

**IMPRISONMENT IN OLD AGE: SHOULD WE INCARCERATE THE ELDERLY? \***

**Abstract**

*The prison system is built for punishment of people who are society's outlaws and so living conditions can be very harsh with little or no rehabilitation for inmates especially people growing old in prison. As prisoners age, prison conditions may feel like double punishment as physical strength diminishes and health problems set in. Economists estimate that it cost two to three times more to incarcerate an older inmate than a younger one. Penal Institutions will continue to spend more on health care as the population of elderly inmates grows, for instance, in the UK alone, inmates aged above 60 increased by over 82% in a space of 10 years.<sup>1</sup> A similar scenario is playing out in the United States, where the number of prisoners aged 55 and older as at 2015 in the State of Texas was a shocking 17,456.<sup>2</sup> These large numbers of people will require more social care than rehabilitation from the correctional service in the coming decades if immediate action is not taken. Prisons may likely look like a nursing home if this group of inmates are not factored into policy initiatives during sentencing.*

**Keywords:** ageing inmates, elderly prisoners, forgotten prisoners, dying in prison.

**1. Introduction**

Generally, Prison serves four major purposes firstly, retribution which punishes the offender for his/her crime against society; secondly, Incapacitation which removes the wrong doer from society so that they can no longer commit any more crimes against innocent people; Thirdly deterrence which warns all other members of the society that there are consequences for breaking the law; fourthly and most importantly, rehabilitation which focus on providing skills and programmes to turn societies' criminals in to law abiding citizens.<sup>3</sup> For prison inmates like 94 year old Francis Clifford Smith, 70 years old Charles Fossard and 86 year old Paul Geidel Jr.<sup>4</sup> it is incredibly difficult to see the purpose for which incarceration serves at this age in their lives. It is clear that neither of the four major purposes for imprisonment can be achieved for inmates when they get to a certain age. At that stage, they would have served most of their lives behind bars and become institutionalized by the system. Institutionalized simply put 'is a term given to an inmate who has completely bought into the prison mentality. Their thoughts, speech, and actions all portray someone who has been locked up for far too long.'<sup>5</sup> Inmates have also described institutionalization 'as a chronic biopsychosocial state brought on by incarceration and characterization by anxiety, depression, hypervigilance, and a disabling combination of social withdrawal and /or aggression'.<sup>6</sup> Take for example the case of 94-year-old Francis Clifford Smith, a man from Connecticut who has been behind bars for over 71 years serving a life sentence.<sup>7</sup> His crime? He murdered a night watchman during a robbery at a yacht club in July 1949.<sup>8</sup> Having been in prison for 71 long years, it's easy to see how an inmate can become institutionalized and in this case, Smith is considered extremely institutionalized. When inmates become institutionalised, they often prefer life behind bars where they are familiar with the day to day activities than in the community where things would have changed a lot from the time they were in the real world. It begs the question whether society should incarcerate people when they get to a certain old age. For this category of people, certain chronic health conditions associated with aging such as hypertension, asthma, arthritis, type 2 diabetes, Alzheimer's, cancer, cardiovascular disease etc are common. More so in prison these health conditions affect inmates at a much higher rate than in the general population. Research shows that 40 percent of people in prison have at least one chronic medical condition or the other, with high blood pressure and diabetes being the highest.<sup>9</sup>

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<sup>1</sup> House of Commons Justice Committee, 'Ageing Prison Population' Fifth Report Session 2019-21 < <https://committees.parliament.uk/publications/2149/documents/19996/default/>> accessed 16 February 2022

<sup>2</sup> Emily Widra, 'Since you Asked: How Many People aged 55 or Older are in Prison by State?' (*Prison Policy Initiative*, May 11 2020) < <https://www.prisonpolicy.org/blog/2020/05/11/55plus/>> accessed 15 February 2022

<sup>3</sup> Stop the Crime, 'Purposes of Prisons' < <http://www.stoptheaca.org/purpose.html>> accessed 17 February, 2022.

<sup>4</sup> Simon Catling, 'Longest Serving Prisoner in History is Still Serving Sentence After 71 Years' (www.ladbible.com, 6 October 2021) < <https://www.ladbible.com/news/news-the-longest-serving-prisoner-has-been-in-jail-for-71-years-20211006>> accessed 17 February 2022

<sup>5</sup> Morgan Molitor, 'Life after Being 'Institutionalized' in Prison/ Noah's Story' (Construction2style, 5 October 2019) < <https://construction2style.com/life-after-being-institutionalized-in-prison-noahs-story/>> accessed 17 February 2022

<sup>6</sup> Johanna Crane, 'Becoming Institutionalized: Incarceration and 'Slow Death'' (items insight from social sciences, 16 July 2019) < <https://items.ssrc.org/insights/becoming-institutionalized-incarceration-and-slow-death/>> accessed 17 February 2022

<sup>7</sup> Catling (n 4)

<sup>8</sup> Ibid

<sup>9</sup> Ibid (n 6)

Elderly prisoners often need more medical attention and social care with getting dressed, eating, and getting about prison environment. America is reported to spend about 16 billion dollars annually caring for older inmates.<sup>10</sup>

In America, the most rapidly growing prison population are men and women above the age of 65 and growing older.<sup>11</sup> This is as a result of high crime rates and tough on crime sentencing policies such as the mandatory minimums and three strikes' law which has implications for old age diseases becoming common among incarcerated people. Prisoners are reported to have physiological age of someone 10 to 15 years older than in the general society due to the high stress prison environment which they live in.<sup>12</sup> Older inmates are more vulnerable and caring for them pose unique challenges to the prison system. For instance, a prisoner with dementia who does not know that he is in prison or does not believe they are in prison or even remember other inmates requires different care program in prison. Inmates serving long sentences often times may no longer have any friends or family outside prison which further makes it difficult for them to be released or granted parole. This article examines these unique challenges facing the elderly prison population especially in the United States which has about 2.2 million people behind bars<sup>13</sup> and in the United Kingdom which is often champions the human right course of incarcerated people. It analyses the unique challenges which plague the fastest growing segment of inmates ageing and dying in prisons all over the world. Also, it examines the prospect of effective alternatives to imprisonment like home confinement for the old-old inmate and compassionate release where appropriate. It concludes with a call for action for these forgotten inmates. In the first part, an attempt is made at defining elderly and the incarcerated elderly to arrive at an age bracket that accommodates female elderly inmates who are a minority in the prison population. In answering the question whether prisons should be used for the elderly, the retributive argument of punishment is weighed alongside the utilitarian/leniency/ low risk to the public argument. The utilitarian argument gains favour and alternatives to imprisonment are recommended for the elderly in prisons all around the world.

## **2. Defining Elderly**

The chronological age of 65 is the age used to describe an elderly person in most western civilized countries. The United Nations have set the cut off chronological age of 60 plus to be the numerical age to refer to people as the older population.<sup>14</sup> The World Health Organisation (WHO) found that as far back as 1875 in Britain, the age of 50 and above was used to define older people, whereas in Africa the age of 50 to 65 are often referred to as elderly. After reviewing various studies that included developing countries in Africa and elsewhere, they eventually resolved that the age of 50 be used to generally define an elderly person.<sup>15</sup> In England and Wales, the official age of 65 for men and 60 years for women are used to describe older or elderly people. These ages used to describe the elderly population are synonymous with retirements and pensions. They are also associated with a decline in health and physical abilities. The biological reality of aging like loss of sharpness of senses, inefficiency of the immune system, start of menopause for women and a decline in physical abilities occurs at different stages in different people's lives. For a complex variety of reasons, some people may experience aging faster than others. Reasons like 'genetic makeup, lifestyle and social environment'<sup>16</sup> are often highlighted as having great influence on the aging process. The people in prison described as elderly prisoners are not immune to the reality of these physical and medical challenges that plagues the aging population in society.

### **Elderly Prisoner**

This lack of general agreement and consistency in the definition of a certain age to be used to describe elderly persons has also fuelled the debate in criminology. Prison researchers have also found it difficult to generally agree on a particular age category to describe an elderly prisoner. Researchers in this field have sited ages as surprisingly low as 25 to as astonishingly high as 82 years with various ages in between.<sup>17</sup> However, ages of 50 and 55 are frequently used by researchers in this field. In the fifth report of the House of Commons Justice committee,<sup>18</sup> Dr Azrini Wahidin provided written evidence to show that in the UK where older prisoners units

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<sup>10</sup> The Economist, 'America's Elderly Prisoner Boom' (The Economist, 18 July 2015)

< [https://www.youtube.com/watch?v=jXnQz2CqzYg&ab\\_channel=TheEconomist](https://www.youtube.com/watch?v=jXnQz2CqzYg&ab_channel=TheEconomist) > accessed 18 February 2022

<sup>11</sup> Ibid

<sup>12</sup> Ibid

<sup>13</sup> ibid

<sup>14</sup> World Health Organisation, *Health and statistics information systems*

< <http://www.who.int/healthinfo/survey/ageingdefnolder/en/> > accessed 8 February, 2022.

<sup>15</sup> ibid

<sup>16</sup> Ronald H Aday, *Aging Prisoners: Crisis in American Corrections* in Younne Jewkes (ed), *Handbook on Prisons*: Elaine Crawley, 'Imprisonment in old age' (Willan Publishing 2007) p 255.

<sup>17</sup> Elaine Crawley, 'Imprisonment in old age': *Handbook on Prisons* Younne Jewkes (ed) (Willan Publishing 2007) p 255.

<sup>18</sup> House of Commons Justice Committee, 'Older Prisoners' Fifth Report of Session 2013-14

exist and abroad, the basic mean age of 50-55 are used to define older offenders.<sup>19</sup> Similarly, in a national study that included the minority group of the prison population that is women in prison, the age 50 and above was used to define older offenders.<sup>20</sup> Charities and advocacy groups that presented evidence to the committee were in agreement that the age of 50 be acknowledged in the prison service as an age to define older or elderly prisoners. Groups like RECOOP, Age UK and the Restore Support Network hold this view in agreement with the following reasons put forward by the Prison Reform Trust<sup>21</sup>:

- Some older prisoners have a physical health status of 10 years older than their contemporaries in the community. This can be due to a previous chaotic lifestyle, sometimes involving addictions and /or homelessness.
- Fifty is used in the NHS healthcare, and services for healthy ageing start at this age.
- AGE UK and Other Organisations working with older people start their services at fifty.
- Changes in the national demographics and numbers sentenced mean that the prison service will have to work with the people on their preparation for old age and on preventive health measures, so policies need to be in place before people need support and / or reach later old age.<sup>22</sup>

Her Majesty's Chief Inspector of Prisons (HMIP) agrees with the argument that people age faster in prison than their chronological age and defines older prisoner as prisoners aged 50 years and above.<sup>23</sup> However Dr. Elaine Crawley rejects this argument and holds the opinion that the retirement age of 65 years, as the definition of older prisoners.<sup>24</sup> According to the leading researcher, the age of 65 is the stage people generally start to 'feel old'. It may be argued that this view may be restrictive and not taking into account the elderly female offenders in custody. There is evidence that to capture the majority of the elderly female offenders, the age of 50 seems to be more appropriate. In a research carried by Wahidin in 2002, the number of female prisoners aged 50-59 years was 137 while the number aged 60 and above was only 16.<sup>25</sup> Furthermore, in 2013 Liem and Kunst found that post-traumatic stress disorder (PTSD) and other psychological problems were associated with long-term imprisonment.<sup>26</sup> Research shows that people with PTSD tend to experience accelerated biological aging.<sup>27</sup> This evidence supports the argument put forward by the Wahidin and others above about long term prisoners aging faster. Therefore, the call for a generally acceptable definition of elderly prisoners is made; the threshold age of 50 years which is the majority view gets a positive nod. This view gains support because it would include the double minority sub group of elderly female prisoners. Researchers like Blowers and Doerner<sup>28</sup> have expressed concern about lumping people of different ages and generation into one category. They argue that research that categorizes elderly offenders as starting from the age of 50 is limiting and 'in doing so may mask important nuances'.<sup>29</sup> They however put forward the idea that additional age categories of 'young-old' (50-54); 'middle-old' (55-60) and 'old-old' (65 and above).<sup>30</sup> This idea may be criticized for failing to provide illustrations of such nuisance they are concerned about. While the further distinguishing of the elderly population is a very interesting and welcoming idea, it is not clear what difference or benefits this categorization makes. Perhaps, if there was an international policy made to provide for standard and equitable care for prisoners in different categories, then these additional categories would be beneficial. Then, 50 years may be the appropriate age that would benefit the majority of the elderly prison population. This is because men and women do not age at the same rate, while

< <http://www.parliament.uk/documents/commons-committees/Justice/Older-prisoners.pdf> > last assessed 9 February 2022

<sup>19</sup> *ibid*

<sup>20</sup> *ibid*

<sup>21</sup> Francesca Cooney and Julia Braggins, 'Doing Time: Good Practice with the older people in prison- the views of prison staff', Prison Reform Trust, 2010 <<http://www.prisonreformtrust.org.uk/uploads/documents/doingtimegoodpractice.pdf> > last accessed 6 March 2022

<sup>22</sup> *Ibid.*, (n 18) p 9

<sup>23</sup> *Ibid.* (n 18) p 9

<sup>24</sup> *Ibid* (n 16)

<sup>25</sup> *Ibid* (n 18) p 240

<sup>26</sup> M. Liem and M. Kunst, 'Is There a Recognizable Post-Incarceration Syndrome Among Related 'Lifers'?' (2013) *International Journal of Law and Psychiatry*, p 336

<sup>27</sup> Sarah Knapton, 'A traumatic event makes victims age biologically faster' *The Telegraph* (London, 11 March 2016) <<http://www.telegraph.co.uk/news/science/science-news/11593174/A-traumatic-event-makes-victims-age-biologically-faster.html> > last accessed 9 March 2022

<sup>28</sup> Anita N. Blower & Jill K. Doerner, 'Sentencing Outcomes of the Older Prison Population: An Exploration of the age Leniency Argument' (2015) *Journal of Crime and Justice* P. 62 <<http://www.tandfonline.com/doi/pdf/10.1080/0735648X.2013.822161>> last accessed 15 March 2022.

<sup>29</sup> *ibid*

<sup>30</sup> *ibid*

women would usually have to go through hormonal changes during menopause, men would not experience such changes.

Researchers have found that elderly female prisoners are more likely to use health care services than their other elderly male counterparts.<sup>31</sup> Elderly female prisoners have been reported to suffer from additional health problems like breast and cervical cancer, hysterectomies—a condition in which the uterus (womb) is removed, due to conditions like heavy periods, fibroids, ovarian cancer etc. They correspondingly suffer from osteoporosis, a condition where women of a certain age begin to lose bone tissues. The bones become brittle and fragile due to hormonal changes when going through menopause. These women are expected to go through these difficult stages of ageing in prison in any way they know best. A situation Crawley and Sparks<sup>32</sup> describes as ‘hidden injuries’, where prisoners are expected to live with problems they cannot publicly articulate. The argument that 50 years be used as an average age is made, as this would allow the penal institutions time to make adequate health care arrangements for changes that may be occurring as they go through the changing phrase of aging. The following section will now discuss the categories of elderly offenders and the increasing rise in the prison population.

### **3. Categories of Elderly Prisoners**

There are different types or classification of the elderly prison population. There are offenders that may have committed a crime when they were young and as a result received lengthy sentences and have grown old in prison. A second group are habitual repeat offenders that have been in and out of prison majority of their adult lives. A third group are elderly prisoners serving sentences for crimes they committed while they were elderly, often times they are first time offenders. The fourth and final group is a combination of those who committed crimes when they were young and consciously evaded justice. These are people who are referred to as ‘elderly evaders’<sup>33</sup>. Those who ought to have been imprisoned but were not on the one hand and those who committed crimes when they were young and are now only being prosecuted for their crimes. This later group in the UK are often convicted of historic sexual offences. A good illustration is the famous children television presenter Jimmy Savile, whose allegations of sexual assaults on children sparked investigations and prosecutions of historic sexual offences of other prominent and non-prominent figures across British society<sup>34</sup>. Similarly, in America, the famous comedian once loved by millions and popularly referred to as ‘American’s Dad’ – Bill Cosby was found guilty of sexual assault in 2017 and convicted to 3 -10 years in jail when he was 81 years old.<sup>35</sup> Another example of ‘elderly evaders’ is the 2005 case of Edgar Ray Killen, an 82 years old man convicted for organising the killing of 3 civil rights workers in Mississippi in 1964.<sup>36</sup> The 82 years old was the supposed leader of the ku klux klan (KKK).<sup>37</sup> A survey of cases featuring this final group of elderly prison offenders has led to the fastest growing population of elderly prisoners in England and Wales. These group of offenders are reported to have over a 100% increase in the growing number of the prison population.<sup>38</sup> According to the House of Commons justice committee report, ‘those aged over 60 and those aged 50-59 are respectively the first and second fastest growing age groups in the prison population’.<sup>39</sup> In 2002 and 2013 there was 120% and 100% increase in these age groups respectively.

The sudden growth in the number of elderly prisoners, according to Crawley and Sparks is a combination of judicial and political decisions.<sup>40</sup> Decisions that determine the kind of offences that require long term prison

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<sup>31</sup> Ibid n 18 p 234

<sup>32</sup> Elaine Crawley and Richard Sparks, ‘Hidden Injuries? Researching the experiences of Older Men in English Prisons’ (2005) *The Howard Journal* 44 (4) p 347

<sup>33</sup> Kelly Porcella, ‘The Past Coming Back to Haunt Them: The Prosecution and Sentencing of Once Deadly but now Elderly Criminals’ (2007) *St. John’s Law Review* p 373

<[https://www.researchgate.net/publication/254668989\\_The\\_Past\\_Coming\\_Back\\_to\\_Haunt\\_Them\\_The\\_Prosecution\\_and\\_Sentencing\\_of\\_Once\\_Deadly\\_but\\_Now\\_Elderly\\_Criminals](https://www.researchgate.net/publication/254668989_The_Past_Coming_Back_to_Haunt_Them_The_Prosecution_and_Sentencing_of_Once_Deadly_but_Now_Elderly_Criminals)> accessed 10 March 2022

<sup>34</sup> Helen Warrell, ‘UK Prisons: Old Crimes, Older Inmates’ *The Financial Times* (London, 26 October 2015) <<http://www.ft.com/cms/s/0/9f7f3432-763b-11e5-a95a-27d368e1ddf7.html#axzz436ROptKX>> accessed 16 March 2022.

<sup>35</sup> Charlie Savage, ‘Bill Cosby’s Release from Prison Explained’ *The New York Times* (1 July, 2021) <<https://www.nytimes.com/2021/07/01/arts/television/bill-cosby-conviction-overturned-why.html>> accessed 10 February 2022; BBC News, ‘Bill Cosby: The Rise, Fall and Release of ‘American’s Dad’’ *BBC News* (30 June 2021) <<https://www.bbc.com/news/entertainment-arts-30194819>> accessed 10 February 2022

<sup>36</sup> Ibid n 21 p 373

<sup>37</sup> ibid

<sup>38</sup> House of Commons Justice Committee report 2013-14 n 18 p 5

<sup>39</sup> ibid

<sup>40</sup> Elaine Crawley & Richard Sparks, ‘Older Men in Prison: survival, coping and identity’ (2005) In Younne Jewkes (ed) *Handbook on Prisons* (Willan Publishing 2007) p 256.

sentence. For instance, the ‘greying’ population in America is said to be as a result of mass incarceration in the 1980s.<sup>41</sup> In the UK evidence points to the use of more lengthy sentences in the penal system. For example medium prison sentence is said to be four months longer than 20 years ago which was 15.9 months.<sup>42</sup> Secondly, the number of people serving life sentences for public protection is reported to have ‘doubled since 1993 from 9% to 17% in 2014’.<sup>43</sup> Thirdly, the prison population serving mandatory life sentences grew from an average minimum term imposed for murder, from ‘12.5 years in 2003 to 21 years in 2013’.<sup>44</sup> The political slogan of ‘tough on crime’ and public responds to sexual offenders are key factors that may be said to have contributed to the aging prison population growth.

#### 4. Imprisonment of the Elderly

The punitive sanction of imprisonment is society’s expression of resentment and condemnation of a crime. In sentencing the elderly, the courts have said that age may be a factor to be taken into consideration. However, more important factors like retributive proportionality and risk management are overriding factors. The punishment principals of retributivism and utilitarianism would be used to discuss critically whether the elderly should be sentenced to a term of imprisonment or alternatives to prison should be considered favourably.

#### Retributive Argument

The arguments put forward by retributivists are that the moral balance in society needs to be protected. Therefore, an offender needs to pay for his crimes hence the phrase an ‘eye for an eye’. For instance, when a horrible crime is committed justice needs to be done for the victim no matter whether the offender is 18 or 65 years old.<sup>45</sup> ‘Retributivists look solely to past voluntary conduct to justify present punishment’.<sup>46</sup> Retributivist theory promotes the balancing of proportionality between the offender’s guilt and the harm done by the crime committed.<sup>47</sup> Porcella, argues in favour of retributive justifications of punishment. She argues for the vindication of victim’s rights. She stresses that in sentencing, the age and the life expectancy of an elderly offender is totally immaterial.<sup>48</sup> She also discusses the leniency side of the arguments that elderly prisoners are low risk to society and should be sentenced less punitively. She points out that retributive theories are not totally in favour of strict sentencing for just punishment’s sake. As a matter of fact, they argue that sentencing an elderly offender (the ‘old-old’ category) to a term of may be 20 years in prison would not be proportionate sentencing when compared to sentencing a young offender. For the first time elderly offenders, given their advanced age, incapacity to adjust to prison life and considering the possibility that the elderly offender may die in prison. A prison sentence would be ‘disproportionately harsh’ when compared to a younger offender.<sup>49</sup> This is because any sentence for an elderly prisoner may be a potential life sentence. On the other hand, the proportionality argument has been rejected on the grounds that proportionality should not be a ‘get out of jail free’ ticket for elderly offenders.<sup>50</sup> Secondly, there are concerns that it would give the terminally ill elderly person the ‘licence to kill’.<sup>51</sup> The suggestion that for elderly evaders, a logical proportionality scheme be put in place to calculate the remaining life of the offender in order to sentence them appropriately was suggested by Porcella. This calculation is proposed to start counting the remaining life from the date the crime was committed in order to discourage the offender from evading the law.<sup>52</sup> It may be argued that this remaining life proportionality calculation is unpersuasive. The question of who would do the counting and how that would effectively work in practice may be problematic. This is because to determine precisely how many years a person may have to live in order to sentence them proportionately may be implausible.

Proponents of retributive proportionality argue that elderly prisoners be given lesser or alternative punishments to prison sentences, or special treatment in prison.<sup>53</sup> The idea of having special treatment in prison may seem kind

<sup>41</sup> Ibid n 4 p 226

<sup>42</sup> Andrew Katzen, ‘Should we be Sending the Elderly to Prison?’ *Newstatesman* (London, 27 January 2015) < <https://www.newstatesman.com/politics/2015/01/should-we-be-sending-elderly-prison> > accessed 2 March 2022

<sup>43</sup> ibid

<sup>44</sup> ibid

<sup>45</sup> Nothinghampost, ‘Prison for Old People can be Double Punishment’ (Prison Reform Trust, 31 March 2014)

<<http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/210> > accessed 16 March 2022

<sup>46</sup> Kelly Porcella, n 33 p 380

<sup>47</sup> ibid

<sup>48</sup> ibid p 385

<sup>49</sup> ibid

<sup>50</sup> ibid

<sup>51</sup> ibid p 386

<sup>52</sup> ibid

<sup>53</sup> ibid p 387

of alien since prison should be punishment. However, early research carried out in prisons in England and Wales, revealed that the prison environment was not built with the needs of the 'old- old' prisoner in mind. The stairs and steps, long walk ways, gymnasias, high security walls football pitches, long queues and constant background noise attest to this.<sup>54</sup> Hence there are prisons with separate units dedicated specifically for elderly offenders which look more like a nursing home than a prison ward. Where there are prisons with no such special units, younger prisons assist the elderly population.<sup>55</sup> Crawley points out instances like when elderly offenders not being allowed adequate time to get to and complete activities, not given additional clothing or bedding in cold weather, having to climb stairs and shower in bathrooms not fitted with non slip tiles to illustrate this point.<sup>56</sup> These needs are not purposefully denied elderly prisoners yet the strict rules and routines of the prison system makes situations like this prevalent. The need to have exercise, engage in purposeful activity and have fresh air in the restricted time provided is very important for both the old and young in prison. Nevertheless, the mental (depression or Alzheimer disease) and physical (immobility and bladder weakness) challenges related with old age makes it extremely difficult for elderly prisoners to be engaged. This is what Crawley and Sparks have referred to as 'institutional thoughtlessness'.<sup>57</sup> Furthermore, these needs of the elderly and the inadvertence of the system to their needs has been criticized for amounting to double punishment for the elderly prisoner.<sup>58</sup>

In contrast to the argument that elderly prisoners be given a lesser or alternative sentence because a prison may be harsher for the elderly. Is the argument made by a United States court, where 'the court suggested that the opposite might be true – long prison sentences are more adverse for young offenders who will probably be unable to marry, be a parent or have a career'.<sup>59</sup> Ultimately each offender deserves to be punished according to his crime therefore, whether for the old or young offender, prison should be humane, just and effective rather than being double punishment in itself. Although to promote the idea that the elderly in prison should be treated specially maybe unrealistic. It may be helpful to remind oneself that these men or women are convicted murders, criminals or abusers. According to Mr Peter Bates, prison officer and head of a specialized team in Rye Hill sex offenders' Prison in Rugby. You cannot ignore the fact that a frail little man sitting on a chair who cannot get out unaided might have done something really wrong.<sup>60</sup> Rye Hill Prison located in Barby; Northamptonshire in England was in 2014 converted into a specialist prison for those convicted of sex crimes. As stated earlier, majority of the elderly prisoners in the UK are serving sentences for historic sexual offences. In Rye Hill it was reported that 'one in five of the inmates is aged over 60; about 40 per cent are over 50'.<sup>61</sup> The prison director Richard Steadman has also admitted to the fact that his penal institution is more like an old people's home with a wall around it.<sup>62</sup> Mr Steadman warns against seeing frailty as a sign of weakness, to assume that older offenders are harmless would be naïve according to Steadman.<sup>63</sup> In his view, some of the prisoners use their physical appearance to support or aid their offending by gaining people's trust.<sup>64</sup> So, while a member of the public or a close neighbour may assume that being well advanced in age and on a wheelchair he is trustworthy to leave kids with him, he might just be a real physical risk.<sup>65</sup> Crawley comments that 'these are problematic old men', bearing in mind that while some are 'killers of other old people, others are abusers of the young'<sup>66</sup> in her view their 'old age is anything but the reward for a virtuous life'.<sup>67</sup> Blowers and Doerner, remind us that 'a person is no less a criminal because of their advanced age'.<sup>68</sup>

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<sup>54</sup> Elaine Crawley, n 32 p 231

<sup>55</sup> Lonny Shavelson, 'Dying in Prison' (23 August, 2012)

< [https://www.youtube.com/watch?v=SUPQIXMdZHQ&ab\\_channel=Reveal](https://www.youtube.com/watch?v=SUPQIXMdZHQ&ab_channel=Reveal) > accessed 11 February 2022

<sup>56</sup> Elaine Crawley, 'Institutional Thoughtlessness in Prisons and its Impacts on the Day to Day Prison Lives of Elderly Men' (2006) 6 (1) Journal of Contemporary Criminal Justice p 356

<sup>57</sup> *ibid* p 358

<sup>58</sup> *ibid* n 32

<sup>59</sup> *United States v Angiulo* In Kelly Porcella, 'The Past Coming Back to Haunt Them: The Prosecution and Sentencing of Once Deadly but now Elderly Criminals' (2007) St. John's Law Review p 388

<sup>60</sup> Helen Warrell, n 34

<sup>61</sup> *ibid*

<sup>62</sup> *ibid*

<sup>63</sup> *ibid*

<sup>64</sup> *ibid*

<sup>65</sup> *ibid*

<sup>66</sup> *ibid* n 40 p 360

<sup>67</sup> *ibid*

<sup>68</sup> *ibid* n 28 p 62

**Utilitarian/Leniency/Low Risk**

The proponents of utilitarian theory of punishment postulate that punishment is to deter or discourage the offender and the general public from further or future wrong doings. They promote the idea that punishment is justified when it results in profits to the society at large. Therefore, arguments for leniency in sentencing of elderly offenders are hinged on the fact that the old, sick and frail prisoner does not pose a risk to society. Secondly the high cost of imprisonment for the elderly offenders and thirdly their contributions to society before their term of imprisonment.

**Low Risk to Public**

The major argument for leniency towards elderly offenders is that, it is very unlikely that a sick elderly offender will go on to reoffend on his release from prison, since they are often seen as low risk offenders. Among scholars and researchers, it has gained general acceptance that this group of the prison population have the lowest rate of recidivism.<sup>69</sup> Research shows that only about 1% of elderly offenders goes on to reoffend.<sup>70</sup> Reasons like, as people grow older, they tend to commit less crimes and health issues are responsible for these results.<sup>71</sup> They are usually characterized as not needing maximum security, double handcuffs or leg chains. In confirming this position, Mr Steadman comments that elderly sex offenders are less aggressive than the younger prison population. However, he points out that they are skilled in the manipulation of themselves and the prison staff.<sup>72</sup> Similarly, the utilitarian argument for deterrence can be debated on the basis that even though an elderly offender would not reoffend on release. Not serving a punishment for his criminal or abusive past act may be seen by the society as being given 'one free kill'.<sup>73</sup>

**High Cost of Imprisonment**

The argument that elderly prisoners are low risk to members of the society compared to younger prisoners but it cost the tax payer and the government more to maintain an elderly prisoner in prison is cited for leniency or alternative measures to punish the elderly. The reason for this high cost of incarceration is the need to access medical care and subsequently resettlement on their release. Naturally as people grow older they require more medical care than the younger people in the community. Likewise, the elderly prisoners are reported to need more medical services in prison than their elderly counterparts in the society. Statistics show that '80% of those aged 60- 64 had at least one moderate or server disorder; so did 91% of those aged 65- 69 and 92% of those over the age of 70'.<sup>74</sup> In 2014, in a report for the Ministry of Justice, it was reported that 85% of elderly prisoners in the 'old-old' (above 60 years) category had one major illness in their medical records as well as 83% were reported to be suffering from one chronic illness.<sup>75</sup> The consequence of this would be additional pressure on the prison service to provide health care to treat these diseases or provide ongoing treatments for the rest of their lives. Recently, it was reported that '54% of older prisoners are estimated to have a disability and of those 28% have physical disabilities'.<sup>76</sup> Older prisoners cost the tax payer two or more times more than younger offenders. Social care for prisoners is estimated to cost £9.4 million per year out of which £7.4 million is for people over the age of 50.<sup>77</sup> Statistics indicate the strain or pressure on available prison resources. It might seem attractive to assume that elderly people in the community do not cost the tax payer near the amount of money it cost to incarcerate a person over the age of 60. However, Porcella presents two rebuttals to that argument. Firstly, elderly people in the community enjoy certain benefits such as free or special discount on transportation, medical care, and social security. The reality of government taxing and spending indicates that whether an elderly person is in prison or not the public is still paying for their services through taxes.<sup>78</sup> What then can be done about this?

<sup>69</sup> Elaine Crawley n 32; Kelly Porcella n 33; Anita N. Blower & Jill K. Doerner n 28

<sup>70</sup> *ibid* n 32 p 381

<sup>71</sup> Dawn Miller, 'sentencing elderly criminal offenders' (2011) 7 (2) National Academy of Elder Law Attorneys Journal p 221-247

<sup>72</sup> Hellen Warrell n 34

<sup>73</sup> *Ibid* n 34 p 382

<sup>74</sup> House of Commons Justice Committee report 2013-14 n 1 p 10

<sup>75</sup> Samuel Omolade, 'The Needs and Characteristics of Older Prisoners: Results from the Surveying Prisoner Crime Reduction (SPCR) Survey' Analytical summary 2014 p 5

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/368177/needs-older-prisoners-spcr-survey.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368177/needs-older-prisoners-spcr-survey.pdf)> accessed 19 March 2022.

<sup>76</sup> Prison Reform Trust, 'Prison: The Fact Bromley Briefings' summer 2015 p 6

<sup>77</sup> *ibid*

<sup>78</sup> Kelly Porcella n 33 p 384

## 5. Conclusion and Recommendation

Since elderly prisoners that belong to the old-old category (inmates 65 years and above) of the prison population cost more to manage and maybe physically incapable of reoffending, neither do they pose a risk to the rest of the society, administrative actions need to be taken immediately to prevent prisons becoming nursing homes in the nearest future. It's very unlikely that prisons are preparing or equipping their correctional facilities to better accommodate the elderly. At best the focus for prisons would be to improve the living conditions of inmates and security of their facility. A story of an inmate in his 90s who did not understand where he was or why he was in prison<sup>79</sup> is often cited to buttress the point that incarceration is not idea punishment for the elderly. To better manage and effectively minimised the humanitarian and financial burden this category of the prison population present, alternatives to traditional methods of punishments should be considered in their favour. Alternatives to prison such as house arrest enhanced by 'electronic tagging' for inmates who are 60 years and above and vulnerable to serious illness due to underlining health conditions, as well as for historic offenders for people of this age is put forward. This will reduce considerably the financial burden for healthcare on the penal system as well as decongest prisons. Additionally, it will proportionally punish the elderly and balance the argument that prison conditions amounts to double punishment. When elderly inmates are with their families the larger burden of caring for the inmate is solely on the family rather than the State. Despite the clear benefit this might bring to the prison service some might resist this idea as being too lenient on a prisoner just because he is old. Some might even ask why society should care for people prisons, the truthful answer is that it is a humanitarian issue and how society deals with its most vulnerable prison population is a reflection of the entire society. There should be considered the idea that an upper age limit similar to a minimum age of criminal responsibility all around the world to enable penal systems deal with older prisoners outside the prison system.<sup>80</sup> Perhaps a good place to start will be for courts to consider the age of the offender at the point of sentencing. Similar consideration gained legislative backing in 2011 in Louisiana when law makers passed a law that non-violent prisoners over the age of 60 should get parole hearings.<sup>81</sup> Furthermore, The option of non-custodial sentence has been made open to offenders sentenced to more than six months in Sweden since 2005.<sup>82</sup> There offenders have the option of choosing an electronic bracelet over imprisonment.<sup>83</sup> Overall, to incarcerate frail and sick inmates with such huge cost does not serve the purpose of imprisonment neither does it rehabilitate the elderly in custody. Once a prisoner is unable to care for themselves due to age and illness, then that inmate should be considered for alternative to imprisonment to 'prevent prisons from turning into dysfunctional nursing homes'.<sup>84</sup>To answer the question in the negative, we should not be imprisoning the elderly.

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<sup>79</sup> Sue Coyle, 'End-of-Life Care in Prison' *Social Work Today*

< <https://www.socialworktoday.com/archive/ND18p16.shtml> > accessed 29 April 2022

<sup>80</sup> Andrew Katzen n 42

<sup>81</sup> Ibid

<sup>82</sup> Ibid

<sup>83</sup> Ibid

<sup>84</sup> Sophie Okolo, 'The Problem with Being Old and Incarcerated' (Global Health Aging, 7 April 2015)

< <https://globalhealthaging.org/2015/04/07/the-problem-with-being-old-and-incarcerated/> > accessed 21 April 2022