supra at Section I, Introduction), the cause of death as determined by a forensic pathologist was due to septic shock from the large ulcers that had developed on his body. However, as indicated earlier, bedsores are not conclusive of neglect per se. Given Mr. Heitzman’s medical history, it is difficult to imagine that a coroner could have reached the same conclusion. Had it not been for the horrific living conditions and Mr. Heitzman’s emaciated state, a lay coroner could have made the determination that the manner of death was a natural result of existing ailments.

Federal funds from the ACA should therefore be directed at excising the coroner system from our national medical system. If funding is applied in the manner in which

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165 Id.
166 Id. at 9-20.
167 Id.
168 Id. at 9-21.
169 Id.
170 Heitzman, 886 P.2d at 1232.
171 Interview with Pat King, supra n. 113.
172 Heitzman, 886 P.2d at 1231.
the NAS Report recommends, the natural side-effect would be that more instances of elder abuse would be detected by trained professionals and oversight by lay coroners could be functionally eviscerated. Only when proper medical procedures are in place to detect abuse and neglect in cases of prior injury or suspicious death will we be able to adequately address the epidemic of elder abuse.
Elders in the Criminal Justice System

Introduction by Mary E. WanderPolo, CELA, CAP

My elderly father-in-law told me several years ago (after he had committed what I believed to be an environmental crime in his home town) that he would be better off going to jail, where he would get, for free, three meals a day, a room and bed, and health care. Those who read Stacy L. Gavin’s article on the effect of elderly prisoners on the cost of prisons in this country may, perhaps, believe that he was on to something. As Dawn Miller explores in her article on the issue of age as a factor in sentencing criminals it is, however, possible that my father-in-law, like Anthony Marshall, would not, at his age, have been given a sentence long enough to allow him to enjoy those “free” benefits.1

These articles, each a winner in the 2009 NAELA Student Writing Competition, examine the effect of an aging population on our criminal justice system. Both begin with the fact that the U.S. prison population continues to grow, and the percentage of prisoners facing age-related health issues is ever increasing. Authors Gavin and Miller look at different aspects of the problems created by these aging criminals, with Gavin focusing on the problem of caring for elderly prisoners already in the system and Miller focusing on the impact a criminal’s age should have on the sentence imposed for the crime.

In “What Happens to the Correctional System When a Right to Health Care Meets Sentencing Reform,” Stacy L. Gavin analyzes problems created by an ever-growing aging prison population. In a country where only prisoners have a constitutional right to health care, the aging prison population strains federal and state budgets. Ms. Gavin’s article explores the efforts that are presently being made and looks at two proposed solutions: early release and segregated alternative facilities. Either solution poses problems for both the prisoner and the institution. Early release, which is supported by evidence that less than two percent of elderly inmates will recidivate,2 poses problems for the released elderly criminal, many of whom have no savings or job prospects upon release and may have lost contact with their support system of family and friends.3 On the other hand, segregated alternative facilities are expensive. In addition, Ms. Gavin highlights the need for staff training or the hiring of health care staff within prisons to specialize in geriatric care. This emerging problem in our penal system reflects the burden our growing elderly population places on society at large.

In “Sentencing Elderly Criminal Offenders,” Dawn Miller considers whether age should be a factor in deciding the length of criminal sentences. Should, for example, Bernie Madoff, age 71 at sentencing, have received a longer or shorter term for his transgres-

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1 At the age of 71, Bernie Madoff received a Guidelines-level sentence of 150 years for his Ponzi scheme, while at the age of 85, Anthony Marshall was sentenced to the statutory minimum term of one to three years for first-degree grand larceny. Sentencing Elderly Criminal Offenders, Dawn Miller, NAELA Journal (2011).
3 Id at 497.
sions just because of his age? To answer that, one has to consider whether equal treatment or deterrence justifies the likely higher cost of maintaining older prisoners. Implicit in both articles is the need to balance distinct goals in sentencing, the desire for uniformity in sentencing of like criminals (regardless of age), and the potentially disparate effects on prisoners due to their age. Of particular note after reading Ms. Gavin’s article on elderly prisoners and the strain on the prison health care system, Ms. Miller reports that opponents of lenient sentencing for elderly criminals cite to the decision of the district court in *United States v. Angiulo*, which viewed the assumption that elderly offenders suffer disproportionately in prison to be “an untested conclusion, unsupported by any psychological or sociological analysis.”

Miller concludes that over-emphasis on age as a mitigating factor might under-deter individual elderly offenders and the elderly population at large.

Both authors review current thinking concerning these challenges to our criminal justice system and analyze proposals for reforming our overworked prison system. The articles serve as a reminder of the American penchant for incarceration. Although not specifically addressed in these articles, it becomes clear to the reader that the criminal justice systems generally are microcosms of societies as a whole, but cross-cultural differences may exaggerate social differences. Gavin and Miller point out the need for solutions to these problems in our criminal justice system. Readers may wonder why we don’t question more than we do the social legitimacy of our current incarceration practices (do they, for example, increase recidivism or marginalize significant groups?). As a society, we need to consider how age should shape social decisions, decide when to be tougher or more lenient to elderly offenders, and recognize the increasing cost of health care in an otherwise controlled environment, the prison.

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5 With more than 2.3 million people behind bars, the United States leads the world in both the number and percentage of residents it incarcerates, leaving far-more-populous China a distant second, according to a study by the nonpartisan Pew Center on the States. Pew Center on the States, *One in 31: The Long Reach of American Corrections* (Washington, D.C.: The Pew Charitable Trusts, March 2009).
I. Introduction

Several recent high-profile cases have highlighted a comparatively small but growing subset of criminal offenders. In just the past two years, both Anthony Marshall and Bernard Madoff have grabbed headlines as each faced prosecution for distinct financial crimes. Marshall was alleged to have illegally schemed to acquire tens of millions of dollars from his mother, philanthropist Brooke Astor, as she battled Alzheimer’s disease. Madoff pled guilty to operating a massive Ponzi scheme, resulting in losses totaling billions of dollars. Marshall at age 85 was significantly older than Madoff at...
age 71, but at the time of sentencing both were older men who faced the prospect of living out the remainder of their lives in prison. However, although their crimes were starkly different, this may not entirely explain away apparent divergences in their sentencing. Madoff received a Guidelines-level sentence of 150 years, while Marshall was sentenced to the statutory minimum term of one to three years for first-degree grand larceny, in addition to one-year concurrent sentences for each of the other 13 counts of conviction. One possibility, not to be overlooked, is the widely varying weight given to age by sentencing courts.

Offenses by the elderly certainly are not limited to efforts to defraud family members and clients out of large amounts of money, as was the case with Marshall and Madoff. Rather, Marshall and Madoff are representative of the larger incidence of crimes and imprisonment within the aging population, with crimes spanning the gamut reflected within the prison population generally. Whether or not dispositive on the ultimate sentence imposed, age is undeniably a factor in these cases and has the potential to wield significant influence in the sentencing process. Though their crimes may be identical, older offenders do not look like and, in many cases, are in fact very different — physically, psychologically, and situationally — from their younger counterparts. Whether and how the judicial system accounts for the age factor is the central question this article seeks to explore.

This article seeks to determine if and under what circumstances elderly offenders deserve to receive abbreviated or otherwise lighter sentences. Section II, Empirical Data on Elderly Offenders, includes a brief overview of the extent to which offenses are committed among the elderly population. This section will explore the rate at which offenses occur, what types of offenses are most common, and potential explanations for the commission of crime during old age, particularly among first-time elderly offenders. The latter topic is crucial, as knowing why older individuals commit crimes informs any justification for treating an elderly offender disparately from or uniformly to other offenders in the system. Next, Section III, Theories Supporting the Sentencing of Criminal Offenders Generally, will briefly introduce some of the core theories supporting the sentencing of criminal offenders, including deterrence, retributive, and rehabilitative rationales. These theories are particularly relevant if one or more of them are undermined by the offender being of advanced age. Section IV, Arguments for Leniency in the Sentencing of Elderly Offenders, and Section V, Arguments for Non-Differential Treatment of Elderly Offenders, will offer in-depth analysis of the various arguments advanced for and against sentencing elderly offenders with leniency. Section VI, The Constitutional Case for and Against Leniency, separately presents the question of whether prison sentences of a certain length for elderly offenders violate the “cruel and unusual punishment” clause of the United States Constitution. The salience of all these arguments can then be weighed against actual sentencing outcomes involving elderly offenders. In order to understand how state and federal courts have approached the issue of age in sentencing, Section VII, Recent Outcomes and Trends in Federal and State Sentencing of Elderly Offenders, will evaluate court application of the now optional Federal Sentencing Guidelines in regards to age as a mitigating factor. In addition, this section will consider whether and how other courts have taken age into account apart from the Guidelines. Finally, in Section VIII, Possible Solutions and Recommendations, this article will examine a number of recom-
Sentencing Elderly Criminal Offenders

mendations and potential alternative approaches to dealing with the complex problem of advanced age and sentencing.

Ultimately, this article argues that any approach should aim to fully consider the unique interests and characteristics of the aging population without forgetting those of the victims and the criminal justice system, or compromising the theory-based justifications for the sentencing of criminals of any age. As will be shown, this objective is best met by adopting a relatively “age-neutral” approach that considers all factors, whether related to age or not, that are factually or legally relevant to an offender’s sentence. To do otherwise would be to make sentencing decisions on the basis of unfounded assumptions or generalizations about age that are not appropriate given the goals of equity and uniformity in criminal sentencing.

II. EMPIRICAL DATA ON ELDERLY OFFENDERS

Although there does not appear to be any immediate crisis of mass offending by the elderly population, it is undeniable that the past few decades have seen significant representation of the elderly in the prison population, including inmates serving long-term sentences, recidivist offenders, and first-time offenders. This growth is expected to continue, with one estimate that elderly inmates may soon constitute up to 33 percent of the entire prison population. As of the year 2000, it was estimated that 3.3 percent of all state and federal prisoners were age 55 or older. Recent data from the Federal Bureau of Investigation’s (FBI) “Crime in the United States 2007” collection of offender information suggests that arrests of individuals age 65 or older accounted for 64,736, or 0.6 percent of arrests in 2007. Individuals age 50 or older accounted for 775,870, or 7.3 percent of arrests. Of all these arrests, 29,299, or approximately 6.5 percent of total arrests and 3.8 percent of arrests at the age of 50 or above, involved violent crime as classified by the FBI (i.e., murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault). Of course, it cannot be assumed that all of these arrests translated to convictions and prison sentences, but this information represents one of the more current indicators of the level of offending by aging individuals.

A. Profile of the Elderly Offender

Exactly who qualifies as an “elderly” offender is somewhat uncertain. Some commen-

1 See Howard Eglit, Elders on Trial: Age and Ageism in the American Legal System 60 (University Press of Florida 2004).
5 Id.
6 Id.
tators have observed that the age considered “older” within the prison population could be as much as 15 years below what would normally be considered “older,” because, based on the burdens and challenges of prison life, “those incarcerated advance in age faster than the general population.”

One report by the Coalition for Federal Sentencing Reform indicated that the age at which a state deemed a person to be “elderly” for sentencing purposes ranged from 50 to 65 years. This article will consider the issues and draw conclusions with a broad understanding of who is aging or elderly, although it is clear that the older the age, the more potential age-related questions will arise in sentencing the individual.

A number of myths surround the sentencing of elderly offenders. First is the myth that older individuals only rarely commit first-time offenses. One 2004 study of prisoners in Canada revealed that 73 percent of elderly inmates were serving sentences for first incarcerations late in life, while only 10 percent were serving life sentences, and only 17 percent were serial recidivists. Second is the myth surrounding the severity of crimes committed by the elderly. As discussed above, offenders age 50 and above have been responsible for violent crime in addition to other offenses. Between 1989 and 1995, although the rates of robbery, forcible rapes, and murder declined nationally, the decline was less among offenders between the ages 55 and 64. From 1980 to 1998, Florida experienced a marked increase in offenses by people age 60 and above, including significant increases in forcible sex offenses, robbery, and aggravated assault. One source noted that the most frequent offenses amongst the elderly in Canada are homicide, robbery, and sex offenses, with the latter offense curiously accounting for 40 percent of all elderly offenses in the country. Although the veracity of this statistic may seem unlikely, it probably takes into account the relative absence of enforcement against other smaller crimes when committed by the elderly. In truth, most crimes committed by the elderly are property crimes, but police officers and prosecutors are often prone to exercising their discretion in favor of leniency when it comes to petty offenses, especially when committed by older persons. As a result, if prosecuted at all, petty offenders of older age are more likely than younger offenders to pay fines rather than serve jail time, have charges against them dropped, find themselves merely subject to supervision, or otherwise receive lenient treatment. Even when sympathy for the elderly offender is not at issue, it may ultimately be unrealistic to pursue a case against an elderly offender based on other practical concerns. For example, one commentator suggests, “It is probable that the obviously disoriented, elderly offender is diverted out of the criminal justice system before competence [to stand trial] be formally considered and decided.”

8 Burrow, supra n. 3, at 323-24.
9 Luther, supra n. 7, at 430.
10 Eglit, supra n. 1, at 61.
11 Id.
12 Luther, supra n. 7, at 430.
14 See id. at 372 n.20; see also Ronald Aday & Jennifer Krabill, Aging Offenders in the Criminal Justice System, 7 Marq. Elder’s Advisor 237, 240-42 (2006).
15 Fred Cohen, Old Age as a Criminal Defense in Elderly Criminals, 113, 132 (Evelyn Newman, Donald
B. Causes of Elderly Crime Commission

The fact that persons of older age often escape prosecution for some offenses does not explain either the incidence of crimes for which elderly offenders receive prison sentences or the growing elderly inmate population. One commentator alluded to four relevant factors which may help explain the occurrence of first-time offenses by the elderly. These include: marital and family issues, including the loss of loved ones and changes in the nature of family interaction, which may contribute to the occurrence of spousal abuse; alcohol and drug use; physiological changes, including changes of both functional and pathological causes, which may contribute to “increased aggression and disinhibited sexual behavior”; and cognitive deficiencies, including dementia. These potential factors are supported by other similar explanations. For example, the cognitive deficiency theory parallels the hypothesis that some elderly violent crime can be tied to a condition known as “chronic brain syndrome,” which is known to include symptoms such as “loss of inhibitions, suspiciousness, quarrelsomeness, and aggressiveness” and may be caused by the “decline in economic and social status experienced upon retirement.”

The relevance of the physiological and psychological changes that occur in the aging process will be further explored in Section IV. However, it should be initially noted that the more closely all these factors correlate with advanced age, the more disconcerting they may be. Specifically, if an elderly offender overwhelmingly shares certain characteristics with most other elderly offenders, but distinct in comparison to younger offenders, differential treatment (whatever this may entail) appears increasingly justified.

The potential explanations for elderly offending discussed are likely supplemented by other factors external to the offenders themselves. Most important is the widespread shift in sentencing philosophy and the resulting enactment of the Federal Sentencing Guidelines (Guidelines). With the aid of the Guidelines and concomitant changes in state sentencing law, court discretion in sentencing decisions was replaced by a system of determinate sentencing, leaving comparatively little room to sentence above or below set margins, and binding decision-makers in the imposition of consistent and often lengthier sentences. In addition, Guidelines sentences often resulted in the incarceration of elderly offenders who otherwise would likely have ended up in a community-based alternative to prison sentencing. Of course, the Guidelines are no longer mandatory for judges and juries rendering sentencing decisions, but their legacy, including the Guidelines’ continued application as an advisory tool, suggests their relevance as an impetus for continued growth in the elderly prison population.

It is in light of all of the evidence of elderly offending and its sources that this article explores the extent to which lengthy prison sentences are appropriate for elderly offenders.

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16 Luther, supra n. 7, at 430-31.
18 Burrow, supra n. 3, at 275.
19 Id.
III. THEORIES SUPPORTING THE SENTENCING OF CRIMINAL OFFENDERS GENERALLY

The question of differential treatment for elderly criminal offenders hinges on the degree to which the motives and rationales behind criminal sentencing generally apply to this subset of offenders. The theories underlying criminal sentencing are certainly debatable, but reviewing several core theories can be instructive in understanding when elderly offenders are most like other offenders, as well as when they seem most distinct.

There are four primary theories used to justify the punishment of criminal offenders: retribution, general deterrence, specific deterrence (i.e., prevention of further harm by the same offender), and rehabilitation. Not all of the theories will be relevant to all offenses, but rather, each will inform the sentencing decision to the degree to which it is a concern, based on consideration of factors such as offense level, criminal history, and personal characteristics, including possibly age. The centrality of these four theories is supported by their inclusion in the Federal Sentencing Guidelines. The Guidelines include a statement of statutory mission, which asserts: “The Sentencing Reform Act of 1984 … provides for the development of guidelines that will further the basic principles of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.”

The theories for criminal sentencing can be broken down into those with utilitarian functions and those with a primarily retributive purpose. General deterrence, specific deterrence and rehabilitation support the utilitarian view, which asserts that “punishment is undesirable unless it will result in a net benefit to society.” According to this view, punishment for punishment’s sake is insufficient justification for the imposition of harsh criminal sentences; rather, punishment should serve some other end aside from or in addition to moral vindication. General and specific deterrence both support a utilitarian view by preventing the further commission of future crime by the same perpetrator or others. Rehabilitation similarly aims to prevent future crime commission by the particular individual, not merely by removing the individual from society, but rather through deliberate processes and programs aimed at preventing crime commission once the individual returns to society. Of all the theories justifying punishment, one Elder Law Journal article referred to rehabilitation as the most controversial, citing the 1974 Martinson Report and its conclusion that “‘Nothing Works’ in correctional rehabilitation programs.” Even the system put in place by the Federal Sentencing Guidelines, which makes note of rehabilitation as one of the Guidelines’ objectives, relegates rehabilitation to a lower status in practice, by shifting sentencing philosophy toward greater determinacy. This shift indicates a preference for uniformity and equitableness over individualized and highly discretionary determination of what is necessary and what works for each offender.

Retribution, on the other hand, focuses on punishment for the crime committed rather than on other external policy goals to be achieved through the sentencing process. Under this approach, prison sentences and other forms of punishment in the criminal justice

22 Id.
24 Porcella, supra n. 13, at 380.
25 Burrow, supra n. 3, at 280.
26 Id.
system are valid mainly as means of retribution against wrongdoers under the law.\textsuperscript{27} As a result, proponents of retribution believe that just punishment for commission of a crime is one that exemplifies “proportionality between the sentence, the offender’s culpability, and the harm caused by the crime.”\textsuperscript{28} The Guidelines, with its emphasis on uniformity in sentencing of like offenders, thus, is largely consistent with a retributive approach.

Age often complicates an otherwise consistent approach under one theory or another. What seems an appropriate sentence under a retributive theory might suddenly appear otherwise if it is determined that the offender is elderly. Likewise, many view the utilitarian objectives of sentencing as rendered moot when the offender is elderly. The next sections explore the relevance of age to sentencing under the philosophies discussed by providing an analysis of some of the arguments for and against leniency in sentencing elderly offenders.

IV. Arguments for Leniency in the Sentencing of Elderly Offenders

Criminal offenders differ from each other in all sorts of ways, but most differences are not relevant or significant enough to justify differential treatment during sentencing. However, there is something peculiar about age that makes some question the appropriateness of failing to consider it during sentencing. Perhaps this is because, as will be discussed, people often associate age with other characteristics relevant to sentencing (e.g., infirmity, psychological decline, physical decline, vulnerability), whether or not age is relevant in and of itself.

A. Chronological Age as a Mitigating Factor Based on its Role in Crime Commission

There is certainly an argument that age, independent of other associations, is relevant and should be considered as such during sentencing. State and federal courts have on occasion made pronouncements to this effect.\textsuperscript{29} Perhaps one of the better arguments for the consideration of chronological age as a factor in sentencing is grounded in the science of aging. In his article “Old Age as a Criminal Defense,” Fred Cohen explains that during the aging process, structural changes to the brain result in functional changes in brain processes, whether a consequence of natural aging or of pathological cause.\textsuperscript{30} These changes may then effect other changes in the body, including anatomical, biochemical, physiological, and behavioral changes.\textsuperscript{31} Regardless of their cause, studies have shown that prevalence of mental and emotional disorders is significantly higher amongst people of older age. Most notable of all mental illnesses and cognitive deficiencies among the

\textsuperscript{27} See Porcella, supra n. 13, at 380.
\textsuperscript{28} Id. at 380-81.
\textsuperscript{29} See Thomas A. Long, The Federal Sentencing Guidelines and Elderly Offenders: Walking a Tightrope Between Uniformity and Discretion (And Slipping), 2 Elder L. J. 69, 87-88 (1994) (citing State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (N.J. 1987)) (holding that age is relevant when a defendant is relatively old “in accordance with probable legislative intent to recognize society’s reluctance to punish the very old and the very young as severely as others”); United States v. Price, 930 F.2d 30 (Table) (9th Cir. 1991) (suggesting that age might be relevant when the offender is substantially older than the average offender for the crime committed).
\textsuperscript{30} Cohen, supra n. 15, at 116.
\textsuperscript{31} Id.
elderly population is dementia, but as a population ages, there is also increased incidence of substance abuse problems, anxiety disorders, and schizophrenia. In fact, psychiatric disorders generally are observable in 15 to 25 percent of the older population.\textsuperscript{32} Even more, mental illness is especially prevalent in the criminal offender population.\textsuperscript{33} Any of the various physical and psychological changes that occur during the aging process could be relevant either in terms of understanding why a person of old age may have committed a crime, or in terms of understanding the different kinds of challenges faced by elderly offenders when incarcerated in the prison system.

On the other hand, Cohen also warns that drawing any kind of assumption based on an offender’s age can be a dangerous and likely inaccurate proposition. One source he cites notes:

\begin{quote}
Individuals vary enormously at any given age in respect to almost all human characteristics. In the case of characteristics studied here, the variation increases as the age of people studied increases. Indeed this has been the finding in most works on the aging, and makes any generalizations about “the aged” very unsound.\textsuperscript{34}
\end{quote}

If the effect of age on an individual’s capabilities and behavior is so variable, what accounts for the widespread insistence on the consideration of age in rendering verdicts and imposing sentences? Perhaps the strength of the argument for leniency based on the impairments that come along with old age rests not on any assumption that the aging process triggers the same effects in all people at the same point in their lives, but rather on the acknowledgment that, while some may fare better than others, the aging process, by no fault of one’s own, undoubtedly affects a person’s functional capacities at least to some extent in a way that is relevant to the imposition of criminal punishment.\textsuperscript{35} As a result, some believe that it is necessary to ascertain whether there were underlying external challenges or other circumstances common to people of advanced age that prompted the crime, or whether some common psychological, emotional, or physical infirmity played a role in its commission.\textsuperscript{36} If so, the argument goes, the offender should be afforded leniency in sentencing. This conclusion would be consistent with retribution as an objective if the theory behind the application of leniency is that the elderly offender is less culpable in light of the constraints or circumstances of old age. As stated by one commentator on the issue of elderly offenders in Canada, “In the case where an elderly person does not appreciate [the reason for incarceration] due to cognitive decline, it is contestable whether continued detention is at all beneficial.”\textsuperscript{37} In addition, leniency may also support the utilitarian viewpoint if the consequences of the offender’s age are such that sentencing would not effectively deter the offender or, conversely, if rehabilitation might be pursued

\textsuperscript{32} Aday, \textit{supra} n. 14, at 253-54.

\textsuperscript{33} \textit{Id.} at 254.

\textsuperscript{34} Cohen, \textit{supra} n. 15, at 116.

\textsuperscript{35} \textit{See id.} at 188 (describing one argument for diminished responsibility at the guilt-determination phase).

\textsuperscript{36} Leavitt, \textit{supra} n. 21, at 313-14.

\textsuperscript{37} Luther, \textit{supra} n. 7, at 432.
through a shorter sentence or alternative measures (or if rehabilitation will be unachievable through any means).38

B. Age as a Mitigating Factor Based on Its Role in Effective In-Court Advocacy

Age might also come into play during in-court proceedings. Proponents of leniency might argue that because some elderly offenders might be at a disadvantage when it comes to presenting their case and defending against accusations, they deserve leniency during sentencing to make up for any detriments during trial. For example, many judges and attorneys are ill-experienced in effectively representing, opposing, and otherwise dealing with older people and understanding their special needs and challenges, including exhaustion, inattentiveness, memory defects, and other physical and psychological deficits that affect an elderly defendant’s ability to serve as an effective witness, receive the benefit of impartiality, or otherwise make a strong case.39 Some jurisdictions, recognizing the complexities faced by elderly defendants in the judicial system, have instituted “special problem-solving centers” as an alternative venue for addressing criminal offenses by elderly persons with mental illness, including dementia and alcohol and drug addiction.40 Perhaps the extent to which such alternatives are acceptable depends on whether retribution remains a legitimate rationale for criminal punishment, especially in cases involving violent and non-petty offenses. The more significant the offense and the more retribution is valued, the less viable such alternative approaches to sentencing appear.

C. Age as a Mitigating Factor Based on Its Effects on the Prison Experience

Regardless of what spurred the criminal behavior of an elderly offender, what happens once incarcerated also gives rise to arguments for leniency. Incarceration certainly creates challenges and hardships for all who encounter the prison system; however, some argue that the burdens escalate to such a degree that such punishment may not be as justified for elderly offenders. Some commentators have observed that elderly offenders face a greater risk of contracting life-threatening diseases.41 Moreover, it can be easy to mistake an observed elderly inmate’s behavior symptomatic of dementia or other cognitive decline for mere bad behavior.42 Physically, elderly inmates suffer because prison facilities are poorly equipped to meet their different mobility needs.43 This is especially true in the case of older facilities, which are not required to comply with the Americans with Disabilities Act retroactively.44

Incarceration might also take a deeper emotional toll on the elderly offender. One article described the frequent experience of an elderly inmate as such:

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38 See Aday, supra n. 14, at 244.
39 Id. at 243-44.
40 Id. at 244.
41 Burrow, supra n. 3, at 291 n.141.
42 Luther, supra n. 7, at 432.
43 Aday, supra n. 14, at 246.
44 Id.
There is expressed guilt, shame, and disappointment with life. They suffer from increased victimization and exploitation. There is also the victimization of violence that occurs when the elderly who are set in their ways refuse to follow the “con code”. . . . They therefore find it increasingly difficult to adjust in general and, because of their poor adjustment, they develop depression, negative self image, feelings of insignificance and unimportance, and sometimes contemplate or complete suicide.\(^\text{45}\)

While such experiences are not necessarily unique to inmates of advanced age, they are perhaps more widely felt and aggrandized among the elderly population. Regarding victimization specifically, elderly inmates are “particularly vulnerable” given their relative weakness when compared to the generally young inmate population.\(^\text{46}\) Even when special programs are in place to address problems of victimization and to meet prisoners’ needs, such programs, including educational and vocational programs, are often not tailored to meet the needs particular to the elderly prison population, leaving elderly offenders isolated and distressed.\(^\text{47}\) Whereas younger inmates have a strong interest in all sorts of recreational and educational programs, older inmates, often devoid of hope of returning to life outside of prison, lack the interest, energy, and/or capacity to participate; instead, the older inmates will be offered programs that are geared more toward health, safety, and emotional stability alone.\(^\text{48}\)

Over the years there has been some progress in the development of programs designed specifically to meet the needs of elderly inmates. A nationwide survey on prison systems in 1982 found that 47 states had no formal special considerations for elderly prisoners, although special considerations and differential treatment would be afforded on the basis of health.\(^\text{49}\) Some of these states, however, did exclude elderly prisoners from “heavy duty work.”\(^\text{50}\) Both Virginia and the District of Columbia were exceptions to the rule: Virginia offered an Aged Offender Program through the state penitentiary which facilitated meetings among elderly inmates to discuss their concerns, and the District of Columbia segregated inmates age 55 and above from younger inmates in entirely separate dormitories and provided age-specific programming to meet recreational, health, financial, and other needs of elderly inmates.\(^\text{51}\) By 1994, most states still refrained from developing programs for elderly inmates, although there was some increase in such programming. Specifically, Texas, Alaska, Mississippi, and South Carolina initiated programs and rules that limit the extent of work, provide for retirement above a certain age, separately house elderly inmates, allow sentencing aberrations, and/or provide additional physicals

\(^{45}\) Luther, supra n. 7, at 432.  
\(^{46}\) Aday, supra n. 14, at 246.  
\(^{47}\) Luther, supra n. 7, at 432.  
\(^{48}\) Aday, supra n. 14, at 247.  
\(^{49}\) Ann Goetting, Prison Programs and Facilities for Elderly Inmates in Elderly Criminals, supra n. 15, at 169, 170.  
\(^{50}\) Id. at 171.  
\(^{51}\) Id.
for elderly inmates.\footnote{Ronald Aday, \textit{Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates}, 58-JUN Fed. Probation 47, 48-49 (1994).} In 2004, \textit{USA Today} reported on further growth in the establishment of specialized housing and programming for elderly offenders

At least 16 states, including Florida, have established separate facilities to house older inmates, and many are offering hospice care for dying prisoners, according to a 2001 summary in the industry journal \textit{Corrections Compendium}. In Texas, about 200 inmates over 65 receive round-the-clock nursing care. Nebraska offers nursing home living for some inmates, and Oklahoma is setting up a prison unit for elderly inmates.\footnote{\textit{Elderly inmates swell prisons, driving up health care costs}, USA Today (Feb. 28, 2004) http://www.usatoday.com/news/nation/2004-02-28-elderly-inmates_x.htm.}

Many more programs and facilities, sometimes labeled as “geriatric,” provide separate specialized accommodations for inmates with health problems, including elderly inmates.\footnote{See, e.g., id.; Goetting, \textit{supra} n. 49, at 171.}

To the extent that separate elderly-specific programs and facilities could be designed, some argue that such programs only create new problems and exacerbate some of the issues that elderly inmates face. While separate accommodations may better address the common interests and needs of elderly prisoners, they also may isolate the elderly from younger inmates, aggravate the stability of the general prison population, preclude elderly inmates’ participation in other programs and activities offered in the general prison system, and result in the removal of elderly inmates from prisons closer to home, their families, and their friends.\footnote{See \textit{Aday, supra} note 14, at 246; Goetting, \textit{supra} note 49, at 173.}

\textbf{D. Age as a Mitigating Factor Based on the Cost of Elderly Offenders}

Even when specialized programs and facilities are deemed to be instrumental, they may nonetheless be so costly that some question the value of the benefit. Indeed, the cost of elderly offenders to the prison system generally is so substantial that lenient and alternative sentences may be appropriate based on the logistical and financial concerns alone. Current estimates are that elderly inmates cost the system two to three times what is required to cover the much larger, younger inmate population, mostly because of the substantial health care burden.\footnote{See, e.g., \textit{Smart on Crime: Recommendations for the Next Administration and Congress}, \textit{supra} n. 2, at 65; Leavitt, \textit{supra} n. 21, at 314.} In 2004, one researcher at the Centers for Disease Control and Prevention estimated the cost of supporting an elderly inmate to be $70,000 a year.\footnote{Elderly inmates swell prisons, \textit{supra} n. 53.} As a result, states are forced to pay the costs of various types of health care for the elderly, including “treatment for chronic and terminal
diseases, protection from younger prisoners, mental health care, and physical plant alterations to accommodate walkers, canes, and geriatric chairs.”\textsuperscript{59} As a general matter, states have delegated the provision of prison health care to managed care organizations that parallel those in the outside world and similarly require co-payments from the inmates, although significant quality concerns surround the provision of care in the prison system.\textsuperscript{60} Some elderly prisoners require around-the-clock care, leading some states to create essentially full-functioning nursing homes operating within the correctional system, or even within a prison, itself.\textsuperscript{61} Such care is undoubtedly expensive and causes many to question the practicality of imposing the burden on the prison system.

E. Age as a Mitigating Factor Based on Elderly Offenders’ Low Risk to the Public

As of yet, this discussion has centered, at least indirectly, on circumstances of old age that can be tied to health or at least to the aging process, itself. For example, the cost-based arguments rely on the assumption that elderly offenders are too expensive for the system to accommodate. One additional key argument is that elderly offenders pose so low a risk to the public that long or otherwise harsh sentences have little to no utilitarian benefit. Whether because of health or other reasons, elderly offenders have the lowest rate of recidivism of all types of offenders; in fact, only about one percent of elderly offenders ever face a second conviction.\textsuperscript{62} As a result, many in the field place emphasis on the need for criminal punishment to accurately reflect the deterrence function of the system. As stated by one such commentator, “[i]f an elderly offender is not presently a threat to society, perhaps it would be better to release these relatively harmless individuals into society than to keep them in prison and have taxpayers incur costly medical expenses.”\textsuperscript{63}

In summary, according to proponents for leniency, the data and experience with sentencing of elderly offenders and the expenses required to provide for their care do not support the imposition of sentences that may be appropriate for offenders of younger age. Incarceration is difficult regardless of age, but especially so for elderly offenders. In many, the aging process renders uncontrolled and undesired effects that limit the ability of an actor to control his or her impulses, use proper judgment, or fully appreciate the consequences of his or her actions, including understanding the rationale for criminal punishment and rehabilitative programs. Likewise, both physical and psychological by-products of aging may disproportionately burden even those elderly offenders deserving of some sort of punishment because prison facilities and programs fail to fully take account of the special needs of elderly offenders. While some jurisdictions have become increasingly responsive to the unique needs of the aging and elderly prison population, even the most well-intentioned initiatives may ultimately do more harm than good, or may be too expensive to justify their operation when other viable alternatives to imprisonment

\textsuperscript{59} Smart on Crime: Recommendations for the Next Administration and Congress, \textit{supra} n. 2, at 65.
\textsuperscript{60} Aday, \textit{supra} n. 14, at 250-251.
\textsuperscript{61} See, e.g., Aday, \textit{Golden Years Behind Bars}, \textit{supra} n. 52, at 51-52 (describing facilities in South Carolina and Mississippi, and planned facilities in other states across the country); see also \textit{Elderly inmates swell prisons}, \textit{supra} n. 53 (noting plans for new elderly units in five Florida prisons).
\textsuperscript{62} Porcella, \textit{supra} n. 13, at 381.
\textsuperscript{63} Aday, \textit{supra} n. 14, at 245.
exist. Elderly offenders cost an overpopulated and overburdened corrections system valuable resources when, arguably, they are on the whole not dangerous enough and not well enough to justify the expense of their incarceration and, most important, the expense of their care in the prison system. Nevertheless, a strong argument against leniency remains.

V. ARGUMENTS FOR NON-DIFFERENTIAL TREATMENT OF ELDERLY OFFENDERS

No one would argue against the proposition that the elderly as a sector of the population face significant challenges and that there are many ways in which elder needs should be better addressed; however, opponents of leniency in the sentencing of elderly offenders argue that the rationales justifying criminal punishment remain equally applicable despite an offender’s advanced age. Although further reforms may be necessary to better accommodate and care for elderly inmates, the fact of an offender’s old age alone should not override an otherwise legitimate sentence. Such a viewpoint, however, does not preclude the mitigation of a sentence on the basis of other factors that may or may not correlate with an offender’s age, including health status. This section will explore the various arguments for equal treatment of elderly and non-elderly criminal offenders in relation to the arguments for leniency presented earlier.

A. Advanced Age Does Not Render a Prison Sentence Inordinately More Difficult

Opponents of lenient sentencing will rebut the proposition that, in light of the physiological and psychological deficiencies of the average elderly offender, prison sentences are more “punishing” on the elderly than they are on the younger population. Aside from the variability in the effects of the aging process on individuals, it may also be an unsafe assumption that the emotional toll of imprisonment is generally greater among elderly offenders. This notion was advanced by the district court in United States v. Angiulo, which viewed the assumption that elderly offenders suffer disproportionately in prison to be “an untested conclusion, unsupported by any psychological or sociological analysis.” In addition, some elderly prisoners who have already lived full lives may suffer comparatively less than younger offenders whose years in prison may cause them to miss out on formative life experiences, including marriage, parenthood, and career pursuits. To the extent that elderly offenders may suffer more than others in the prison population, efforts to improve prison facilities and programming to fit elder needs, including the increasing establishment of age-specific units, may level out much of the inequality by ameliorating the added hardship experienced by older inmates.

If in fact prison sentences do unduly challenge the elderly, proponents of leniency assert that there should be no negative deterrent effect from the imposition of lighter sentences. As argued by Cristina Pertierra in the Nova Law Review: “If a penal sentence falls more harshly on an older person, then it must also be true that a sentence proportioned to the person’s age and life expectancy will deter them as much as it would deter someone

64 See supra p. 12.
Consistent with this line of thinking, if for whatever reason prison sentences do not fall any more harshly on elderly offenders, then displays of leniency both risk under-detering the commission of crime by elders and also challenging the integrity of the criminal justice system and equitableness of sentencing across subsets of offenders. What is likely most needed to definitively resolve disagreement on this particular argument is more research and empirical data to help ascertain precisely the effects of prison sentences both on elderly and non-elderly offenders.

B. Elderly Offenders Are Equally Culpable from a Retributive Perspective

A second argument for the imposition of equally harsh sentences on elderly offenders contends that in addition to any utilitarian function, criminal punishment serves fundamentally retributive objectives. According to this sentencing philosophy, like criminal offenders, regardless of age, deserve consistent punishments that fit the crime committed in order that the offenders suffer proportionally to their wrong. This argument focuses on the nature and gravity of the offense as determinants of the punishment rather than on the individualized effect of punishment on the offender. If anything, some would argue that many elderly offenders are even more culpable than their younger counterparts in light of their age. In other words, elderly offenders have the benefit of more years life experience and knowledge and should simply “know better” than to commit the offenses for which they are convicted.

Corroboration of the significance of victims’ rights is another important goal of the criminal justice system, and advocates for equivalent criminal responsibility assert that sufficient criminal punishment as a means of identifying the culpable party is necessary from the victims’ vantage point. In an issue of the St. John’s Law Review, Kelly Porcella writes that the victims’ rights argument is compatible both with utilitarian and retributive philosophies:

A utilitarian argument for the protection of victims’ rights is that proper punishment deters private revenge. The [retributive] theory [asserts that] 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.

Thus, the victims’ rights argument, like retributive arguments that focus on the offender, emphasizes the nature and severity of the crime, rejecting consideration of other factors that may or may not be pertinent to the fulfillment of retribution in actuality.

Ultimately, the question at the heart of this conflict is what constitutes full and functional retribution for a crime committed. If retribution depends only on the nature and severity of the offense, then age absolutely should not be a factor in sentences designed to meet retributive ends. Conversely, if the punishment must not only fit the crime but also

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67 Perttierra, supra n. 66 at 817.
68 See Porcella, supra n. 13, at 393.
69 See Cohen, supra n. 15, at 118.
70 Porcella, supra n. 13, at 396.
the offender, based on characteristics and vulnerabilities such as age and health, then perhaps sentences that parallel those of younger offenders overreach. The latter view returns us to the different arguments discussed in sub-section A and requires a determination of whether equivalent sentences fall more harshly on elderly offenders. As the consensus on sentencing philosophy continues to evolve, it will be interesting to see which view of retribution wins out.

C. The Costs of Punishing Elderly Criminal Offenders Are Appropriate and Justifiable

As extraordinary as they may be, the health and other costs incurred by prisons due to elderly inmates are worth the expense, according to opponents of lenient treatment of elderly offenders. First, one might argue that expense alone is insufficient reason to reduce the sentence of an offender who otherwise is culpable and deserving of a particular sentence. Second, and perhaps more persuasive, is the argument that the cost of elderly offenders to the system does not represent any additional burden on either state or federal government. This could be so because should elderly offenders receive shorter sentences or alternative sentences that enable them to return to their home communities, they will still require services and care that may nonetheless remain largely taxpayer-funded, either through Medicare, Medicaid, Social Security, or other government resources.\footnote{Id. at 384.} It is only a matter of where the care is being provided.

On the other hand, moving recipients of health care and elder services out of the community and shifting the burden to the prison system might create added costs, especially if the prison system is not as efficient or effective in rendering the services. There certainly are significant qualitative issues with the level of care provided to prison inmates generally. The managed care system for prison health care struggles because the prison population is generally less healthy, quality of care is deficient, and inmates have no alternative sources of care.\footnote{Aday, supra n. 14, at 251.} In addition, inmates may be forced against their will either to accept treatment or to accept refusal of treatment based on the medical judgment of prison health personnel, who in some prison settings are less qualified than those outside the system.\footnote{Id. at 251, 255.} Even so, modernizations and reforms to the prison health and elder care system may improve quality in a way that better justifies continued allocation of the costs of caring for elderly offenders to the criminal justice system.

D. Uniform Punishment of Offenders of all Ages Facilitates Needed Deterrence

Despite arguments that elderly offenders are so harmless and have such low rates of recidivism that long prison sentences serve no utilitarian purpose, others contend that deterrence remains a salient concern. This assertion may be especially true in the case of violent crime. Although Kelly Porcella discusses the continued importance of deterrence in the context of elderly evaders (i.e., elderly offenders who are convicted late in life for crimes committed decades earlier, including Nazi persecutors who immigrated to the United States under false pretenses and perpetrators of civil rights murders), her argument equally applies to first-time elderly offenders. She contends, “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” … [which could fail to] send a message to others considering committing similar crimes that there will be consequences for their actions.”74 To support this proposition, she cites the Idaho case of *State v. Baker*, in which the court denied a request for leniency from an elderly offender who had committed voluntary manslaughter because such an allowance “would be saying to the community that it is okay to take another’s life.”75 Even when an elderly offender may be somewhat less culpable based on his or her own impairments associated with advanced age, there is the danger that leniency may insufficiently deter others with an intention to commit crime by mitigating the perceived risk of a conviction.

Perhaps those on opposing sides of the issue of leniency for elderly offenders do not disagree as much as they might think. Many of the arguments for leniency are principled on how the science of aging and impairments in old age in some way subvert the primary purposes of criminal punishment. For example, physical, cognitive, and emotional deficits may play a role in crime commission, affect the comparative harshness of a sentence, and alter the costs of care. The arguments against leniency toward the elderly instead focus largely on the irrelevance of age per se when it comes to determining the propriety of a particular sentence. The inquiry here is less directed at any single characteristic of the offender and more at the nature of the crime and the interests of and effects on others aside from the offender, including the victims and the public at large. There is, however, one distinct area of disagreement that looks at chronological age, apart from health and other associated factors, and its relevance to sentencing in light of Constitutional Law. The next section explores both sides of this unique argument for leniency.

**VI. THE CONSTITUTIONAL CASE FOR AND AGAINST LENIENCY**

Proportionality between an offense and its punishment has been an ongoing question of Constitutional Law over the past few decades. Even apart from the issue’s specific application to elderly offenders, many have questioned whether sentences that are in some way disproportionate violate the requirement under the Eighth Amendment that “cruel and unusual punishments [not be] inflicted.”76 Current Eighth Amendment doctrine does not include any requirement of individualized punishment (i.e., that punishment fit individualized offender characteristics) for sentences except possibly capital punishment.77 In reaching this decision, the Supreme Court effectively overturned its earlier holding in *Solem v. Helm* that the Eighth Amendment required that all criminal sentences be proportional as determined through a three-pronged inquiry.78 In his opinion in *Harmelin v. Michigan*, Justice Antonin Scalia expressly renounced any earlier notion that the Eighth Amendment contains any proportionality guarantee, although he spoke only for himself.

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74 Porcella, *supra* n. 13, at 382.
76 See Perttierra, *supra* n. 66 at 795-95.
78 *Solem v. Helm*, 463 U.S. 277, 292 (1983) (holding that criminal sentences must be proportional in light of the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for the crime in other jurisdictions); *see also* Perttierra, *supra* n. 66, at 798-800.
and Justice William Rehnquist on this point in the opinion. Although the absence of a majority opinion on some of the issues used to decide the case has left room for lower federal courts and state courts to develop their own compatible rules on proportionality, current Eighth Amendment interpretation generally limits only the methods of punishment and, in rare cases, punishments that are “grossly disproportionate.”

The jurisprudence on proportionality controls whether imposition of similar sentences for elderly and non-elderly offenders violates the Eighth Amendment. The argument is that for some elderly offenders, any sentence that includes imprisonment will constitute essentially a life sentence on account of the offender’s old age, thus, rendering the sentence “grossly disproportionate.” Even if the offender does not die in prison, unless life expectancy was taken into account during the sentencing process, the offender will have spent a greater proportion of his or her remaining life in prison. Thus, some argue that sentences should be determined accordingly so as not to sentence unfairly above the scope of what would be full retribution.

Most courts have held, consistent with Harmelin, that there is no proportionality problem with sentences that result in elderly offenders spending a greater percentage of their remaining life expectancy in prison. There are exceptions to the rule, including, most notably, People v. Moore. In Moore, the Michigan Court of Appeals held that a prison sentence other than life must actually be less than life, requiring courts to consider a defendant’s life expectancy in selecting a sentence. This holding, however, ultimately had little effect. On remand, the court upheld the imposition of a 100–200 year sentence for the 34.5-year-old defendant and decided that courts are not required to make findings regarding an individual defendant’s life expectancy, whether on the basis of age or any demographic or other factor.

Interestingly, Judge Richard Posner does not believe that the consideration of life expectancy is appropriate during the sentencing of offenders with poor health, but nonetheless believes that life expectancy is relevant for elderly offenders. In United States v. Prevatte, Judge Posner wrote:

I do not think that the judge should also consider the defendant’s health.

79 501 U.S. at 965.
81 Pertierra, supra n. 66, at 800-01.
82 Id. at 808.
83 Porcella, supra n. 13, at 385.
84 Pertierra, supra n. 66, at 813, citing, e.g., Alvarez v. State, 358 So. 2d 10, 12 (Fla. 1978); Powlowski v. State, 467 So. 2d 334, 335 (Fla. 5th Dist. Ct. App. 1985); Juarez v. State, 855 P.2d 818, 820-21 (Colo. 1993) (en banc).
86 Id.
88 United States v. Prevatte, 66 F.3d 840, 848 (7th Cir. 1998) (discussing the relevance of life expectancy in the context of defendant arguing for leniency on the basis of health concerns); see also Burrow, supra n. 3, at 286.
Apart from the complexities and uncertainties involved in computing life expectancies on the basis of the health of a specific person, a sentence reflects a judgment about the gravity of the defendant’s conduct. A person is not less an arsonist for having only six months to live, and a five-month sentence for arson might be thought to depreciate the gravity of his crime.89

Yet it is difficult to reconcile this view with his opinion that sentences other than life sentences ought to be determined by considering age and gender so as to better ensure that the sentence is in fact “significantly less severe than a term of life.”90 Is an arsonist any less an arsonist because he or she is elderly? Perhaps Judge Posner is trying to assert an opinion that the relationship between health and life expectancy is variable and unpredictable, whereas he might believe that judges are capable of making legitimate estimates about life expectancy as a function of age.

VII. RECENT OUTCOMES AND TRENDS IN FEDERAL AND STATE SENTENCING OF ELDERLY OFFENDERS

Since the mandatory Guidelines have given way to the now advisory system under Booker, offenders face a possible return to more indeterminate and discretionary sentencing. The long term effect of this breakaway from strict Guidelines sentencing leaves somewhat open the question of how sentencing is changing and whether any changes reflect a shift in sentencing philosophy. Therefore, an analysis of the case law on sentencing of elderly offenders is instrumental in determining which theories current sentencing practices best support. This section offers some analysis in the hopes of facilitating understanding of sentencing practices common to elderly offenders. Only with this clearer view of what sentencing practices and philosophies prevail today can practical recommendations and solutions be provided.

Studies over the years have produced mixed evidence on whether courts impose more lenient sentences on elderly offenders on account of their age. Some researchers have found that elderly offenders, if convicted, are more likely to be fined or otherwise receive lighter sentences, and many also receive leniency before or during the guilt-determination phase.91 Conversely, other researchers have found quite the opposite — that elderly offenders are sentenced more harshly than younger offenders and may even be more likely to be convicted.92 Even so, on the whole, people of advanced age are overwhelmingly thought to receive the benefit of sympathy from both judges and juries; in fact, it is common for prosecutors to refrain from seeking the death penalty for elderly offenders based on knowledge that few juries would ever authorize it.93

State-to-state sentencing law varies substantially with regard to the relevance of old

89 Id.
90 Id.
91 See Aday, supra n. 14, at 241-42 (citing studies by researchers Cutshall and Adams, Feinberg and McGriff, and Helms).
92 Id. at 242 (citing studies by researchers Bachand, Feinberg and Kholsa, and Wilbanks).
93 Porcella, supra n. 13, at 377.
age in sentencing. Kelly Porcella’s 2007 piece in the *St. John’s Law Review* noted that at least one state (Alaska) requires consideration of age when the conduct arose from “physical or mental infirmities resulting from the defendant’s age.”

Other states allow the consideration of age as a mitigating factor under state statutory law or consistent with case law.

The Guidelines contain a provision that directs judges not to consider age as a mitigating factor under most circumstances. The policy statement on age as amended in 2004 states:

> Age (including youth) is not ordinarily relevant in determining whether a departure is warranted. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

This policy statement is fundamentally the same as it was when it was initially enacted in 1989, although the last sentence is a more recent addition.

The Guidelines policy on age is fraught with ambiguities. If age is “not ordinarily relevant,” the Guidelines fail to make clear when age might be relevant; in addition, courts have struggled in giving meaning to the terms “elderly,” “infirm,” and “efficient.”

The reference to §5H1.4 is especially deceiving because the Guidelines instruct under §5H1.4 that “extraordinary physical impairment” such as the case of “a seriously infirm defendant” may warrant a downward departure. The text, thus, implies that any defendant eligible for a departure under §5H1.1 will already have been eligible under §5H1.4, leaving the former provision devoid of any unique protection for elderly defendants that it might otherwise create. The end result of all this confusion has been widespread variation in interpretation, thereby undermining the very purpose of the Guidelines to improve sentencing uniformity, and instead precipitating widely diverse sentencing practices when it comes to departing downward from the Guidelines sentence for a particular offense based on age.

Leading case law from the federal circuit courts assisted in generating increased understanding about when and how old age could ever be a mitigating factor under the Guidelines regime. Among the key cases was *United States v. Carey*, in which the Seventh Circuit held that age could rightfully be considered as a mitigating factor, but only if the conditions under §5H1.1 were strictly met and only if the sentencing court made “par-

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94 Id. at 375 n36.
95 Id. at 375; see also Pertierra, supra n. 66, at 808-09 nn159-160.
97 See Porcella, supra n. 13, at 375 n35.
98 See Burrow, supra n. 3, at 283-86.
100 See Long, supra n. 29, at 79-80.
101 Burrow, supra n. 3, at 284.
ticularized findings” to that effect. Thus, an opinion that a defendant was deserving of a downward departure under §5H1.1 of the Guidelines was insufficient absent particularized findings. Another significant case was United States v. Harrison, in which the Eighth Circuit held that a downward departure under the Guidelines was not allowable for the 64-year-old defendant because he had failed to show that he was “elderly and infirm.” Effectively, the court ruled that, absent the “extraordinary case,” age alone will never be sufficient to warrant a departure for an offender of advanced age; rather, §5H1.1 will usually only apply when chronological age combines with infirmity or a qualifying physical condition in such a way so as to make age a relevant mitigating factor. In United States v. Tolson, the trial court applied Carey in holding that a 60-year-old defendant with multiple health problems did not qualify for a downward departure under §5H1.1 because the court was unable to make any particularized findings to the effect that, although elderly, the defendant’s health problems disabled him in such a way so as to render him “infirm.” This holding is representative of the narrow, limiting fashion in which the age provision of the Guidelines has been construed. Ultimately, the leading case law suggests that elderly status (addressed under §5H1.1), infirmity (addressed under §5H1.1), and extraordinary physical impairment (addressed under §5H1.4) must converge for an elderly defendant to wage a successful case for departure under the Guidelines regime.

One study surveying sentencing outcomes under the Guidelines in the Second, Seventh, Ninth, and Eleventh Circuits found substantial circuit-to-circuit and even district-to-district variation (especially in the Second and Ninth Circuits) in the extent to which downward departures were granted generally and in the extent to which they were granted among elderly defendants (defined as age 50 or above). Only in the Ninth Circuit was elderly status not a significant predictor of downward departure, whereas elderly defendants in the Eleventh Circuit were 23 percent more likely to receive downward departures than other defendants. This data suggests that, whatever the reason, elderly offenders were more likely than others to benefit from leniency in sentencing during the Guidelines era.

The Guidelines are no longer controlling on state practice; however, they continue to be an important advisory source in sentencing, especially given that they must still be considered as factors in imposing a sentence under the Sentencing Reform Act of 1984. In order to uncover any trends in current consideration of age in the sentencing of elderly defendants, this article offers insight into some of the more recent court opinions issued on the topic. After surveying some of the decisions rendered between 2006 and 2008, it appears that courts, while not entirely afraid to deviate from the Guidelines on the

102 United States v. Carey, 895 F.2d 318, 324 (7th Cir. 1990).
103 United States v. Harrison, 970 F.2d 444, 447 (8th Cir. 1992).
104 What exactly might qualify as an “extraordinary case” where age in and of itself might be relevant was left undetermined. Long, supra, n. 29, at 76-77.
105 United States v. Tolson, 760 F. Supp. 1322, 1330-31 (N.D. Ind. 1991); see also, Burrow, supra, n. 3 at 291.
106 See, Burrow, supra, n. 3, at 296.
107 Id., at 308-10.
108 Id., at 313-16.
whole, largely consider age as a mitigating factor in a similarly restrictive way akin to construction of §5H1.1. One of the most prominent concerns expressed by circuit courts in their decisions was specific deterrence and risk of recidivism, as numerous cases held that even though the offender was of older age and/or in poor health, the nature of the crime, history of recidivism, and/or risk of future recidivism justified the length of the sentence imposed. Some federal and state courts suggested that old age was simply not an independently relevant factor in determination of the sentence. Other courts took a different approach — acknowledging the limited relevance of age as a mitigating factor and considering age to the extent it was relevant, but nonetheless rejecting defendant’s arguments to further reduce the sentence on account of age. Certainly, there are other occasions in which shorter sentences are imposed on the basis of age, but even in these cases, many other considerations often enter into determination of the sentence in addition to age. Interestingly, a number of courts indicate their cognizance of the Eighth Amendment debate about the relevance of life expectancy and proportionality in sentencing and expressly consider life expectancy, despite the overwhelming jurisprudence to the contrary.

The sentencing of Bernard Madoff, in particular, is consistent with the restrictive approach to consideration of age as a mitigating factor embraced by the leading federal cases. Even so, court filings and the sentencing transcript reveal that the relevance of age, and especially life expectancy, was a central matter in dispute between the government and the defense team in making their respective sentencing recommendations. The government, on the one hand, sought a sentence of 150 years or “a substantial term of imprisonment that will ensure that he spends the rest of his life in jail.” The defense, however, saw the imposition of a 150 year sentence on a 71-year-old man as “bordering on the absurd.” Thus, the defense argued first that “[b]ased upon his health, … his family his-


111 See, e.g., United States v. Martinez-Villa, 221 Fed.Appx. 751 (10th Cir. 2007) (holding that 67-year-old’s sentence within the Guidelines range was reasonable despite age and numerous serious medical conditions); State v. Robinson, 984 So.2d 856 (La. App. 5th Cir. 2008) (holding that age will not justify downward departures); Stover, 208 Fed.Appx. 484 (holding that age was not relevant given lengthy criminal history).

112 See, e.g., United States v. Seljan, 547 F.3d 993 (9th Cir. 2008); United States v. Carter, 538 F.3d 784 (7th Cir. 2008); Beatty, 538 F.3d 8; United States v. Canania, 532 F.3d 764 (8th Cir. 2008) (requiring a showing that age render the defendant especially vulnerable in prison for age to be a mitigating factor); Long v. State, 982 So.2d 1042 (Miss. App. 2008); Twilley, 225 Fed.Appx. 817; Oliver, 225 Fed.Appx. 45.

113 See, e.g., Anderson, 517 F.3d 953 (imposing a Guidelines sentence, but refusing to impose sentence in high end of the range based on age combined with serious kidney disease).

114 See, e.g., Seljan, 547 F.3d 993 (acknowledging that the lower court had appropriately addressed the possibility that the defendant’s prison term might equate to a life sentence); Long, 982 So.2d 1042 (holding that both age and life expectancy are relevant considerations in the sentencing process); but see United States v. Holcomb, 220 Fed.Appx. 756 (9th Cir. 2007) (holding that sentence remained reasonable despite the likelihood that the defendant would die during his prison sentence).


116 Id. at 32.
tory, his life expectancy, ... we argue for a sentence of 12 years, just short, based upon the statistics that we have, of a life sentence.”\textsuperscript{117} In the alternative, the defense argued for a sentence of 15 to 20 years, reasoning that “if Mr. Madoff ever sees the light of day, in his 90s, impoverished and alone, he will have paid a terrible price. He expects ... to live out his years in prison.”\textsuperscript{118} The government in turn responded that the defense’s proposed sentence of 12 years, or alternatively 15 to 20 years, was insufficient given the gravity of the crimes. The government believed that a 12-year sentence would put “garden variety fraud case[s]” in the jurisdiction on a par with Madoff’s crimes.\textsuperscript{119} Further, the government asserted, “Not only would [a 12-year sentence] not reflect the seriousness and scope of the defendant’s crimes, but, also, it would not promote the goals of general deterrence going forward.”\textsuperscript{120}

The court ultimately imposed the government’s recommended sentence of 150 years, consistent with the Guidelines, comprised of consecutive terms of imprisonment for each of the 11 counts of conviction.\textsuperscript{121} Judge Chin, in determining the sentence, acknowledged the defense’s concern that any sentence above 12 years would likely constitute a life sentence, making a sentence of 12, or alternatively 15 to 20 years, sufficient punishment in the case. In fact, he went so far as to concede that “[i]f [the defense attorney’s] life expectancy analysis is correct, any sentence above 20 to 25 years would be largely, if not entirely, symbolic.”\textsuperscript{122} Nonetheless, Judge Chin not only was willing to accept such symbolic punishment but also deemed such symbolic punishment necessary in the case to adequately satisfy the ends of retribution, general deterrence, and “to help [the] victims in their healing process.”\textsuperscript{123} Specifically regarding the objective of retribution, Judge Chin reasoned that “the message must be sent that in a society governed by the rule of law, Mr. Madoff will get what he deserves, and that he will be punished according to his moral culpability” rather than to a numerical prediction of life expectancy.\textsuperscript{124} Under the court’s symbolic approach, Judge Chin managed to avoid directly implicating the relevance of age as a sentencing factor generally because age and life expectancy alone were undoubtedly incapable of overcoming the substantial competing considerations, including most notably the scale, duration, and sheer dollar level of the financial crimes, weighing so heavily in favor of the imposition of the Guidelines-level sentence of 150 years.

The sentencing of Anthony Marshall significantly contrasts from that of Madoff. On the basis of news accounts of the trial and sentencing, Marshall’s age and health were matters not only of legal argument but also of inescapable real-time impact in the course

\textsuperscript{117} Id. at 34.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 41; see also Government’s Sentencing Memorandum at 15-16, United States v. Madoff, No. 1:09-cr-00213-DC (S.D.N.Y. June 26, 2009) (“[I]n this case, sentencing the defendant to a term of imprisonment comparable to that regularly imposed on much smaller-dollar fraud cases would not adequately account for the magnitude of defendant’s crimes and would result in the very sentencing disparity that Section 3553(a)(6) and the Guidelines seek to prevent.”).
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 49.
\textsuperscript{122} Id. at 46-47.
\textsuperscript{123} Id. at 47-49.
\textsuperscript{124} Id. at 47.
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of the trial. According to The New York Times, Marshall was already in “frail health” at the commencement of the trial proceedings, and his condition only worsened over the course of the trial, during which delays totaling four days were necessary as a result of serious medical issues.125 In the end, Marshall was found guilty and sentenced to the statutory minimum term of one to three years for first-degree grand larceny, in addition to one-year concurrent sentences for each of the other 13 counts of conviction.126 In this case, the one- to three-year sentence imposed is slightly less than the 1.5- to 4.5-year sentence reported to have been recommended by the Assistant District Attorney in the case.127

The dispute about age and life expectancy seen in the Madoff sentencing again reappeared in Marshall’s case. According to one article, Marshall’s attorneys argued for the first-degree grand larceny conviction to be thrown out on account of Marshall’s age and health, causing the prosecution to question, “Can you at age 81 steal millions that were earmarked for charity and then at age 85 claim that you are too old to serve any jail time?”128 The defense, however, maintained in court records that “sending [Marshall] to prison would be tantamount to imposing a death sentence.”129 In support of its argument, the defense submitted statements from physicians who had treated Marshall after a quadruple bypass surgery and mini-stroke, including one statement from his neurologist concluding that “Mr. Marshall is not capable of withstanding the inevitable hardship which a jail sentence confers on a patient … and will react adversely.”130 Just how much the competing arguments on age actually influenced the court’s sentencing decision is difficult to determine on the basis of media coverage of the case.

Perhaps the significant differences between the Madoff and Marshall cases, and between Madoff and Marshall themselves, can help account for the vastly different sentences. Of course, the major factor separating the two cases are the crimes involved. The Madoff case involved federal claims of fraud allegedly committed over the course of more than 20 years,131 resulting in losses of perhaps $13 billion among families and organizations across the country,132 whereas the Marshall case, while still a tragic case involving millions of dollars, involved different crimes on a different scale. Furthermore, Marshall’s sentence may not even look so small when compared to his request for no jail time despite his conviction for first-degree grand larceny. But even granted that such considerations had much to do with the sentencing disparity, these considerations should not automatically suggest that age was not a part of the calculus contributing to Marshall’s comparatively short sentence. First of all, at his time of trial, Marshall at 85 was signifi-

128 Id.
129 Barron, supra n. 126.
130 Id.
131 Transcript of Sentencing, supra n. 115, at 40.
132 Id.
cantly older than Madoff at age 71. Not only that, but Marshall was significantly older at the time of commission of the crimes for which he was convicted, whereas Madoff’s crimes spanned an extensive period of time. Finally, older age for Marshall arguably meant something very different from that for Madoff, given the major health complications Marshall had been facing during and prior to trial. Indeed, age carried starkly different implications for Marshall than for Madoff at the times of their convictions, which may somewhat explain the sentencing variation. On the other hand, to the extent that these age-related differences do not account for the discrepancy, we might also attribute it to contrasting judicial approaches both as to the relevance of age generally and as to the weight afforded to the various objectives of criminal punishment.

Across the board, the case law appears to be heavily influenced by the Federal Sentencing Guidelines and earlier jurisprudence under the mandatory Guidelines regime. As such, age remains a factor in court thinking about sentencing, although it appears judges are generally careful to avoid giving age too much weight in the decision. Like it or not, age is one of many factors considered and will likely continue to be so. Still, the lack of solid agreement among courts and commentators renders continued discourse on the issue valuable in order to encourage more uniform and consistent sentences that better align with the philosophical goals of criminal punishment.

VIII. POSSIBLE SOLUTIONS AND RECOMMENDATIONS

Views about the degree of discretion that judges and juries should be granted in making sentencing decisions vary, and while the recent consensus tends to favor procedures that increase uniformity and determinateness in sentencing outcomes,133 the debate is an evolving and ongoing one. The growing numbers of elderly offenders introduced into the system and already among the prison population further complicates this debate. Age-related concerns, including both adequate and humane treatment of individual offenders and also the magnified costs of running a continuously expanding prison system that can accommodate offenders of all ages, must be considered in light of the competing theories to justify the punishment of criminal offenders in the prison system and through other alternatives. All this must be done in a way that properly considers the relevance or irrelevance of age, both independently and in association with health problems, without merely exacerbating bias or paternalism in the criminal justice system. Indeed, deciding on the extent to which and circumstances under which age should be relevant in future cases will not be an easy task for judges and people in the field.

Competing views on the comparative harshness of prison sentences between elderly and non-elderly offenders have been offered. On this issue, the arguments against leniency feel somewhat more persuasive. If a sentencing system were developed which required age-based determinations of whether a particular sentence would be disproportionately harsh, would such an analysis be necessary based on every other possible contingency (e.g., education level, wealth, race, gender, etc.)? Trying to compare the relative effects of a prison sentence — especially emotional impact — on cohorts of offenders might just be too dangerous a business for judges and juries. It is certainly fair and necessary to

133 Burrow, supra n. 3, at 275.
ensure that the basic medical, physical, and psychological needs of all inmates are met. This requirement may translate into special units and programs for elderly inmates if they are carefully designed and not to simply embrace paternalism but rather to protect elderly inmates’ rights and satisfy their needs. But to simply assume that a sentence will be harsher on the basis of age independent of other variables, and to respond by imposing a lighter sentence, is not an appropriate way to vindicate either the purposes of criminal punishment in our system or the special needs of the elderly.

Likewise, the costs of confining elderly offenders within the prison system may not be sufficient reason to grant widespread early releases or hinder the imposition of otherwise applicable sentences. The alternatives to extended incarceration may be both appropriate and effective under many circumstances; however, they should be considered on their own merit, not solely as cost-alleviators. Further efforts should be undertaken to implement creative new ways to improve the provision of elder care in a cost-effective manner. Nonetheless, to the extent that retribution continues to be a legitimate objective of criminal sentencing or that deterrence is undermined, expense alone should not propel leniency in the sentencing of elderly offenders.

There is probably a stronger legal and public policy basis for rejecting the consideration of life expectancy and the proportionality argument for leniency. Judges and juries probably should not be in the business of calculating life expectancies, especially considering the unpredictability of the myriad variables that may or may not contribute to life expectancy in a particular individual. Imposition of sentences based on life expectancy may also have a negative deterrent effect if potential elderly offenders view the expected level of punishment for a crime as sufficiently low to justify the risk. Finally, “pro-rating” sentences based on age and other factors relevant to life expectancy necessarily results in highly variable sentences across a group of offenders, potentially raising Fourteenth Amendment equal protection concerns. While there is some difference of opinion, courts and commentators overwhelmingly seem to agree that prison sentences need not be proportional to life expectancy.

To the extent that elderly status independent of health is a mitigating factor in sentencing across jurisdictions, it would seem an uncontroversial proposition to insist on some kind of consensus on exactly who qualifies as “elderly.” Given the wide variation in what correctional systems deem to be “elderly,” it makes sense to adopt a uniform standard that takes into account the average chronological age at which the comparative burden of incarceration significantly shifts upward (rather than merely the average age considered to be “elderly” among the population generally). This approach would be consistent with the retributive aims of criminal punishment, by ensuring that the punishment is consistent with the level of culpability considered in light of the offender’s age.

One commonly proposed alternative to the disjointed way in which the criminal justice system handles elderly offenders is the creation of an independent elderly penal

134 See Porcella, supra n. 13, at 386-87.
135 Id. at 386 (worrying that reduced sentences for elderly defendants may equate to a “get out of jail free” card).
136 Pertierra, supra n. 66, at 816.
137 Id. at 324.
system. The growth in the establishment of elder housing in the prison system and other age- or health-focused programs moves closer to such a scheme, although another version of this alternative could include an entirely separate court and sentencing system for all or some elderly offenders. While an interesting concept, there are many commentators who advocate strongly against such an approach. For example, one commentator writes that the goal should be “not to create a parallel system, but to ensure that the needs of elderly offenders are comprehensively articulated.” Perhaps, the best approach is a moderate one that seeks to identify areas in which the needs of elderly offenders are not being met and ways to meet those needs without subverting the other interests and goals of criminal punishment. This approach includes the establishment and implementation of new programs and services oriented to the elderly prison population. Those in a position to make these changes should avoid premising institutions and programs for elderly offenders on paternalistic or otherwise false or biased assumptions about people of advanced age; instead, extensive empirical data and experience should support such programs as beneficial both to the elderly offenders and the justice system on the whole. In addition, further resources should be allocated to programs outside the criminal justice system that preventatively attend to the needs of the elderly in order to preclude crime commission in the first place.

IX. CONCLUSION

Ultimately, the most important question to be answered is the most difficult: assuming that uniformity in the sentencing of like elderly offenders is something to be desired on a normative level, to what degree, if any, should elderly offenders receive the benefit of comparative leniency in criminal sentencing? It appears fundamentally unjust not to consider age at some level. For example, elderly offenders with cognitive or physical deficiencies that either contributed to commission of the crime or result in a sentence producing extreme hardship do not seem to fully deserve the criminal punishment meted out. In such cases, it seems appropriate to consider age as a mitigating factor, as advocated by commentators Burrow and Koons-Witt in the Elder Law Journal. Of course, criminal punishment aims to do more than just support retribution as an objective. Over-emphasis on age as a mitigating factor would tend to have the effect of under-detererring individual elderly offenders and the elderly population at large, not to mention that younger offenders might question the equitableness of their sentences.

Such problematic effects might most easily be avoided by thinking less about chronological age in the sentencing process and more about other individualized characteristics, including those that tend to correlate with age. Howard Eglit advocates this view in

138 E.g., the Hon. Peter M. Leavitt proposed the creation of a Senior Offender Procedure comparable to the Youth Offender Procedure already in place in the state of New York. See Leavitt, supra n. 21, at 311-312; see also Cohen, supra n. 15 at 121 (discussing the hypothetical creation of Elderly Offender and pre-Elderly Offender categories of persons subject to separate institutional and procedural arrangements).
139 Luther, supra n. 7, at 431; see also Cohen, supra n. 15, at 134 (“Efforts to create a special offender category or special benevolent court for the elderly offender would appear to be particularly dangerous to the publicly held concept of older persons and to self-image, and dangerous because of the risks of creating another treatment-rehabilitation establishment.”).
140 Burrow, supra n. 3, at 274.
his book *Elders on Trial*, offering the example of considering “low recidivism potential” rather than mere age in making the sentencing decision. He encourages the adoption of such an approach because he believes that, “by focusing on the recidivism data and not on age per se, one helps to sanitize the process and thereby to avert misuses of age in other sentencing situations[,]” whether or not recidivism as a factor may even be a “proxy for age.” Fred Cohen’s position as drawn from his piece on old age as a defense mostly mirrors that of Eglit. According to Cohen, the best approach is one of “age neutrality,” which would not allow for the consideration of age per se in asserting a defense (or for this article’s purposes, arguing for leniency during sentencing). Rather, age is only relevant insofar as health and other related considerations undermine in a significant way the utilitarian or retributive purposes of the particular sentence. This article similarly asserts that the most practical and effective method of dealing with elderly offenders is a “totality of the circumstances” approach that takes into account all individual characteristics that are legitimately relevant. In some cases, the retributive value of a punishment may rightly override consideration of age and other factors in sentencing. In others, factors that correlate with age may have a more significant role to play. In the end, age is just a number. It is the circumstances and effects of the aging process on individual offenders that have real meaning in view of what criminal punishment seeks to achieve.

141 Eglit, *supra* n. 1, at 124.
142 Cohen, *supra* n. 15, at 120.
What happens to the Correctional System When a Right to Health Care Meets Sentencing Reform

By Stacy L. Gavin

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I. INTRODUCTION

By all accounts, the United States is in the midst of a health care crisis. Costs are increasing. The number of uninsured is rising. Baby boomers are leaving the workforce to retire without enough workers to replace them. Fortunately, assuming the federal government is able to restructure spending to meet demand, most of the aging population can rely on the federal Medicare program for affordable insurance coverage.¹

One population that will not be so lucky is aging prisoners. As a rule, Medicare does not pay for services received while incarcerated.² Yet prisoners have a Constitutional right to health care guaranteed by the prohibition against cruel and unusual punishment in the Eighth Amendment,³ and someone has to pay for it. Although there is growing momentum towards making inmates pay for these services, the efficacy of those programs is uncertain,⁴ and most states continue to foot the bill for care received by persons in state correctional facilities.

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⁴ William J. Rold, Legal Considerations in the Delivery of Health Care Services in Prisons and Jails in Michael Puisis, Clinical Practice in Correctional Medicine, 527 (2d ed., Elsevier 2006). See Janice Francis-Smith, Inmate medical cost bill advances in Okla. house judiciary committee (Apr. 5, 2007),
custody. Unfortunately, as with the health care crisis on the outside, the health care crisis caused by the elderly in prison has no perfect solution. Below is a description of the problems imposed by and on the geriatric prison population and several solutions that have been proposed, followed by concerns that make each of those solutions difficult to implement and a conclusion that finds there is no universal solution to the health care burden posed by aging inmate populations.

II. THE PROBLEM

Responsibility for inmate medical care is causing a fiscal crisis in state and federal correctional system budgets. The sheer number of inmates is increasing at an unprecedented rate, causing overcrowding, which forces more funding to be required for housing,

daily care, and health care in general. As it is with the general population outside prisons, the cost of health care is a budgetary concern in the correctional system. Elderly prisoners, in particular, require an increased number of health care services, causing health care expenditures to rise disproportionately.

Florida is one of many states attempting to address this issue, and one of the few that funds ongoing research into its impact on the state. The disproportionate amount of services used by the elderly in Florida’s correctional system is illustrated in Chart 1. During 2003-2004, geriatric inmates comprised less than 11 percent of the prison population, but used up to 37 percent of services, and the disparity continues to grow. California has a similar trend with 22 percent of off-site health care expenditures going to prisoners over age 55, who account for only five percent of the total prison population.

One of the causes of the increase in the number of older prisoners is sentencing reform. Prior to the 1980s, the correctional system focused on rehabilitation. As public sentiment began to demand accountability from the criminal justice system, state and federal governments responded by reforming sentencing guidelines. Sentencing reform included truth-in-sentencing acts that required stricter adherence to lengths of sentences assigned, and stricter laws that put repeat felons in prison for life after two or three crimes, typically felonies. Many of these laws also narrowed eligibility for or completely abolished parole. Sentencing reform meant more criminals were sentenced to prison and forced to remain, leaving more inmates aging in prison. At the same time, mental health facilities were deinstitutionalized, and many of those patients eventually ended up in the correctional system as well. The number of mentally ill inmates now outnumbers the number of mentally ill patients in other institutions. The problem of prison overcrowding is more attributable to these reforms than to a general increase in crime rates.

The effect of sentencing reforms cannot be underestimated. The average sentence served under truth-in-sentencing legislation increased by 15 months. Even in Alabama,
the state with the lowest cost per prisoner at $32 per day, an additional 15 months means each prisoner costs an additional $14,600. In other states, such as California, it would cost an additional $40,000 for an average inmate. Geriatric prisoners cost much more. California estimates its older inmates cost $138,000 per year. One in 11 prisoners is serving a life sentence, an increase of 83 percent between 1992 and 2003. In fact, the number of inmates is increasing faster than the general population. Since 2000, the prison population has risen 15 percent, while the United States population has grown only 6.4 percent. During that same time period, more people were sent to prison each year than were released. If more people are being sent to prison and fewer people are being released, the number of geriatric inmates will continue to increase.

The growth in prisoners is compounded because the general population also is aging. The baby boom generation is now ages 45-65, and comprises the largest sector

18 Williams, *supra* n. 9, at 5. California spends $32,000 per year to house a non-elderly inmate. *Id.*
22 *Id.* at 2.
23 *Id.* at 3.
of the United States population. People over age 65, the age at which one is typically considered elderly in the general population, are expected to comprise 20 percent of the United States population by 2030. When a certain demographic increases, that increase is likely to be represented elsewhere. Because of its size relative to other age groups, the baby boom generation is likely to comprise a proportionally large section of the prison system. Even more alarming is that one in five elderly prisoners can be expected to die there, so the correctional system will be responsible for supplying comprehensive, end-of-life care.

The baby boomers’ burden on correctional system resources has already begun. Due to substance abuse, poverty, and lack of health care throughout their lives, incarcerated individuals age quickly. This consideration further increases the number of prisoners considered elderly, and it means chronic health issues are problematic earlier than they would be in the general population. Most literature defines “elderly” to begin at age 50 or 55 for prisoners, so the massive baby boomer generation should already be showing in prison demographics, and, in fact, it is. The prison population over age 55 has increased dramatically over the past 20 years, from 9,000 in 1985 to 14,000 in 1998 to 74,000 in 2007. When the defining age is lowered to 50, as in Chart 2, the increase is more prominent. Including inmates over 50 in the geriatric count pushes the elderly population in 2007 to 150,000 prisoners.

The problem of supporting a greater number of prisoners is compounded by the increasing age of those prisoners and its corresponding increase in the need for health services. In addition to requiring more resources for traditional room, board, and security, the increase in prisoners requires additional health care expenditures. The Supreme Court, in an often cited landmark case, Estelle v. Gamble, made medical care a Constitutional right guaranteed to prisoners. The Court reiterated its previous holding in Gregg v. Geor-

25 Julie Meyer, Census 2000 Brief: Age (Oct. 2001), http://www.census.gov/prod/2001pubs/c2kbr01-12. pdf (accessed Apr. 27, 2009). In 2000, the baby boomers comprised nearly 30 percent of the population, or 83 million people, and they are the fastest growing age groups. The 2000 US census showed a 55 percent increase in 50-54-year-olds and a 45 percent increase in 45-49-year-olds since 1990. Id.
26 Williams, supra n. 9, at 4. Every day, nearly 8,000 people turn 60. Id.
28 Williams, supra n. 9, at 1-2.
29 Curtin, supra n. 3.
32 West, supra n. 21 at 19.
33 Id. The total number of prisoners in 2007 was 1,598,316, so the geriatric population was nearly 10 percent of the total prison population in 2007.
that held “deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment.”

This right to health care arises because prisoners have no other option than to rely on their keepers for medical services. By ignoring a prisoner’s health problem, a prison keeper would effectively be allowing the further infliction of that pain.

Because health care is a Constitutional right, as the inmate population increases, the costs of health care increases. Because the elderly use a disproportionate amount of health care resources, the increase in geriatric prisoners will further compound the problem. The rulings in class action suits can impose further liability on the correctional system to provide adequate health care, and these suits are primarily brought for health care claims.

As a result of class action suits, 40 states have been ordered to limit prison population and/or improve conditions. Many of the deficiencies are the result of a lack of trained personnel, incomplete medical records, and the absence of necessary facilities and resources. In addition, courts may require specific steps be taken to improve the system. For example, prison officials may be replaced or time restrictions may be imposed on providing medical care. Alabama, for example, one of the worst offenders, had its officials replaced and now spends $50 million per year, or one-fifth of its annual corrections budget, to maintain its health services at the Constitutional standard.

Compared to class action suits, health care claims encompass a small portion of individual inmate suits. On a much smaller scale than class actions, litigation filed by individual prisoners also can be long and costly. The average settlement in individual suits addressing health care issues is around $134,000.

In addition to the cost of care and litigation regarding care, the actual provision of health care to geriatric inmates is an issue. Access can be problematic. Medical care in prison is modeled after military medical care, which may work for a young, healthy population with acute illnesses that occasionally require a visit to the infirmary. It is not the ideal method, however, to deliver the consistency in care needed for chronic and terminal

36 Estelle v. Gamble, 429 U.S. at 104.
37 Id. at 103.
38 Rold, supra n. 4, at 521.
39 Rold, supra n. 4, at 521, see also The Prison Litigation Reform Act, 18 USCS § 3626 (1996) for an effort to curb federal courts’ authority in class action suits against the correctional system, especially regarding court orders to decrease prison populations. Under the Act, courts can only provide population ceilings and other injunctive relief for crowding when it finds the overcrowding “causes the infliction of cruel and unusual punishment.” In addition, injunctive relief may be terminated “in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”
40 Id. at 524.
41 Id. at 521.
42 Id.
43 Crowder, supra n. 17.
44 Id.
45 Rold, supra n. 4, at 521.
46 Curtin, supra n. 3, at 476.
illnesses. Prison health care facilities traditionally do not house specialists or nursing home beds, so they cannot adequately provide many types of specialty health services, and a failure to provide care as ordered by a physician can constitute deliberate indifference. Instead, prisoners who need these kinds of care must be transported by armed guard to other facilities. In the case of elderly patients with chronic conditions, transport may be needed on a regular basis, sometimes several times a week. These services require correctional systems to pay for the outside care, as well as the cost of transportation with armed guards.

Furthermore, prisons were not made to house the elderly, so additional accommodations are necessary to make housing this population feasible. Facilities may need ramps to make them accessible by wheelchairs and walkers, showers may need lifts, and phones may need amplification. Sometimes these additional requirements may conflict with already existing processes. For example, elderly residents may need assistance walking, so canes and walkers, which are otherwise forbidden as weapons, must be allowed. Accommodations such as these are also mandated by the Americans with Disabilities Act, which requires state institutions to make reasonable accommodations for persons with disabilities. The Supreme Court confirmed that prisons are no exception to this requirement and must accommodate prisoners with disabilities, including the elderly, who need assistance with activities of daily living.

Staffing concerns also arise as the number of elderly inmates increases. Because elderly prisoners are much less violent and less likely to attempt elaborate escapes, they often require a lower level of security. Although they require fewer guards, the prison staff working with this population needs specialized training. Geriatric prisoners, particularly those in prison for the first time, may have a more difficult time adjusting to prison because they have an established life routine on the outside. Typical geriatric inmates suffer from an average of three chronic diseases, which may include conditions like cardiovascular disease and diabetes, and up to 20 percent suffer from mental diseases, such as Alzheimer’s disease and depression, as well. Staff must be trained properly to identify and treat ongoing physical and mental diseases that may not be apparent to the untrained

47 Id.
48 Ornduff, supra n. 30, at 178.
49 Todaro v. Ward, 565 F.2d 48 (2d Cir. 1977). Inmates brought a class action suit alleging the delay and denial of necessary medical care. The Second Circuit Court of Appeals affirmed the District Court’s finding of deliberate indifference and upheld its order requiring the correctional system to improve conditions.
50 Rold, supra n. 4, at 524; Ornduff, supra n. 30, at 178.
51 Ornduff, supra n. 30, at 185.
52 Id.
53 Neal v. Brown, 1991 U.S. Dist. LEXIS 11777 (W.D. Mich. Aug. 16, 1991). The Court issued a summary judgment in the prison’s favor where the prison removed an inmate’s cane because it was considered dangerous contraband after it was no longer needed for medical purposes.
54 Curran, supra n. 6, at 254.
55 Id. at 256.
56 Id. at 261.
57 Curtin, supra n. 3, at 494.
58 Id. at 484.
eye. In addition, prisoners must have access to appropriate specialists and treatment options, whether those are provided by the prison or off-site.

Further mental illness may be caused from the stress of being with the general prison population, which is comprised primarily of younger, stronger inmates, who often prey upon the elderly. To cope, the elderly may keep to themselves and away from potentially threatening interactive situations. The programming structure of prisons actually encourages this withdrawal. Programs are often aimed at rehabilitating younger inmates, and older persons do not feel comfortable participating.

The cost of housing an elderly prisoner is three times the national average of per prisoner costs, and much of the difference is attributed to additional health care needs. As stated previously, the increase in elderly prisoners corresponds to a similar increase in age in the overall population and stricter sentencing. Surprisingly, the growth in geriatric prisoners is also due to the health care received behind bars. Prisoners are the only population in the United States with a constitutionally guaranteed right to medical care. Due to improved access to care, prisoners are leading longer lives, and mortality rates are reported below those of the general population.

III. PROPOSED SOLUTIONS

Before considering solutions that have been proposed, one should be familiar with the profiles of the elderly inmate. Different profiles may have different needs, which further complicates finding a solution to the increasing elderly inmate population. Ronald Aday, who has made a career of studying the topic, places geriatric inmates into four categories.

First, an elderly inmate may be a person who was sentenced at a young age to life in prison. These inmates will not have adjustment issues. They may no longer have a support network or assets outside of prison. Their have an established routine based on prison life.

Another type of elderly inmate, similar to the first, is an inmate sentenced during middle age who is in prison when he turns 55, but who is not serving a life sentence. These prisoners are distinguished from the lifers described in the first category because their motivation to behave and to learn reentry skills is different.

The third type is a recidivist. These inmates are repeat offenders. Like inmates serving long sentences, recidivists are unlikely to have adjustment problems in prison. However, they may be more likely to have a routine and support network established on the outside.

Finally, an elderly inmate may be a first-time offender. First-time offenders have

60 Curran, supra, n. 6, at 248.
61 Ornduff, supra n. 30, at 178.
62 Id. at 184.
63 Id.
64 Curtin, supra n. 3, at 479.
65 Id. at 475.
67 Williams, supra n. 9, at 6-7.
68 Ronald H. Aday, Aging Prisoners: Crisis in American Corrections 18 (Praeger, 2003).
lived their lives on the outside and are sentenced to prison for the first time at an advanced age. These prisoners are likely to have problems adjusting to being institutionalized and are more likely to be victimized by other inmates. They are most likely to have left an established routine and network on the outside.

Prison is hard on all inmates, but disproportionately so for the elderly, who have higher levels of anxiety and depression, and who may constantly fear for their safety among younger, healthier, stronger criminals. An elderly individual may require specialized treatment, programming, and equipment. This specialized attention provided for a select few inmates may not be accepted among the general population. These services, which would be difficult to provide even in ideal prison settings, are further complicated because chronic overcrowding limits resources and allows elderly prisoners to get lost in the shuffle. Because their necessary services extend beyond the standard care that is provided to the general population, and because geriatric prisoners are increasing at a rate too large to make case-by-case accommodations feasible, broad reform is necessary.

Several solutions have been proposed to diminish the financial effect of the increase in geriatric inmates. Different policies are being implemented throughout the nation to combat the issues. These solutions fall into two broad categories, early release and alternative facilities, each with some variation. Unfortunately, though different solutions are being attempted, little follow-up data is available to evaluate their comparative success, making it difficult to formulate a model approach that can be implemented universally.

A. Early Release

Support for early release programs comes from the evidence that less than two percent of elderly inmates will recidivate. Although that number is estimated to be higher by other sources, those estimates remain below those for other age groups, whose recidivism rates can be up to 70 percent. Research shows the best predictor of recidivism is age not only because propensity to commit crime decreases with age, but also because a career in crime tends to end after a couple of crimes and 10 years. Two variations of early release — medical parole and traditional parole that uses age as a consideration — are discussed here.

One form of early release is medical parole, also commonly called compassionate release. Under these programs, prisoners are released to die. Generally, medical parole is not available to inmates convicted of violent crimes or felonies. Inmates must be

69 Anno, supra n. 24, at 10.
70 Id.
71 Ornduff, supra n. 30, at 174.
72 Corwin, supra n. 31, at 687.
73 Williams, supra n. 9. Virginia reported 24 percent recidivism among geriatric inmates. Missouri reported 18 percent. See Cal. Assembly 1965, 2007-2008 Reg. Sess. 1, wherein the preamble cites a recidivism rate of two percent to 10 percent in California.
74 Corwin, supra n. 31 at 688.
76 Frederick L. Altice et al., HIV in the Correctional Facility in Michael Puisis, Clinical Practice in Correctional Medicine 198 (2d ed., Mosby 2006).
diagnosed with a terminal illness with a prognosis of less than six months to one year to live,\textsuperscript{77} and they have to be incapable of committing another crime.\textsuperscript{78} The benefit of medical parole is that it saves the prison system the cost of care during those last critical months, which evidence shows are the most expensive months in terms of health care.\textsuperscript{79} In addition, it allows a prisoner to have a say in his death — where he dies, if he has any last wishes, who is present, etc. — which he would likely be denied while incarcerated.\textsuperscript{80}

In a survey by the Southern Legislative Conference, states that have abolished parole and do not have an exception for medical reasons, such as Mississippi and West Virginia, continue to face significant health care burdens, whereas states that reported use of medical parole, such as Georgia, attested to having achieved cost-savings benefits.\textsuperscript{81} A report issued by the U.S. Department of Justice states that medical parole is legally available in most states, but not granted enough to combat the effect of increased numbers of geriatric inmates.\textsuperscript{82} This could be caused by the narrowness of its applicability. In North Carolina, for instance, medical parole is available only to those who are incapacitated, and parolees are required to show proof of their ability to retain their own medical care.\textsuperscript{83} Because the inmates must be at least 65 years old to qualify, many inmates could qualify for Medicare and because of their financial situation, they may qualify for Medicaid as well. While the requirement of incapacity may be the greater barrier to applying for medical parole in North Carolina, a requirement to finance medical care could be the bigger problem in states that define the elderly as those people below age 65. Either way, the eligibility criteria make qualifying for medical parole difficult.

Because medical parole requires many levels of review and adherence to strict eligibility criteria, its usefulness to combat a widespread problem is questionable. Even in California, which grants the highest proportion of medical parole requests, prisons remain at double their maximum capacity.\textsuperscript{84} Citing a minimum estimated savings of $19.9 million, Assembly Bill 1965 was proposed in California to expand medical parole to non-violent elderly offenders.\textsuperscript{85} The bill would allow release to prisoners who are over age 55 and who have been diagnosed with a chronic disease that requires ongoing medical care.\textsuperscript{86} In doing so, it would expand the use of medical parole from terminal to chronic conditions. It also would reduce the minimum sentence served for felonies from 80 percent to 50 percent.\textsuperscript{87} The prisoner would remain on supervised parole and could be taken back to

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\textsuperscript{77} Corwin,\textit{ supra} n. 31, at 699.
\textsuperscript{78} Altice,\textit{ supra} n. 76.
\textsuperscript{80} Ornduff,\textit{ supra} n. 30, at 191.
\textsuperscript{81} Williams,\textit{ supra} n. 9, at 18 and 27.
\textsuperscript{82} Anno,\textit{ supra} n. 24, at 53.
\textsuperscript{84} Anno,\textit{ supra} n. 24, at 53. California grants 35 percent of requests for compassionate release.
\textsuperscript{85} Cal. Assembly 1965, 2007-2008 Reg. Sess. 1 (citing a Cal. Dept. of Corrections study that estimated marginal cost savings, which provide a more conservative estimate than average cost savings).
\textsuperscript{86} \textit{Id}.
\end{flushleft}
prison for any violations. The bill received strong opposition for giving older criminals a free pass, since so many older people suffer from at least one chronic condition.

California’s Assembly Bill 1965 was tabled during the 2008 session, but a recent federal court decision may hasten its vote. In Coleman v. Schwarzenegger, the District Court for the Northern District of California said California’s prison system is not providing the level of health care required under the Eighth Amendment, and overcrowding is the primary cause of the violations. Pending further evaluation of the evidence, the court expressed its intent to order a prisoner release.

The California bill also illustrates the second form of early release, which would allow prisoners to be paroled before their sentence ended, similar to what was permitted under the traditional parole model but limited to those serving long sentences and growing old in prison. Virginia is one state that has passed legislation to offer this relief from strict adherence to sentences. In 1995, Virginia passed truth-in-sentencing legislation that eliminated parole for anyone convicted after January 1, 1995. Due to concerns about overcrowding, Virginia amended the law in 2001 to allow parole to elderly prisoners who had served a minimum of five to 10 years of their sentence. As a result, Virginia had one of the lowest increases of geriatric inmates among southern states between 1997 and 2006. Florida allows parole based on the traditional model where age may be a consideration, but the major determinants are an individual’s condition, the nature of the crime and the amount of time already served. Other states, such as Arizona, offer parole on a limited basis under an exception in their truth-in-sentencing laws, usually with a requirement that the prisoner not be convicted of a violent crime and serve a minimum of 85 percent of his sentence. Even after expanding parole eligibility, these states continue to have problems with overcrowding and rising health care expenditures.

The detrimental effects that overcrowding has on everyone involved in the correctional system are well-known, and several groups advocate for reform. The National Center for Institutions and Alternatives is investing resources in support of programs that consider age and time served, as well as risk to the community, in granting parole to the elderly on a case-by-case basis. Another idea that has been suggested is to allow parole

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91 Id. at 34.
94 Williams, supra n. 9, at 9. Florida realized an increase of 122 percent in geriatric prisoners, compared to an average of 136 percent among the 16 southern states surveyed. It should be noted that Virginia defines elderly as 65 years of age, so their increase would not be comparable to states defining elderly at a lower age.
95 Id. at 12.
97 Corwin, supra n. 31, at 701.
for elderly prisoners who have served at least one-third of their sentences.\textsuperscript{98} The Federal Sentencing Guidelines, which are alleged to have increased the federal prison population by over 300 percent, currently do not provide for age considerations on the sentencing side of the equation.\textsuperscript{99} Instead, they require sentencing based on the offense and the offender’s prior criminal history, allowing consideration for age only in cases of “extraordinary circumstances,” which must be specifically stated in the court’s findings.\textsuperscript{100} The Coalition for Federal Sentencing Reform seeks a more routine exception to allow parole for elderly prisoners.\textsuperscript{101} If sentencing policy does not allow for routine exceptions made for the elderly, it may be questioned whether parole policy should.

Many elderly inmates have no savings or job prospects upon release and may have lost contact with their support system of family and friends, even if they had one prior to becoming incarcerated.\textsuperscript{102} Releasing elderly prisoners, unemployed, homeless, and without a support system, sets them up for failure. Where parole is granted, prisoners are supervised upon their release, but where parole is not permitted, they are released without condition, which makes the transition even more difficult.\textsuperscript{103} To combat this problem, some programs assist released inmates with job searches and housing until they have adjusted back into free society.\textsuperscript{104} Under early release programs that use careful screening processes and require an inmate to have a place to go upon release, recidivism rates are reported close to zero.\textsuperscript{105}

The major benefit of early release programs is the cost savings to the correctional system. However, if a prisoner is released without a job or place to live, responsibility for his support may still be placed upon the state.\textsuperscript{106} Responsibility for health care, which is the major cost prohibitor in keeping elderly prisoners, may continue to fall partially upon the state under state-sponsored Medicaid programs, but the federal government contributes funds to these programs as well.\textsuperscript{107} Some newly released inmates over age 65 will qualify for Medicare, which is fully paid for by the federal government.\textsuperscript{108} In addition to saving state dollars, these programs are well-established and likely to be a more efficient

\textsuperscript{98} Mauer, \textit{supra} n. 20, at 31.
\textsuperscript{99} Corwin, \textit{supra} n. 31, at 705-6.
\textsuperscript{101} Williams, \textit{supra} n. 9, at 5.
\textsuperscript{102} Curtin, \textit{supra} n. 3, at 497 (discussing the Guidelines).
\textsuperscript{103} Crowder, \textit{supra} n. 17.
\textsuperscript{104} \textit{Public Health Behind Bars, supra} n. 8, at 69. The Senior Ex-Offenders Program in San Francisco offers services to released prisoners, which include assistance applying for Medicare and training in transitional skills. See U.S. Department of Justice, Office of Justice Programs, \textit{Learn About Reentry}, http://www.reentry.gov/learn.html (last accessed Apr. 30, 2009) for a discussion of federal programs available to prepare inmates for release and assist them after release.
\textsuperscript{105} Curtin, \textit{supra} n. 3, at 498.
\textsuperscript{106} \textit{Id.} at 477.
means of providing health care. Transactional costs, including the expense of providing services in prisons or transporting prisoners off-site, would be eliminated, and the federal government would subsidize care for released inmates found eligible for Medicare, a subsidy that is unavailable for inmates. Generally, Medicare requires ten years of work history. Though it need not be continuous or full-time employment, the work requirement is likely to disqualify some elderly criminals. No age specific data was found on the percentage of prisoners that would be ineligible for Medicare upon release, which makes calculating actual savings difficult. If an individual was already receiving Medicare benefits, he will be eligible to resume benefits upon his release.

A longitudinal study of 400 male prisoners released in Chicago, Ill., is the closest indication of enrollment in government insurance programs. In the study, two percent enrolled in Medicare, and another eight percent enrolled in Medicaid. These data show that some prisoners are eligible for government insurance programs, so their release from prison would shift their health care costs away from the correctional system. Though the study is not right on point, its application here should be read broadly for two reasons. First, the sample population had an average age of 34. It would be reasonable to assume that an older sample would have a much higher rate of enrollment in Medicare. Second, the study reported enrollment, not eligibility. It gives no indication of the potential eligibility of the 80 percent who reported being uninsured. Other barriers could have been present that reduced the number who actually enroll. Although the precise extent cannot be determined, the study does show that part of the health care burden would be shifted to a governmental division that specialized in health care, releasing funds for duties more closely related to the correctional systems’ primary functions of punishment and rehabilitation.

A reduction in health service utilization further supports continuing treatment outside the correctional setting. Although the rates vary depending on the presence of chronic diseases, an elderly prisoner averages two dozen medical visits per year. The average non-incarcerated elderly person averages about one-half this number of visits. Even if health care expenses for a released prisoner continued to fall upon the state, the decrease in use of those services, combined with the elimination of transactional costs, would still add up to significant savings. The U.S. Department of Justice reported an estimated $175 million would be saved in the first year following release of nonviolent elderly prisoners.

109 Corwin, supra n. 31, at 689.
110 Haley, supra n. 107.
112 Mallik-Kane, supra n. 108.
113 Id. Ten percent enrolled in private insurance plans.
114 Id. at 1.
115 Corwin, supra n. 31, at 688.
116 Sarah Maaten et al., Chronic Disease Risk Factors Associated with Health Service Use in the Elderly, 8 BMC Health Serv Res. 237 (Nov. 15, 2008), http://www.biomedcentral.com/1472-6963/8/237 (accessed May 11, 2010).
117 Corwin, supra n. 31, at 714.
The efficacy of medical parole in reducing the health care burden that geriatric inmates place on correctional systems poses several challenges. It is available in every state, but prisoners may not know it is available or how to request it, and, even if they do, few states grant it on a routine basis. Another concern is that its criteria are so narrow that it is not available to enough individuals to noticeably reduce the number of incarcerated elderly. If medical parole cannot or is not used, it will not effectively reduce the burden of the elderly on prison resources. To be more effective, states would have to simplify the proceedings and be authorized by law to grant parole more liberally. Yet politicians may be hesitant to propose an increase in medical parole utilization for fear of offending voters who feel criminals should remain in prison as punishment, regardless of the financial cost.

In addition, while end-of-life care is the most expensive in terms of health care, the most expensive patients are those for whom the outcome is unknown. Even with many medical interventions, those patients may or may not survive. Either way, last minute interventions can be quite costly and must be provided in a prison setting when not providing care can open the door to liability for deliberate indifference. On the outside, patients and physicians have more choice in what care is sought and provided, and voluntary refusal of treatment is easier to achieve. On the other hand, on the outside, individuals do not have a Constitutional right to health care. In fact, under the current health care system, it is questionable whether a person has any right to health care. Under the circumstances, an argument can be made that released inmates would not seek treatment due to a lack of insurance or access, and one can debate whether that is indeed a voluntary choice. Regardless, society has not yet made health care a guaranteed right for anyone else. So, while releasing elderly prisoners could detrimentally reduce their access to health services, it would simply place them on a level equal to the rest of society.

Death is difficult to foresee, so parole based on a diagnosis of six months to live is difficult to implement with accuracy. The more traditional model avoids this objection. However, the goal of medical parole is to allow an elderly individual to die in the comfort of home with the presence of family. Following this objective, any expansion of eligibility to inmates not on their death bed, whether intended or not, would defeat the goals of offering medical parole. In states that support this narrow definition of medical parole, it is revoked if an inmate’s condition improves.

B. Alternative Facilities

Prisons were not designed for housing the elderly; they were designed for the young and healthy. As noted previously, the Americans with Disabilities Act holds prisons to the standards set forth in it. Thus, prisons must make reasonable accommodations for

118 Rold, supra n. 4, at 530; Anno, supra n. 24, at 53.
119 Ornduff, supra n. 30, at 188.
120 Luce, supra n. 79, at 752.
121 See Rold, supra n. 4, at 527 (stating that all patients have a right to refuse treatment, but the prison setting requires a higher standard to show the refusal was truly voluntary and informed).
122 Luce, supra n. 79, at 752.
123 Ornduff, supra n. 30, at 193.
124 Anno, supra n. 24, at 10.
prisoners with a disability. Many disabilities could be present in an elderly person that would require accommodation. For example, a person who cannot walk long distances may need a wheelchair to get to the cafeteria in a prison, or a person who cannot climb may need a lower bunk. In addition, as discussed above, necessary medical care is required under the Eighth Amendment. The broad range of services a prison may need to provide to meet this requirement include dialysis, heart surgery, or even hospice care. From bath rails to lighter work loads to health care for chronic diseases, correctional facilities must be able to meet a continuum of needs for the growing population of elderly they house. A variety of facility arrangements have been proposed as solutions to the increasing geriatric prison population.

The alternative that requires the least up-front cost and commitment is modifying current correctional facilities to make them more navigable by elderly inmates. This method is the one that has been followed in most prisons in the past because when the number of elderly prisoners is small, reacting to their individual needs is not as burdensome. An additional problem arises in the current situation because chronic overcrowding throughout the system limits the spatial and financial resources available to accommodate individuals.

One alternative to traditional correctional facilities is house arrest. Under a house arrest arrangement, prisoners wear an electronic bracelet that notifies authorities if the prisoner leaves a predefined perimeter. It is similar to supervised parole, except house arrest provides much closer supervision. The benefit of keeping prisoners in their homes is that the homes should already be properly equipped. However, this benefit will not be realized if a prisoner has grown old while in prison. A house arrest agreement can stipulate that prisoners become self-supporting and accountable for all of their own needs, including food and health care, thereby releasing the correctional system from responsibility.

The Federal Bureau of Prisons recently implemented a pilot program, authorized under the Second Chance Act, and entitled, “Elderly Offender Home Detention Pilot Program.” Generally, inmates allowed in home detention have a responsibility to provide for their own medical and other care. The inmates also pay 25 percent of any income towards administrative and monitoring costs. Since the pilot program just ended in 2010, data is not yet available on the efficacy of federal home detention for the elderly, but, with the inmate paying for his own support and paying a fee to defray administrative costs, it is difficult to see how this program could not save money, at least for the correctional system.

As the population has expanded, however, some state prisons have taken more proactive steps to address the needs of elderly prisoners, reduce health care expenditures and decrease overcrowding. At least 15 states, including Minnesota, Pennsylvania, and

125 Estelle, 429 U.S. at 104.
126 Williams, supra n. 9, at 7.
130 Id.
131 Corwin, supra n. 31, at 698; see Williams, supra n. 9, at 7.
Ohio, have congregated elderly inmates in one centralized geriatric prison, by either converting an existing facility or building a new one. Because people age differently, inmates are typically kept in the general population until they specifically require geriatric facilities, regardless of their age. These separate facilities may have access to a variety of services specifically for the population served, including special work assignments and programming, 24-hour access to nursing staff, or handicap-accessible bathrooms.

Whether modifying an existing facility or building a new facility from scratch, budget restraints make it difficult for a state correctional system to fulfill the whole spectrum of health service needs. As a compromise, many states have adopted specialized geriatric units or wings within existing facilities throughout the state, not just in one centralized location. Because of the cost associated with providing comprehensive care for only a few patients at a time, these wings are unlikely to be able to provide the same level of specialized care as a dedicated facility, but they are more convenient to address the needs of smaller populations of elderly inmates who are dispersed throughout the system.

As the state with the third largest population of incarcerated elders, Florida is an example illustrative of the continuum of geriatric accommodations. At River Junction Work Camp, 80 percent of the inmates are over age 50 and 100 percent are over 40. There, elderly inmates who have no major medical issues can live separated from the general population while remaining independent. The largest concentrations of geriatric inmates in the general population reside in three prison facilities. Two of the facilities, along with the facilities with lower concentrations of older prisoners, accommodate geriatric needs on a case-by-case basis, modifying facilities as the need arises. The third provides separate housing and programming. As with all of Florida’s facilities, qualification is based on medical need, not just age. This arrangement leaves Florida without the equipment and personnel necessary to fulfill all health care obligations. For some of the remaining services, outside providers are contracted to provide services on-site; for others, prisoners are transported off-site. Nearly $80 billion was spent on contracted and outside health care services. Though comprising only 13 percent of the prison population, geriatric prisoners accounted for just over one-third of outside health care spending.

As an alternative to designing their own elder-friendly facilities, some states have

132 Anno, supra n. 24, at 8.
133 Id. at 30.
134 Id. at 31.
136 CMA, supra n. 27, at 5.
138 CMA, supra n. 27, at 10.
139 Id.
140 Id.
141 Id. at 10-11.
142 Id. at 15.
143 Id.
144 Id. at 16.
out-sourced their responsibility for incarcerated elders.\textsuperscript{145} Private companies run what are essentially high security nursing homes for state correctional systems.\textsuperscript{146} Wisconsin’s elderly inmate population tripled between 1995 and 2005, largely due to the elimination of parole for those sentenced prior to 1999.\textsuperscript{147} In the seven years after the legislation, Wisconsin’s costs attributed to health care more than tripled to $87.6 million.\textsuperscript{148} As a result, the state is considering releasing low-risk prisoners directly into community nursing homes.\textsuperscript{149}

Despite foreseeable cost savings and improved quality of care, congregate facilities for the elderly, whether operated by prison officials or a private organization, face criticism.\textsuperscript{150} Some critics hesitate to place convicted criminals, no matter their age or condition, into nursing homes filled with vulnerable individuals, as they believe it could lead to detrimental or unforeseen consequences.\textsuperscript{151} This concern is not unfounded, as the vast majority of elderly inmates are male, and, although most are repeat drug and other non-violent offenders, many others have been incarcerated for sexual and/or violent crimes.\textsuperscript{152} One cannot know with certainty how they would react in a nursing home setting, especially if they are placed there as a result of debilitating mental disease, such as dementia. Furthermore, with Medicaid and Medicare budget cuts, public nursing homes may not have beds available for geriatric inmates. Private nursing homes do not offer a better option. Some states, like Pennsylvania, have found private nursing homes are unwilling to admit prisoners, making it a difficult solution to implement.\textsuperscript{153} Other states, such as Illinois, have mandatory reporting laws that require nursing homes to disclose registered sex offenders upon request to residents, residents’ guardians, and employees.\textsuperscript{154} Armed with that knowledge, it is possible some residents and employees would choose not to stay at that nursing home. That possibility may be enough to make private nursing homes refuse admission to elderly inmates.

Nursing homes are not the only skeptical ones. Some prison officials disagree with having separate facilities for fear of detrimental effects on the inmates themselves. These critics fear elderly inmates will become even more isolated and inactive, as they are removed from daily schedules and activities available to the general population.\textsuperscript{155} In addition, the general prison population will lose the benefit of having older generations, who may provide guidance to and a soothing effect on younger prisoners.\textsuperscript{156}

\textsuperscript{145} Corwin, supra n. 31, at 700.
\textsuperscript{146} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Anno, supra n. 24, at 50-51.
\textsuperscript{151} Purvis, supra n. 147; Curtin, supra n. 3, at 477.
\textsuperscript{152} CMA, supra n. 27, at 19.
\textsuperscript{153} Haley, supra n. 107, at ¶ 5.
\textsuperscript{155} Anno, supra n. 24, at 51.
\textsuperscript{156} Id.
crimination and special treatment have also been raised.\textsuperscript{157} After all, prisons are meant to be punishment, and the general public, as well as the general prison population, may view special facilities as a luxury that should not be provided to any convicted criminals, regardless of the cost savings for the taxpayer.\textsuperscript{158}

**IV. ADDITIONAL AREAS OF RESEARCH**

None of these options specifically addresses staff needs. Regardless of the reform option selected, the correctional system must invest in training. Staff must be specially trained to recognize the unique health needs of the elderly. Some facilities may need to hire health care staff to specialize in geriatric care. In addition, security must be trained to handle the special vulnerabilities of elderly inmates in the general population.\textsuperscript{159} Unfortunately, research, as illustrated in Chart 3, shows most facilities do not provide training to work with the elderly, ill and disabled.\textsuperscript{160}

Furthermore, none of the solutions discussed here address the policies that are responsible for the increase in geriatric prisoners. As mentioned previously, much of the increase in geriatric prisoners has been attributed to stricter sentencing guidelines. Policy reform has been suggested to curb the length of sentences and/or use alternatives to prison when sentencing elderly defendants. Although these topics deserve further research, they will not address the increased geriatric population already incarcerated and are beyond the scope of this paper.

**V. CONCLUSION**

The elderly population is increasing, draining the health care budget and resources of an already overcrowded correctional system, and it continues to be the fastest-growing population, which means the problem is only going to get worse. Inmates have a Constitutional right to appropriate health care under the Eighth Amendment, and the corresponding responsibility for providing health care falls upon the correctional facilities that house the inmates. The range of alternative solutions discussed here raises concerns about effectiveness, practicality, and feasibility. It is unlikely that any one solution will be a universal cure to prison overcrowding and its implications to older inmates. These concerns must be addressed by each individual correctional system to balance its resources against the health and wellness needs of inmates and to facilitate an appropriate solution. Due to widespread concerns for public safety and demands for criminal retribution, which further hinder policy reform, correctional systems may be limited in the options available to reduce the number of elderly already in incarceration. A better option may be to reduce costs by congregating the elderly in facilities to maximize efficiency of services. Unfortunately, this option may not be feasible for some states because of the up-front costs of

\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} CMA, supra n. 27, at 21.
\textsuperscript{160} Anno, supra n. 24, at 99-100.
conversion or because the composition of inmates in that particular state does not warrant such a great expenditure. Additionally, with the judicial system pushing prisons to reduce inmate populations, prison demographics could shift in the future, making centralized facilities unnecessary. Although the current trend does not suggest this change, it should be considered before a system invests in widespread modifications or builds new facilities.
Politicians pit funding generous pensions for government workers against funding education for young people. Medical ethicists question whether to earmark limited transplant resources for the young and relatively strong, rather than for older persons who may have been on the waiting list for years. U.S. government budget cutters are gutting programs for the old to protect programs for the young, and vice versa. And in a natural disaster such as Japan’s, the ocean of grief is filled disproportionately with elders too fragile to escape harm’s way or the deprivation that follows. These headline-grabbing, intergenerational conflicts reinforce a romanticized view of aging — the wisdom of the aged to be embraced versus the physical and mental disintegration to be pitied — presented in the popular media.

Author Ted Fishman avoids such platitudes. Instead, Fishman’s exposé of the realities of our aging world, Shock of Gray, poses the questions: Will a world dominated by the aged inevitably disadvantage the young; and can an economic system survive if the young feel marginalized, beholden to, and burdened by the enormous needs of their elders? Fishman’s central thesis sounds simplistic but the implications are enormous. Given the demographic explosion of the elderly population, the nation that figures out how to provide quality of life and adequate medical care for an increasingly older population without breaking the Treasury will win the global economic sweepstakes. The bad news: Nobody has figured out yet how to do this. The good news: An aging society is not all bad news.

Fortunately, this is not just another book about the tug of war between the old and the young. Fishman does not examine the minutiae of fiscal policy, offer policy recommendations, or take a woe-is-me, all-is-lost approach. In the voice of a narrative journalist, he examines diverse societies that have struggled and developed ways to cope with the aging demographic. If there is any comfort to be derived from Fishman’s work, it comes from the knowledge that there is no corner of the world, no economic system, no social sphere, no class that is immune from the demographic push-pull. Fishman highlights this struggle by exploring its effect on disparate communities around the world. He shows us the happy or at least somewhat successful (Sarasota, Fla.), the less successful (Rockford, Ill.), the somewhat content but concerned (Spain), the coping but unhappy (Japan), and the megalith in denial of the problem and overtly hostile to its aging population (China). He looks at the impact on families, the workplace, the economy, religion and religious...

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practices, charities, government, and education. No region is perfect, but the picture Fishman paints suggests that society as a whole benefits from caring for its elders, allowing them to unlock their economic potential and contribute in many other ways.

I. CHINA AND JAPAN: GENERATIONAL TENSIONS

Fishman argues that China’s booming economy is a house of cards predicated in part on attracting energetic young people, willing to work on the cheap, from rural areas into city factories. To make room for these younger workers, the government shifts older workers out of jobs and back to the countryside, where there are few jobs, even fewer services, extremely limited access to health care and, worst of all, families who are reluctant caregivers. China’s “one child” policy should be renamed the “six elders per child” policy since, Fishman notes, on average, each young worker has six older family members to support — mother, father, and two sets of grandparents. The most rapidly aging country in the world is on a collision course with its future. As younger workers begin to push for better wages and working conditions — could civil rights and democratic reform be far behind?

Chinese youth may soon become a problem, not a refuge, for a government wishing to avoid its obligations to elders. Fishman suggests that China may grow old before it grows rich. At the same time, the country’s long tradition of veneration of its elders is going the way of their ancestral homes, which are being bulldozed to make way for Beijing’s architectural wonders and homes for the young, wealthy, well-educated, and well-employed. (Interestingly, the Chinese building boom is affording older architects from the United States, Europe, and Japan rewarding work and a chance to rejuvenate flagging careers.)

In neighboring Japan, “land of the missing son,” young people are rebelling against the elder-focused culture and the imposition of caregiving duties on family members by the government. Demographically, Japan is at the center of a great-grandparent boom. Tokyo has more old people than any other city in the world and they are healthier and longer-lived than they have ever been. Japanese attitudes toward aging are schizophrenic. While traditional reverence of ancestors and elders persists among middle-aged adults, studies show that middle-aged Japanese are losing faith that their families will be around to care for them. Fishman describes elders who refuse to visit their sick friends, in part because they believe their friends would not want to be seen in such condition and in part to deny their own inevitable decline.

The author argues that the Japanese government’s attempt to foster familial care of elders has triggered this revolt. Japan offers tax breaks to encourage family members to live together and take care of each other. Forty-five percent of Japanese over age 65 live with their adult children, while the world average is 20 percent. Although this sounds beneficial to an aging society, the policy has created a generation of “parasitic singles,” young people living at the margins of society with no need or desire to marry, reproduce, contribute financially to the household, or, in general, grow up. These genteel young rebels express their angst by adopting infantile dress and manners or avant garde “ganguro” poses, or by burying themselves in technology. Boys and girls drift into youth districts, where they play games and watch videos in solitude in “manga” cafés. They are “single-
ton children,” says Fishman, with little need to work and little desire to interact with others. Ironically, a policy aimed at encouraging familyhood, has instead contributed to a decline in traditional families and an “epidemic of solitude.”

In contrast to this youthful rebellion is the ability of well-heeled Japanese elders to support themselves through a wide array of professional services. For a person with means, Fishman says, “it is good to be old in Japan.” Older people have their own section of Tokyo, the Sugamo, where they are catered to in almost every conceivable fashion. Sidewalks, restaurants, and shopping are all tailored to their needs. Fishman was struck that all of the caregivers in an assisted living facility he visited in the district were Japanese natives. Workers who are not forced into relationships with older folks tend to appreciate their elders. They also serve a spiritual function in a society that reveres cleanliness and order. Japanese caregivers are paid as professionals, and they specialize, servicing multiple clients in one day who need their particular service. An elder who needs total care experiences a daily rotation of professionals who each serve an individual function. This professional work force does not suffer the emotional attachment and sheer exhaustion that can inflict caregivers with multiple functions. Further, as Fishman learned when he interviewed a former law student turned professional bather, caregiving can be extraordinarily lucrative and emotionally satisfying. The bather said he often receives letters from families describing the significance of the bath to their dying relative: “The letters make me realize how important the seeming[ly] small things in life can become to the people I serve and that nothing is to be taken for granted.”

II. UNITED STATES AND SPAIN: THE IMMIGRANT LABOR SOLUTION

It is no surprise that an aging world is a dependent world, with more and more resources diverted from the young to maintain and care for the elderly. The old need the services of the young, but often youngsters are in short supply. In countries like Japan and China, youngsters resent being forced into the role of caregiver. In Spain and in down-and-out cities like Rockford, Ill., much of the caregiving is done by immigrants seeking a better life. In these places, the aging population boom means prosperity and improved quality of life for young immigrant families. These non-native employees contribute to the economies of their adopted homes, providing essential services at reasonable cost, and they contribute to their native economies by sending money to the folks back home.

Spain morphed from having the youngest population in Europe to the oldest in a span of 30 years. Credit for this transformation goes the Mediterranean diet and excellent health care, the influx of well-heeled foreign pensioners, and educated Spanish women who pursue careers instead of child rearing. Where Spain once exported workers to the rest of the continent, it now imports workers from Africa, the former Soviet bloc, and South America. Many of these workers care for elderly pensioners and send the money they earn to their families back home. The Spanish banking system and government policies encourage this foreign exchange. The fiscal policy is sound. The workers leave their dependents back home, sparing the Spanish government the cost of schooling and health care, while workers at the peak of their energy provide a valuable service keeping elders in their homes. These immigrant workers also tend to move back to their native countries when they age out of the labor force. As long as Spain keeps attracting these laborers,
life will likely be good for its elders, but the question remains, how long can the Spanish economy rely on this labor force and what happens when the populations of the home countries also age out?

Unlike the Spanish immigrant labor paradigm, the chapter on Rockford, Ill., illustrates what happens when an older society cannot afford care. Fishman details the heartbreaking recent history of this once-thriving city, which has experienced the out-migration of its young, factory closings, and the loss of well-paying blue collar jobs to China and Mexico. Left behind are Rockford’s elders, who are left with a continuing need to work past retirement “not matched by the need for American companies to hire them.” Older workers compete with younger workers for the scarce remaining jobs, and in many cases the experienced elders are winning the competition. The biggest loss is to the city’s future. Younger workers left out of the work force lose the benefit of solid earnings, which in turn reduces their ability to save for retirement and robs them of valuable on-the-job experience, which Fishman terms the “invisible curriculum.” A younger workforce benefits the overall economy, Fishman notes, because young workers contribute more to the nation’s investment capital and savings than they take out — at least theoretically. On the other hand, Fishman reports that older entrepreneurs with the intellect, skills, ability, long view, and “deep well” of social connections to be successful, may take up the slack.

Rockford officials are desperate to lure young people back into the city. They are investing in a clean and green “cool” city campaign. Their efforts are hampered because Rockford lacks an institution of higher education that would attract upper middle class residents, young and old. But while younger entrepreneurs head for what appear to be greener pastures in Silicon Valley, older entrepreneurs are staying put in Rockford and other aging cities. The businesses they start up likely will not rock the world in the same way that some novel high-tech invention hatched by an exuberant youngster may change the face of society, Fishman says, but elder entrepreneurs are more likely to develop businesses that are offshoots of their previous careers or enterprises that support larger companies. Nevertheless, these businesses can contribute to the local economy and they can gainfully employ young and old, which also benefits society as a whole.

So even for down-and-out Rockford, the news about aging is not all bleak. In addition to starting new businesses, displaced older workers are taking on roles as caregivers for the young. In Rockford, as in other parts of the country, “granny is the new mommy.” Grandparents who care for children are the under-appreciated economic engines of Rockford and other communities worldwide, including China and Japan, Fishman writes. In the United States alone, they provided $39.2 billion in unpaid services in 2002. They work until they drop. And without them, younger workers could not be in the workforce contributing to society.

Another example of the self-reliance and durability of Rockford’s elders is how, far from the urban environs of Boston and New York City, a group of elders living in a small apartment complex called the Cloister have come together to look after each other and provide resources the community lacks. Fishman suggests that the tenants were lured by the Cloister’s elevator to give up their two-story homes. Technology aside, they stay for the community and camaraderie.

The news that a naturally occurring retirement community, or NORC, has sprung
up in a working class city in the middle of the country is another positive sign that individuals and families will find solutions to problems far ahead of governments and urban planners. These organic solutions tend to work, without the unintended consequences of social programs that spring from the imaginations of politicians and bureaucrats. Without government funding, Rockford elders help each other with groceries, transportation, housekeeping, and meals, and, most important of all, socialization. If an outsider inquires how this retirement community came into being, residents bristle and vehemently deny they are living in a retirement community. They reject suggestions that they organize a system of outside service providers to assist them — as in Japan, these elders do not want to be reminded of their or their neighbor’s weaknesses. They see their home as an example of their continued independence rather than a place to wither into dependency.

III. SARASOTA: A GRAYING UTOPIA?

Fishman paints the happiest picture of aging in Sarasota, Fla., “God’s Waiting Room.” This community centers around its affluent elderly population, as does the Florida economy in general. Florida under-spends on programs targeted for the young, such as education, an attractive fiscal policy to older taxpayers with no young children to educate. Sarasota residents are healthy, well educated, and engaged in life. They move to the area to rejuvenate and reinvent themselves, not to fade into the woodwork and die. A person’s stock in the community comes not from what he or she did in their past life, but how interesting they are in the present. Older Sarasotans value interesting raconteurs, who are involved in the community, live a healthy lifestyle, and keep fit. They support museums and are so passionate about opera that patrons will stay seated through a heart attack rather than call the EMTs. The cultural and social amenities that support elder émigrés are beneficial to residents of any age. While Rockford, Ill., exports its young people all over the country, Sarasota’s graying economy attracts the young and old from all over the world.

Giving back to the community is a way of summing up a good life, and Sarasota’s young benefit from their elders’ largesse. The primary beneficiaries are charities for children. Ironically, a relatively small portion of the community’s charitable giving benefits the elderly, who make up the bulk of Sarasota’s population. Fishman calls this “Playing Santa to kids and Scrooge to their parents.” The administrator of a nonprofit residential facility for poor elders was more sanguine: “The fear factor in this business is the reality of the aging process. People may like to know there is an institution in town that takes care of the elderly in the worst situations, but they don’t want to get too close to it. Even … professional care providers have a hard time facing they could end up in a place like this.” Sounds like the elderly Japanese who shun their ill friends.

The currency in Sarasota that rides tandem with class is good health. The old stereotype of the aging geezer is being replaced by the stereotype of the active elder. Both do a disservice and could be damaging to the older population. The geezer is someone we do not want to be around — the geezer stereotype is isolating and demeaning. But the active elder stereotype can be just as destructive since the flip side is, if you are not healthy and active you do not count. Plastic surgery, hair transplants, vein reductions — business is booming with elders struggling to keep the appearance of youthful currency. Sarasota has a disproportionately high number of physician specialists in almost every discipline ex-
cept for geriatricians, who, ironically, are in short supply. The community is also willing to pay high prices for boutique health care. In another example of the push-pull between young and old, many of these jobs in the health care industry catering to wealthy elders are filled by young people who cannot afford to pay for health insurance.

Lest we get too enthusiastic about the Sarasota lifestyle, Fishman brings us down to earth. As with the failure of the wealthy to support services for the poorest of the community’s elderly, Fishman suggests that the obsession with the active adult lifestyle is also born of fear. Many older women in Sarasota are obsessed with exercise and diet not because of narcissism but because they need to stay healthy to care for their aging husbands. The area is home to beautiful and sumptuous continuing care retirement communities (CCRCs) that, while offering gorgeous amenities and the comfort of knowing that “no one will have to worry about their care,” isolate rich retirees from their community. Perhaps, they might prefer Rockford’s Cloisters. Despite its reputation as nirvana for the well-heeled and the well-preserved, there is nothing organic about Sarasota’s aging economy. It clearly has sprung from the many entrepreneurs and companies who saw the profit in catering to the oldest among us. The CCRC is Sarasota’s version of a NORC.

The Sarasota section contains the one mention in the entire book about long-term care planning. Fishman notes the scores of attorneys and other professionals who advise clients on ways to protect assets through “complex trust documents passed between high-fee law firms and private bankers” and compares the highway billboards advertising these services to ads for personal injury attorneys and bail bondsmen. Not a flattering image of the profession.

Fishman leaves the inferences and larger truths to the reader’s imagination. The implications for the Elder Law practitioner are enormous, in terms of our own business models and the services and advice we offer clients. For example, Fishman notes that the number of entrepreneurs in the under-40 age group is shrinking, while the number in the over-45 age group is growing. One in 10 individuals is self-employed, but in the age 50 and up group, the number is one in six — a staggering statistic that has larger implications for the Elder Law practitioner. To add value to our practice, perhaps we need to expand beyond benefits and health care and move into the law of business start-ups. Clients starting businesses at a later age have a host of issues particular to this age group. A young entrepreneur is unlikely to plan to transition out of the business at the same time he or she is starting out, but an older client may wish to have an exit strategy in place from the outset. Family considerations will also be a factor for an older entrepreneur in planning mode.

Fishman advises the reader that our nation needs to decide whether to open its arms to older folks and ease their transition into the golden years, as Sarasota has, or push them aside in favor of short-term gains, as China has. Old folks and young folks are both needy, each group in its own way. No matter how good we look on the outside, the fact is we are all rusting from the inside out.

And while it often seems that the old and young are on a collision course, it does not have to be so. Society is an organism that strives to survive, and like Rockford’s NORC, Japan’s professional bather, older entrepreneurs, and sunny Sarasota, people will find a way.