

THE INTERSECTION OF ELDER LAW AND CRIMINAL LAW: MORE TRAFFIC THAN ONE MIGHT ASSUME

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I. OVERVIEW

There is a large body of literature for law school professors on the subject of pedagogy. One bibliography of such literature, which excluded pieces that discussed general curricular issues, located 209 articles for the period of 1993–1999.¹ Some of these articles attempt to persuade professors to employ different teaching methodologies, while others encourage the discussion of a wide variety of issues previously excluded or marginalized in traditional law school core courses.² Some suggest that traditional first-year law school courses should include the perspectives of clinicians.³ Others advocate for the discussion of diversity and multicultural concerns across the law school curriculum.⁴ For example, some critical legal scholars argue that issues concerning women and minority groups must be included because of the belief that traditional courses overrepresent the perspective of white heterosexual males.⁵ While other critics of legal education argue that law school should include more discussion of other disciplines such as economics, literature, or sociology,⁶ other scholars yearn for more discussion of morality and values in the law

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1. Arturo Lopez Torres & Mary Kay Lundwall, *Moving beyond Langdell II: An Annotated Bibliography of Current Methods for Law Teaching*, 35 *Gonz. L. Rev.* 1, 2 (2000).

2. *Id.*

3. Margaret M. Russell, *Beginner's Resolve: An Essay on Collaboration, Clinical Innovation, and the First-Year Core Curriculum*, 1 *Clin. L. Rev.* 135, 138 (1994). This discussion concerning the role of skills training in legal education is a major concern of the American Bar Association's MacCrate Report, formally known as the American Bar Association Task Force on Law Schools and the Profession: Narrowing the Gap, *Legal Education and Professional Development — An Educational Continuum. Id.* at 35.

4. *Id.* at 141–142.

5. See Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 *Willamette L. Rev.* 541, 546–552, 566 n. 73 (1996) (providing examples of how societal stereotypes and cultural assumptions can dictate both legal analysis and results and can lead to the alienation of women and persons of color in the law school classroom).

6. *Id.* at 555.

school curriculum⁷ and advocate for more discussion of international legal issues within traditional first-year law courses.⁸

For the beleaguered professor who already feels that there is not enough time to teach all the analytical skills needed by first-year law students, another article suggesting yet another perspective on what should be included in the course syllabus may seem daunting or perhaps even annoying. Nevertheless, this Article will attempt to persuade professors who teach in the criminal justice arena that including materials addressing concerns about or of relevance to older persons can heighten discussion of core issues and recognize a group in society with a growing presence and influence. Furthermore, due to the stereotypes about older persons, one could argue that, particularly in the area of criminal law, they are inappropriately left out of the discussion more often than in other traditional first-year law courses. Even though all courses involving criminal law should increase the number of discussions concerning the issues of older persons, this Article will focus primarily on issues relevant to introductory criminal law courses, because most law students will come into contact with such a course in law school, and therefore, the inclusion of these issues in such a course will have the maximum impact.

One may question still why discussion of issues concerning older persons merits attention. There are a number of reasons why such a discussion could enhance a criminal law course. First, as already indicated, the discussion below will attempt to highlight how basic criminal law concepts can be enriched by discussing those concepts in relation to the elderly. Second, the increase in the number and percentage of older persons will be enormous in the next few decades as the baby boom generation moves from middle age to old age. Projections estimate that the number of people sixty-five and older will more than double by 2030, reaching approximately twenty percent of the population.⁹ This growth likely will have numerous effects on the criminal justice system.¹⁰ Potentially, a larger number

7. Dennis Turner, *Infusing Ethical, Moral, and Religious Values into a Law School Curriculum: A Modest Proposal*, 24 U. Dayton L. Rev. 283, 285 (1999).

8. Richard S. Frase, *Main-streaming Comparative Criminal Justice: How to Incorporate Comparative and International Concepts and Materials into Basic Criminal Law and Procedure Courses*, 100 W. Va. L. Rev. 773, 774 (1998).

9. Max B. Rothman et al., *Introduction*, in *Elders, Crime, and the Criminal Justice System: Myth, Perceptions, and Reality in the 21st Century* xxix, xxxi (Max B. Rothman et al. eds., Springer Publ. Co. 2000).

10. *Id.* (stating that the changes, specifically the increase in the older population and the change in the diversity of that group, will impact the criminal justice system).

of older persons will be targeted for criminal activity.¹¹ There will be a growing number of older persons who will require that others care for them, which may result in more cases of abuse and neglect, some of which may require intervention by the criminal justice system.¹² A larger number of the elderly may be perpetrators of crime.¹³ Even more probable is the likelihood that a larger number of the elderly will be in penal institutions.¹⁴ In addition to the above reasons, a discussion of how elder law and criminal law intersect is important, because the field of elder law is a growing field, which reflects the growth of this group of legal consumers and their corresponding legal needs.¹⁵ Finally, some law students are older persons themselves, and in the typical law school classroom, these students may feel similarly marginalized as those students who belong to other minority groups may feel.¹⁶ An open discussion of issues about a group of which the student is a member may help the student situate himself within the classroom and the subject matter being discussed.

Beyond all of the arguments presented, ageism is an issue within our society and is an issue that law students could profit from pondering.¹⁷ When a law review note can be written and published with the title, *Blue Hairs in the Bighouse: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*,¹⁸ sensitization to elderly stereotypes

11. *Id.*

12. *Infra* pt. II(B).

13. Rothman et al., *supra* n. 9, at xxxi.

14. *Id.* Not only would the elderly population in prisons increase due to the increase in the number of elderly perpetrators, but also due to the aging of the current prison population. John J. Kerbs, *The Older Prisoner: Social, Psychological, and Medical Considerations*, in *Elders, Crime, and the Criminal Justice System: Myth, Perceptions and Reality in the 21st Century* 207, 210-211 (Max B. Rothman et al. eds., Springer Publ. Co. 2000).

15. Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 *Elder L.J.* 1, 1-2 (1993); Peter J. Strauss, *Elder Law in the Nineties*, 1 *Elder L.J.* 19, 19 (1993).

16. *See generally* Dark, *supra* n. 5, at 566 n. 73 and accompanying text (discussing how women and minority groups can feel marginalized in the law school setting; the elderly could be similarly affected.).

17. *See generally* Steven Keith Berenson, *Can We Talk?: Impediments to Intergenerational Communication and Practice in Law School Elder Law Clinics*, 6 *Elder L.J.* 185 (1998) (discussing how the contrasting social environments in which younger and older persons are situated and how the differences in their collective life experiences cause problems in dialogic encounters in the law office setting).

18. Nadine Curran, Student Author, *Blue Hairs in the Bighouse: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 *New Eng. J. on Crim. & Civ. Confinement* 225 (2000).

remains a problem that merits discussion. The first line of this note continues the troubling characterization of older persons, exemplified by the title and starting in a stereotypical fashion by stating,

When one thinks of the elderly, one envisions images of a fragile old man or woman needing help to carry groceries, getting help on the subway stairs, or the times when their own grandparents needed help cutting the lawn.¹⁹

In fairness to the author of this piece, the rest of the note strives to counter some of the stereotypes raised by the title and opening sentence; unfortunately, the image suggested, of the exceptionally frail older person as the norm, may actually reflect the thinking of several students at contemporary law schools.²⁰

As the discussion above indicates, there are a number of perspectives from which older persons can be viewed in regard to criminal law. Part II of this Article will discuss older persons as victims of crime. To what extent they are more vulnerable and in need of increased protection as victims of crime is an issue debated by researchers. Some older persons are targeted for certain types of crimes,²¹ and the appropriate response by the criminal justice system is a topic that can engender a worthwhile class discussion. Such a discussion could include a comparison to other crimes or sentencing decisions that vary depending upon the victim's membership in a particular group. Part III of this Article will discuss older persons in the penal system. Some of these persons will be incarcerated for the first time when they are older.²² Others will be in the penal system because they are recidivists or they received long prison sentences for a serious crime committed at an earlier age.²³ The impact in economic and human terms may be significant,²⁴ and there are philosophical questions concerning the reasons and goals

19. *Id.*

20. The author notes that "elderly" for a geriatric inmate is considered to be age fifty." *Id.* at 238.

21. This is why the United States Sentencing Commission enacted a "vulnerable victim" provision for the federal sentencing guidelines. Trent M. Murch, Student Author, *Revamping the Phantom Protections for the Vulnerable Elderly: Section 3A1.1(b), New Hope for Old Victims*, 6 *Elder L.J.* 49, 51 (1998). This issue will be discussed below in part II(A) and accompanying footnotes.

22. Curran, *supra* n. 18, at 239.

23. *Id.* at 239-240.

24. *Id.* at 226-227.

underlying criminal punishment that are worthy of discussion in relation to the problems posed by an aging prison population.

Much of the academic literature related to aging issues discusses the difficulty in analyzing the research concerning older persons because of a lack of a societal consensus on when someone is "old" in our culture.²⁵ This is particularly true in the criminal justice arena, where penal and other institutions sometimes categorize people as "old" at an earlier age than in other institutions and programs.²⁶ For purposes of this Article, the particular age used to designate who is "old" is less important than discussing the fluidity of the concept of old age in American society. It may, in fact, be advisable to discuss the different numerical indicators for old age in different conceptual areas to highlight that fluidity. In addition to suggesting some of the public policy debates underlying issues in the area of elder law, this Article will refer to cases and law review articles that can be used to stimulate discussion or provide background material on the topics raised.

The above-mentioned lack of consensus, concerning at what age a person is considered "old," presents practical problems in discussing the academic research and scholarship concerning older persons. In part, this lack of consensus reflects the fact that persons who are the same age may function at different levels either physically or mentally.²⁷ The lack of consensus also reflects a societal disagreement about when a person passes into the category of being old. Furthermore, different physical, mental, political, or economic factors may be relevant to the consideration of the age of the recipient or perpetrator in the areas being considered.²⁸ Government programs such as social security traditionally have used age sixty-five as the cutoff for receiving benefits based on a variety of economic and political factors.²⁹ Criminologists, on the other hand, have used the age of fifty or fifty-five as the cutoff in studying criminal activity or the age of prisoners, because changes at earlier ages can have a significant impact on criminal activity or penal

25. William E. Adams, Jr., *The Incarceration of Older Criminals: Balancing Safety, Cost, and Humanitarian Concerns*, 19 *Nova L. Rev.* 465, 467 (1994); William E. Adams & Rebecca C. Morgan, *Representing the Client Who Is Older in the Law Office and in the Courtroom*, 2 *Elder L.J.* 1, 5 (1994).

26. Adams, *supra* n. 25, at 467; Curran, *supra* n. 18, at 238.

27. Adams & Morgan, *supra* n. 25, at 6.

28. Adams, *supra* n. 25, at 467 n. 10.

29. *Id.* at 467; Curran, *supra* n. 18, at 238 n. 123.

policies.³⁰ For example, in the study of incarceration rates of older persons, a person who reaches fifty has different health and safety issues than younger prisoners; therefore, the age of fifty may be a more appropriate indicator of old age than in some of the other subjects being discussed.³¹ This Article will refer to the age being referenced whenever discussing various research and issues.

II. OLDER PERSONS AS CRIMINAL VICTIMS

A. "Traditional" Crimes

As suggested by the student note discussed above,³² the stereotypical image of the fragile and vulnerable older person is a pervasive one within our culture, and the image does, in fact, represent a segment of the older population because aging does cause a decline in physical abilities.³³ This frail group is an appealing target to some criminals and for some kinds of criminal activity. The United States Sentencing Commission recognized this problem by recommending enhanced penalties for criminals who victimize unusually vulnerable persons, including the elderly.³⁴ While this Author cannot deny the fact that some criminals do target vulnerable older persons for property crimes, the stereotype exaggerates the prevalence of this scenario.³⁵ In addition, significant numbers of older persons do not fall within this category of the fragile victim. A survey by the American Association of Retired Persons indicated

30. Kerbs, *supra* n. 14, at 208.

31. Adams & Morgan, *supra* n. 25, at 6; Curran, *supra* n. 18, at 238–239.

32. Curran, *supra* n. 18, at 22–24.

33. Adams & Morgan, *supra* n. 25, at 7–8.

34. Murch, *supra* n. 21, at 59. Trent M. Murch quoted the 1997 revision to Section 3A1.1(b) of the United States Sentencing Guidelines, which stated: "If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that the victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels." U.S. Sentencing Commn., *Guidelines Manual* § 3A1.1(b) (1997) (emphasis in original). Since then, the Guidelines have been amended; however, the effect is identical. Currently, the *Manual* states, "If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels." U.S. Sentencing Commn., *Guidelines Manual* § 3A1.1(b)(1) (West 2000) (emphasis in original). The Guidelines define a "vulnerable victim" in part as one "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." *Id.* at 276 n. 2(B).

35. Murch, *supra* n. 21, at 56. The Bureau of Justice Statistics's 1994 National Crime Victimization Survey indicated that persons aged sixty-five or older were less likely "to become the victims of violent crime, personal theft, or household crime" than the general population. *Id.*

that the older victims of telemarketing fraud often were relatively well informed and well educated.³⁶ A 1987 report by the Department of Justice found persons aged sixty-five and older were the least likely age group to be victims of violent crimes.³⁷ Nevertheless, some studies have suggested that not only did personal crimes against the elderly increase in the late 1980s,³⁸ but that older persons also suffered greater harm from crime.³⁹ This stereotype of the vulnerable older victim may closely reflect reality in regards to crimes of financial exploitation, in which some groups of older persons are targeted often by con artists and other perpetrators of fraudulent consumer schemes.⁴⁰ Without enhanced sentencing guidelines, crimes against the elderly may escape punishment, as compared to the violent crimes “against a member of the public at large.”⁴¹

Crimes of financial exploitation may fall outside the coverage of traditional criminal law courses, which may focus more on violent crimes. The issue of the appropriate punishment for these crimes, in which the crime itself or the sentence for it may be enhanced because of the age of the victim, is an issue appropriate for class debate. This discussion of whether the status of the victim should change the definition of the crime or its penalty can be compared to the goals of so-called “hate crimes” statutes. In discussing the appropriateness of considering the victim’s status in crime definition or penalty enhancement, the professor can ask the students about what makes old age an appropriate category for protection. If the reason for punishing perpetrators more severely for injuring an older person is that the victim was vulnerable, students can consider whether age is a legitimate proxy for vulnerability. The professor also can discuss what level of mens rea is appropriate; for example, should the perpetrator be required to know the age or

36. *Id.* at 55.

37. Rosalie S. Wolf, *Elders as Victims of Crime, Abuse, Neglect, and Exploitation*, in *Elders, Crime, and the Criminal Justice System: Myth, Perceptions, and Reality in the 21st Century* 19, 21 (Max B. Rothman et al. eds., Springer Publ. Co. 2000). This report also found that forty-five percent of violent crimes against the elderly were robberies, as opposed to eighteen percent for younger persons. *Id.*

38. Murch, *supra* n. 21, at 53.

39. *Id.* at 54, 56; Wolf, *supra* n. 37, at 21, 23.

40. Wolf, *supra* n. 37, at 22. This stereotype is illustrated by a 1994 Justice Department report indicating that the elderly were particularly vulnerable to economic crimes, including robbery, personal theft, larceny, burglary, and motor vehicle theft. *Id.*

41. Murch, *supra* n. 21, at 57. The Federal Sentencing Guidelines’ “vulnerable victim” provisions are intended to apply more stringent punishment to those who target “vulnerable victims” such as the elderly, for the purpose of deterrence. *Id.*

vulnerability of the victim as an element of the crime? A number of federal cases struggled with this issue in relation to the United States Sentencing Guidelines Vulnerable Victim Sentence Enhancement.⁴²

B. Abuse and Neglect

A recent trend in criminal law is the increased application of criminal penalties to those who neglect and abuse older persons. This trend is in response to the perception that this phenomenon is a growing social problem.⁴³ According to one congressional report, approximately five percent of the elderly population is abused annually.⁴⁴ The accuracy of this estimate is hard to assess, because the report also found that elder abuse was significantly less likely to be reported than child abuse, estimating that only one out of every eight elder abuse cases was reported.⁴⁵ The causes for this failure include embarrassment or fear.⁴⁶ Meanwhile, other older victims may feel that they deserve the mistreatment or may be physically unable to report the abuse.⁴⁷ Because of these and other concerns, Congress recommended mandatory reporting of elder abuse, and an overwhelming majority of states have passed some form of the mandatory reporting scheme.⁴⁸

Early elder abuse statutes were modeled after child abuse statutes, a model that is less than ideal, because the two age groups present different issues.⁴⁹ First, the movement to apply criminal

42. Wolf, *supra* n. 37, at 20–21.

43. Robert A. Polisky, Student Author, *Criminalizing Physical and Emotional Elder Abuse*, 3 Elder L.J. 377, 380 (1995) (noting that elder abuse was first recognized in the late 1970s).

44. *Id.* at 381 (citing a 1981 United States House of Representatives report indicating that the prevalence of these crimes has increased by 500,000 per year since they were first recognized).

45. *Id.* Another study conducted in 1996 estimated that “449,924 unduplicated older persons experienced abuse and/or neglect,” but only 70,942 were reported and substantiated. Wolf, *supra* n. 37, at 30.

46. Polisky, *supra* n. 43, at 381.

47. *Id.* at 381–382; Molly Dickinson Velick, Student Author, *Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse*, 3 Elder L.J. 165, 173 (1995); Wolf, *supra* n. 37, at 30.

48. Velick, *supra* n. 47, at 166–167.

49. Wolf, *supra* n. 37, at 28 (These issues include different competency issues, and the abusers of older persons are often spouses or partners.).

sanctions to elder abuse is controversial.⁵⁰ If criminal sanctions are appropriate, it is not always clear whether the penalties should vary depending on whether the caretaker is an untrained relative of the victim or a professional caregiver.⁵¹ This latter debate stems from the perception that the latter perpetrators are sometimes persons under stress (some of whom are caring for children as well as older persons) or who lack the resources and expertise to undertake their role as compared to professional caregivers.⁵² In addition, the Author could argue that a professional caregiver is more deserving of criminal punishment because of a heightened duty.

The belief that elder abuse and neglect is in facilities that care for older persons suggests to some commentators the need for criminal penalties.⁵³ The importance of providing appropriate protection to those placed in long-term health care facilities is heightened by some researchers' estimate that twenty-five percent of the population may some day reside in nursing facilities at least on a temporary basis.⁵⁴ Despite the belief that there is a problem of neglect and abuse within these facilities, there has been surprisingly little research on the incidence of abuse in institutional facilities.⁵⁵ One study of nursing home abuse found that eighty-one percent of the staff members who responded reported that they had observed at least one emotionally abusive incident within the previous year in the facility in which they worked.⁵⁶ The causes of this abuse are not simply that the staff members are cruel, but, as a congressional report on elder abuse found, staff members assigned to primary care for nursing home residents "[were] often ill-trained, grossly overworked, and very poorly paid."⁵⁷ In addition, many

50. See Daniel M. Gitner, Student Author, *Nursing the Problem: Responding to Patient Abuse in New York State*, 28 Colum. J.L. & Soc. Probs. 559, 569, 569 n. 67 (1995) (noting that some researchers argue that some forms of patient abuse are noncriminal and should be treated as errors of judgment).

51. See Polisky, *supra* n. 43, at 382, 397-398 (noting that formal research generally has ignored the problem of elder abuse in care facilities in order to focus on abuses in home care).

52. Wolf, *supra* n. 37, at 36.

53. E.g. Polisky, *supra* n. 43, at 410-411 (arguing that criminal liability will serve to keep abusers out of facilities by creating a criminal record on the abuser, thus deterring others from similar behavior).

54. Gitner, *supra* n. 50, at 559 n. 2.

55. Wolf, *supra* n. 37, at 34.

56. Polisky, *supra* n. 43, at 383. Forty percent of the staff surveyed "admitted they committed at least one emotionally abusive act against an elderly resident within the preceding year." *Id.* at 384.

57. *Id.* at 385 (referring to a 1981 United States House of Representatives report on elder abuse).

states have failed to fund their adult protective services programs adequately, which are supposed to provide protection for older persons who are the victims of neglect or abuse.⁵⁸

In spite of these problems, the debate still exists over whether the criminal law is the appropriate vehicle to remedy this perceived social problem. Some commentators argue that tort law remedies are inadequate to deal with the problem.⁵⁹ The reasons for this inadequacy are the failure of older persons to seek tort remedies due to physical inability, lack of knowledge, fear of retaliation, and inadequate remedies.⁶⁰ In addition, a tort judgment may not prevent the staff member from working in another jurisdiction; therefore, the tort judgment lacks the deterrence capability of the criminal law.⁶¹

By 1991 all fifty states had enacted some type of protection against elder abuse, but the approaches varied.⁶² Even among those jurisdictions that have chosen to apply criminal penalties in this area, there is a lack of uniformity.⁶³ Although elder abuse sometimes technically can fall within traditional criminal legal categories, such as assault or battery, prosecutions still may be utilized only when the physical injury is severe.⁶⁴ Beyond these traditional criminal remedies, there is considerable variation among the states that choose to punish elder abuse and neglect.⁶⁵ Some states only criminalize the failure to obey laws that mandate reporting elder abuse.⁶⁶ Other states criminalize only some physical abuse.⁶⁷ Yet others punish physical and emotional abuse if the state can prove the victim's mental anguish.⁶⁸ A small number of states punish abusive acts without requiring proof of mental anguish.⁶⁹ Some of the latter states' statutes have been constitutionally challenged for

58. Velick, *supra* n. 47, at 178–180 (discussing the lack of funding provided to the states by Congress for federally mandated adult protective services and abuse reporting programs).

59. *E.g.* Polisky, *supra* n. 43, at 387 (discussing the inadequacy of tort remedies to redress the harm inflicted on victims of elder abuse).

60. Gitner, *supra* n. 50, at 573; Polisky, *supra* n. 43, at 387–388.

61. Polisky, *supra* n. 43, at 388–389.

62. *Id.* at 392.

63. *Id.*

64. Gitner, *supra* n. 50, at 571–572; Polisky, *supra* n. 43, at 392.

65. Polisky, *supra* n. 43, at 392.

66. *Id.* at 393.

67. *Id.* at 394.

68. *Id.* at 394–395.

69. *Id.* at 396. As of early 1995, only three states — Delaware, Arkansas, and Rhode Island — had such laws on their books. *Id.*

overbreadth and vagueness,⁷⁰ but courts have been willing to uphold those statutes that were drafted properly.⁷¹

Discussing whether these acts should be criminalized gives professors the opportunity to contrast the goals and purposes of criminal law and tort law. In addition, students can compare and contrast the culpability issues of professional caregivers and untrained relatives and discuss what deterrence goals are accomplished by applying criminal punishments to these perpetrators.

C. Euthanasia and Assisted Suicide

Another area in which elder law and criminal law intersect concerns the related topics of euthanasia and assisted suicide. The former term is sometimes used to cover "passive" situations in which necessary treatment or assistance is terminated, as well as when active assistance is provided to hasten another's death; therefore, euthanasia is a broader concept than assisted suicide.⁷² This area provides criminal law professors with another opportunity to discuss the concept of duty in criminal law, particularly with the concept of failing to provide necessary treatment. In the case of assisted suicide, which can involve either medical professionals or lay persons, the goals and purposes of criminal law also can be discussed in relationship to a crime in which the "victim" actively desires or requests that the "criminal" act be performed on him.

There is considerable legal scholarship in this area, which intersects medicine, law, religion, and philosophy.⁷³ This area also has drawn a good deal of attention among the public. For example, in 1994 Oregon voters approved a ballot initiative that legalized procedures for physician-assisted suicide.⁷⁴ This controversial piece

70. *Id.* at 403–407 (discussing such challenges in the context of Delaware law).

71. *E.g. Robinson v. State*, 600 A.2d 356, 365–366 (Del. 1991) (rejecting a vagueness and overbreadth challenge to a criminal abuse statute); *Sieniarski v. State*, 756 S.2d 68, 74 (Fla. 2000) (rejecting a challenge to the statute that required culpable negligence).

72. Tom L. Beauchamp, *The Justification of Physician-Assisted Deaths*, 29 Ind. L. Rev. 1173, 1176–1177 (1996).

73. *E.g. id.* at 1173 (article written by a professor of philosophy); Robert A. Burt, *Rationality and Injustice in Physician-Assisted Suicide*, 19 W. New Eng. L. Rev. 353, 353 (1997) (article written by a professor of law); Marshall B. Kapp, *Old Folks on the Slippery Slope: Elderly Patients and Physician-Assisted Suicide*, 35 Duq. L. Rev. 443, 443 (1996) (article written by a professor of community health and psychiatry).

74. Or. Rev. Stat. Ann. §§ 127.800–127.897 (LEXIS L. Publg. Supp. 1998).

of legislation stimulated much scholarship.⁷⁵ This area of the law also presents an opportunity to compare the law in the United States to the laws in other countries. The Netherlands, for example, has taken one of the most tolerant approaches to euthanasia.⁷⁶ Thus, the area presents the professor with opportunities to discuss the law's relationship to other disciplines or to other societies.

Another topic of concern is highlighted by a recent study in Florida, which has a "large proportion of older [people], [and also] one of the highest suicide rates in the nation: 24 per 100,000 in 1993."⁷⁷ In general, older persons commit disproportionately more suicides than other age groups, with males over the age of sixty-five having the highest suicide rate in this country.⁷⁸ The homicide-suicide combination can concern both issues of assisted suicide and abuse. These homicide-suicide cases frequently involve a perpetrator who kills the victim and then kills himself.⁷⁹ The perpetrator usually is a caregiver for a victim suffering from declining health or a debilitating illness, such as Alzheimer's disease, Parkinson's disease, or cancer.⁸⁰ The caregiver-perpetrator often suffers from ill health and severe depression exacerbated by exhaustion and financial strain from years of caregiving.⁸¹ These studies are not clear about how many of the victims may have desired to terminate their lives. The perpetrator in these cases escapes punishment if the suicide is successful; therefore, the dynamics of this phenomenon suggest that homicide-suicide cases may be preventable through increased availability of respite care, incentives for other family members who may lack the financial resources to help, and additional availability of hospice, nursing home, and related health care resources.⁸²

75. E.g. Edward R. Grant & Paul Benjamin Linton, *Relief or Reproach?: Euthanasia Rights in the Wake of Measure 16*, 74 Or. L. Rev. 449, 450 (1995); Paul J. Zwier, *Looking for a Nonlegal Process: Physician-Assisted Suicide and the Care Perspective*, 30 U. Rich. L. Rev. 199, 199 (1996).

76. Julia Belian, Student Author, *Deference to Doctors in Dutch Euthanasia Law*, 10 Emory Intl. L. Rev. 255, 255-256 (1996); Stephen G. Potts, *Looking for the Exit Door: Killing and Caring in Modern Medicine*, 25 Hous. L. Rev. 493, 495 (1988).

77. Edith Elisabeth Flynn, *Elders as Perpetrators, in Elders, Crime, and the Criminal Justice System: Myth, Perceptions, and Reality in the 21st Century* 43, 70 (Max B. Rothman et al. eds., Springer Publ. Co. 2000).

78. *Id.*

79. *Id.*

80. *Id.* at 70-71.

81. *Id.* at 71.

82. *Id.* at 71-72.

III. OLDER PERSONS IN THE PENAL SYSTEM

A. Who Commits Crimes?

Most traditional criminal law courses probably do not discuss older criminal perpetrators, because they are rare, particularly in the area of violent crime, which is the focus of most courses.⁸³ Because statistics on the age of perpetrators were not available until recently, it is difficult to ascertain precisely the frequency with which older persons perpetrated serious crime in the early part of the last century and prior centuries, although it is believed that it probably was rare.⁸⁴ Even when discussing crime statistics from the last half of the twentieth century, however, instructors must acknowledge that methodological problems create difficulties in drawing conclusions even when crime statistics exist. These problems include the fact that not all law enforcement agencies or officers report or treat criminal activity the same when the activity is reported.⁸⁵ In addition, record keeping changes due to the variations in police practices or technological advances in recording the data.⁸⁶

Due to the relative infrequency of criminal activity by older persons, small percentage increases can appear to signal large changes, because the percentage of criminal activity is influenced by small numerical changes.⁸⁷ Due in part to this statistical anomaly, in the 1970s there was a perception in the popular media and, to a lesser extent in the academic community, that an "elderly crime wave" was emerging,⁸⁸ but criminologists challenged this notion in the 1980s.⁸⁹ This flurry of media interest probably was due in part to the fact that the notion of a "geriatric crime wave" countered both popular perceptions of law-abiding, benign senior citizens and that most serious crimes are committed by young males.⁹⁰

83. Adams, *supra* n. 25, at 466 (noting that the elderly as a group are the least likely to commit crimes).

84. Flynn, *supra* n. 77, at 44.

85. *Id.* at 48.

86. *Id.* at 48–49.

87. Adams, *supra* n. 25, at 467.

88. *Id.* at 466.

89. Flynn, *supra* n. 77, at 45–47.

90. *Id.* at 44. However, some researchers have discussed some similarities between adolescence and old age, which may explain why some older persons may turn to crime in old age. These include lives in transition physically and socially and similarities in self-concepts

A more recent study of crime patterns in the 1990s reconfirmed the studies from the 1980s that found that older persons still commit crimes on a less frequent basis than their younger counterparts.⁹¹ According to 1995 statistics, only 0.7% of persons arrested were aged sixty-five and older, despite the fact that this age group constitutes 12.8% of the population.⁹² This statistic remains true because of a variety of biological, individual, and social factors that contribute to the "aging-out effect" of criminal behavior.⁹³ In spite of the low prevalence of the elderly in crime statistics, some older persons do commit crimes, including violent crimes. Even though a very small percentage of persons aged sixty-five and older commit violent crimes, more than 4,000 arrests for violent criminal acts during 1995 were of persons in this age group.⁹⁴ Furthermore, if the age is lowered to sixty and property crimes are included, the number of arrests was more than 165,000 during 1992.⁹⁵ In addition, some categories of crimes are increasing amongst older persons. The number of people aged sixty-five and older who committed offenses against their families increased seventy-nine percent between 1989 and 1995, which is almost equal to the seventy percent increase in the total population for the same criminal category.⁹⁶

Even if the proportion of older persons committing criminal acts is not increasing, the growth of the elderly population portends an increase in the absolute number of older criminals.⁹⁷ Further, a study of the categories in which older persons constitute a higher proportion of arrests than the norm may suggest areas of discussion about the social and economic situations that cause this concentra-

and traits. In addition, both age groups are exempted from certain work and family responsibilities. Furthermore, both groups suffer from lower prestige and status as compared to working adults. *Id.* at 62.

91. *Id.* at 50.

92. *Id.* at 51 tbl. 3.1.

93. *Id.* at 61. The physical factors include the fact that many criminal activities require good physical condition and mental development. Additionally, high levels of testosterone have been tied to aggression and violence in young males. Other researchers have found the pressure of peer influence to be a factor in the criminal activity of teenagers. *Id.*

94. *Id.* at 53 tbl. 3.3.

95. Thomas A. Long, *The Federal Sentencing Guidelines and Elderly Offenders: Walking a Tightrope between Uniformity and Discretion (and Slipping)*, 2 *Elder L.J.* 69, 69 nn. 1, 2 (1994).

96. Flynn, *supra* n. 77, at 58 tbl. 3.5. An explanation for the large increase in the number of arrests may be due to changes in the law as well as differing police practices as opposed to increased criminality by individuals.

97. Rothman et al., *supra* n. 9, at xxxi.

tion.⁹⁸ The eight categories of criminal activity in which persons aged sixty-five and older constitute a higher proportion of arrests in 1995 help demonstrate the pattern of elder criminality.⁹⁹ These categories are gambling (3.0%), sex offenses (2.2%), drunkenness (1.4%), vagrancy (0.8%), larceny or theft (0.8%), disorderly conduct (0.6%), and weapons offenses (0.6%).¹⁰⁰

Additionally, in relation to those older persons who commit crime, there may be important social and physical factors that need to be considered in treating the offender. For example, the correlation between organically based disorders and criminal activity may suggest a causal link for some elders who commit crime, because some of these disorders may be more prevalent amongst the elderly.¹⁰¹ There also are interesting findings concerning homicides committed by older persons. Although homicide rates vary considerably between states and older persons have a comparatively low homicide rates as compared to other age groups, the ratio between elder and younger killers is similar across jurisdictional boundaries.¹⁰² In addition, the fact that older killers disproportionately kill family members may in part reflect the increased social isolation and disengagement by some elders, which may reflect the intensity of the remaining interpersonal relationships.¹⁰³

Much of the attention on older persons committing crime focused on the elderly shoplifter. Contrary to this stereotype, older persons are less likely to shoplift than members of other age groups.¹⁰⁴ Also countering some perceptions about the motivational factors of elderly shoplifters, one study found that elderly shoplifters tend not to be indigent, rarely take items due to selective memory loss, and do not engage in shoplifting out of loneliness, isolation, or attention-seeking motivations.¹⁰⁵ The author of this study attributes the criminal activity to role disengagement and transition as opposed to those more traditional assumptions and explanations,

98. Flynn, *supra* n. 77, at 58 tbl. 3.5.

99. *Id.* at 59.

100. *Id.* These categories do not constitute the categories in which the most older persons are arrested, but merely what categories have the highest proportions of older persons arrested.

101. *Id.* at 64–65.

102. *Id.* at 68.

103. *Id.* at 69.

104. Persons aged sixty-five and over accounted for only three percent of adults arrested for shoplifting. Fifty-two percent of the arrestees were between the ages of eighteen and thirty. *Id.* at 74.

105. *Id.* at 75.

such as economic hardship or marital and familial conflict.¹⁰⁶ However, this area of criminal activity often does involve older persons who otherwise are law-abiding citizens.¹⁰⁷ The relevance of this issue to the severity of punishment to be imposed is another area ripe for class discussion.

B. Sentencing Issues

In spite of an increase in research on aging issues, there still has been relatively little research on the impact of old age on sentencing.¹⁰⁸ Generally, the research that has been conducted on sentencing patterns concluded that judges tend to focus on the following three issues when determining sentences: (1) offender blameworthiness and degree of harm caused to the victim; (2) protection of the community; and (3) practical implications of sentencing determinations.¹⁰⁹

In one study of sentencing practices, Pennsylvania judges found that older persons were less likely to be incarcerated and more likely to receive shorter sentences than persons in other age groups, even when other variables were similar.¹¹⁰ The study found similar preferences in the federal system in spite of the sentencing guideline restrictions on judicial discretion.¹¹¹ Whether these disparities are warranted because older persons have lesser criminal propensity or blameworthiness or because of legitimate practical concerns due to the increased cost of incarcerating older persons is not clear from this study.¹¹² Furthermore, other studies have reached contradictory

106. *Id.* at 75–76.

107. Adams, *supra* n. 25, at 471.

108. Darrell Steffensmeier & Mark Motivans, *Sentencing the Older Offender: Is There an "Age Bias"?*, in *Elders, Crime, and the Criminal Justice System: Myth, Perceptions, and Reality in the 21st Century* 185, 185 (Max B. Rothman et al. eds., Springer Publ. Co. 2000).

109. The third factor includes the offender's ability to handle the sentence including health factors, costs borne by the correctional system, disruption to the offender's family, and the impact on the judge's reputation. *Id.* at 187.

110. Defendants aged fifty-five to fifty-nine were five percent less likely to be incarcerated than persons aged thirty to forty-nine and fifteen percent less than persons aged twenty to twenty-nine. Defendants aged sixty and older were thirty percent less likely to be incarcerated than those between the ages of twenty and twenty-nine. The difference between the incarcerations of the different age groups was less pronounced for drug offenses than nondrug offenses, which may reflect that the perception of lesser danger and greater rehabilitative potential that applies to older offenders is not as strong with older drug offenders. Similarly, the sentencing "advantage" for older offenders is more pronounced for property crimes than for violent crimes and drug offenses. *Id.* at 197–199.

111. *Id.* at 199–200 tbl. 9.4.

112. *Id.* at 202–203.

conclusions about the impact of age on sentencing decisions.¹¹³ The impact that age should have on sentencing can, again, be a subject ripe for a discussion of the goals of criminal law. In a law review article, one judge has suggested a separate sentencing procedure, similar to those applied to youthful offenders, for older persons whose life, background, and circumstances indicate that they are unlikely to pose a threat to society.¹¹⁴

Although it would appear that older persons are not committing crimes at a greater rate than they have in the past and that there may be leniency in sentencing older persons on average, the number of older prisoners is increasing at a faster rate than any other age group.¹¹⁵ This rapid growth caused some commentators to begin discussing the need for correctional institutions that specialize in nursing care for older prisoners.¹¹⁶ This rise in both the number and proportion of older prisoners is probably a result of tougher sentencing policies passed by various jurisdictions.¹¹⁷ The older prisoner may become incarcerated for the first time in old age or is a recidivist.¹¹⁸

Although the research on the physical, psychological, and social needs of older prisoners is not extensive or completely in agreement, the general consensus is that older prisoners tend to have stronger needs in all of these areas than both their younger counterparts in prison and their older counterparts outside of prison.¹¹⁹ Also, “[m]ost older inmates are male.”¹²⁰ About half of older inmates are found in jails, as opposed to prisons.¹²¹ On average, the older inmates have low intelligence, alcohol problems, “and a higher proportion of

113. Adams, *supra* n. 25, at 477–478.

114. Honorable Peter M. Leavitt, *Proposal for Senior Offender Law*, 19 Pace L. Rev. 293, 311–322 (1999).

115. The number of prisoners aged fifty and older more than doubled between 1991 and 1998. Kerbs, *supra* n. 14, at 208.

116. *Id.* at 208–209.

117. At this point, the increase seems to be mostly with prisoners between the ages of fifty and sixty-four, but researchers predict growth in the sixty-five and older population once some of the so-called three strikes sentencing policies have been in effect for more years. The latter policies usually mandate life sentences for recidivists. *Id.* at 210–211.

118. One national study found that, of prisoners aged fifty-five and older, 41.38% experienced their first incarceration in this age category, 2.32% came into prison prior to fifty-five and served more than twenty continuous years, 45.6% were career criminals, and 10.86% came into prison prior to fifty-five, but served fewer than twenty continuous years. *Id.* at 212.

119. *Id.* at 213–217; Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 Elder L.J. 173, 174 (1996).

120. Ornduff, *supra* n. 119, at 181.

121. *Id.*

mental problems than younger prisoners.”¹²² These additional problems may result in the costs of incarcerating an older prisoner to be more than three times as much as the cost of incarcerating a younger one.¹²³

In addition, “victimization and fear of victimization by younger inmates is a problem” for older inmates.¹²⁴ The longer terms of confinement also have caused some researchers to opine that inmates may become more difficult to decarcerate because of the “institutional dependency” prompted by longer separation from society.¹²⁵ The increasing needs of older prisoners and their growth in numbers is exacerbated by the fact that most states appear to be ill-prepared to meet these needs.¹²⁶ Part of the increased costs for caring for older prisoners is a result of collateral costs in obtaining special services or transporting prisoners off-site to obtain the special services.¹²⁷ These growing financial needs are reflected in a study in which nearly half of the states indicated that their most pressing problem was responding to the medical costs of aging and infirm inmates.¹²⁸ These concerns are aggravated further by the general problem of overcrowding in prisons across the country.¹²⁹

The fiscal and societal costs of the increasing number and proportion of older inmates again raise issues about the goals of punishment. In discussing the social wisdom of incarcerating criminals for longer periods of time (even if the criminal no longer poses a serious threat), professors can pose questions concerning rehabilitation, retributivism, and utilitarian theories as the chief justification for punishment.¹³⁰ In addition, the professor can discuss the incapacitation goal achieved by incarceration although older

122. *Id.* at 181–182.

123. John J. Kerbs, *Arguments and Strategies for the Selective Decarceration of Older Prisoners*, in *Elders, Crime, and the Criminal Justice System: Myth, Perceptions, and Reality in the 21st Century* 229, 231 (Max B. Rothman et al. eds., Springer Publ. Co. 2000); Ornduff, *supra* n. 119, at 185 n. 99 (citing 1993 *Bureau of Justice Statistics* 15 tbl. 1.11 (U.S. Dept. J. 1994)).

124. Kerbs, *supra* n. 123, at 235–236; Kerbs, *supra* n. 14, at 217.

125. Kerbs, *supra* n. 14, at 218–219.

126. Kerbs, *supra* n. 123, at 234–235; Kerbs, *supra* n. 14, at 220–223.

127. Kerbs, *supra* n. 123, at 231.

128. *Id.*

129. In January 1995 the “American Civil Liberties Union reported that 28 states and the District of Columbia were under consent decree or court order to decrease” the population of either some or all of their prisons. Kerbs, *supra* n. 123, at 229. In the 1990s prisons were found to be operating at an average of 120% of their capacity. Ornduff, *supra* n. 119, at 176.

130. Ornduff, *supra* n. 119, at 188.

prisoners are less likely to commit crimes,¹³¹ in part because they are less capable of doing so.¹³² A number of criminological and sociological scholars argue that the inverse relationship between age and criminal activity is one of the most widely accepted premises in criminal research.¹³³ Thus, keeping such prisoners incarcerated at a great cost when they are arguably less dangerous presents society with interesting policy decisions.

The manner in which age is considered in sentencing determinations varies among jurisdictions. Several states permit age to be a mitigating factor.¹³⁴ In addition to some of the reasons cited above, some scholars argue that a longer sentence has more of an impact on an older perpetrator, because the sentence constitutes a greater percentage of his remaining life.¹³⁵ Due to the United States Supreme Court's holding in *Harmelin v. Michigan*,¹³⁶ it would be extremely difficult, if not impossible, to challenge such a sentence under the Eighth Amendment's Cruel and Unusual Punishment Clause, because after *Harmelin*, a court will only apply the clause to sentences that are barbaric or grossly disproportionate.¹³⁷ Some courts have determined that their state constitutions ban disproportionate sentences.¹³⁸ Of course, even this review would not necessarily void a sentence against an older defendant merely because it would amount to a life sentence, and a number of state courts have refused to allow old age to be a reason for shortening a sentence.¹³⁹

131. One study found that twenty-two percent of criminals between the ages of eighteen and twenty-two return to prison within one year of release, while two percent of offenders over forty-five return. *Id.* at 199.

132. *Id.* at 196.

133. Kerbs, *supra* n. 123, at 233.

134. Long, *supra* n. 95, at 86 n. 109.

135. Ornduff, *supra* n. 119, at 188.

136. 501 U.S. 957 (1991).

137. *Id.* at 995.

138. *E.g. In re Lynch*, 503 P.2d 921, 930 (Cal. 1972) (holding that a disproportionate sentence violates the California Constitution when the sentence "inflicted . . . shocks the conscience and offends fundamental notions of human dignity"); *Hale v. State*, 630 S.2d 521, 526 (Fla. 1993) (holding that a disproportionate sentence violates the Florida Constitution when the sentence inflicted is either cruel or unusual); *State v. Dorthey*, 623 S.2d 1276, 1281 (La. 1993) (remanding for a determination on whether the sentence was constitutionally excessive).

139. *E.g. Fisher v. State*, 480 S.2d 6, 8 (Ala. Crim. App. 1985) (rejecting a constitutional argument that a twenty-five-year sentence for a sixty-four-year-old defendant, who had committed a rape, was excessive); *State v. Johnson*, 640 P.2d 861, 867 (Ariz. 1982) (en banc) (reversing the appellate court's consideration of a fifty-two-year-old defendant's age as a mitigating factor); *Alspaugh v. State*, 133 S.2d 587, 588-589 (Fla. Dist. App. 2d 1961), *cert. denied*, 130 S.2d 693 (Fla. 1962) (affirming a five year sentence for a seventy-five-year-old

Federal judges are even more restricted in considering age, because the federal sentencing guidelines were passed both to create harsher penalties and provide uniformity.¹⁴⁰ While at least one federal court has used age to increase a sentence within the guidelines,¹⁴¹ others have been somewhat restrictive in permitting departure from the guidelines because of the defendant's old age.¹⁴² The latter cases present professors with an opportunity to examine statutory interpretation in relation to the disagreement between the circuits over the meaning of Section 5H1.4 of the *Guidelines Manual*.¹⁴³ The Guidelines' policy statement notes the following:

Age may be a reason to impose a sentence below the applicable guideline range when 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.¹⁴⁴

Although some circuits have ruled that this guideline requires all four "elements" to be present (i.e., old age, infirmity, efficiency, and cost savings),¹⁴⁵ at least one commentator has argued that other circuits have expressed a willingness to be more flexible in their opinions.¹⁴⁶ There is a large body of literature commenting on the sentencing guidelines in general, which can be referenced in

man convicted of operating an illegal lottery); Cristina J. Pertierra, *Do the Crime, Do the Time: Should Elderly Criminals Receive Proportionate Sentences?*, 19 *Nova L. Rev.* 793, 802-806 (1995).

140. Long, *supra* n. 95, at 70-71.

141. *U.S. v. Fairchild*, 940 F.2d 261, 267 (7th Cir. 1991), *aff'd on other grounds*, 116 F.3d 1482 (7th Cir. 1997) (sentencing a forty-seven-year-old defendant at the top of the sentencing guidelines, in part, due to his age).

142. *E.g. U.S. v. Carey*, 895 F.2d 318, 324 (7th Cir. 1990) (reversing a downward departure for a sixty-two-year-old defendant convicted of passing bad checks); *U.S. v. Harrison*, 970 F.2d 444, 447-448 (8th Cir. 1992) (upholding the trial court's refusal to depart from the guidelines for a sixty-four-year-old defendant guilty of embezzling funds).

143. U.S. Sentencing Commn., *supra* n. 34, at § 5H1.1.

144. *Id.*

145. *U.S. v. Seligsohn*, 981 F.2d 1418, 1428-1429 (3d Cir. 1992) (reversing downward departure when a sixty-two-year-old defendant convicted of fraud did not allege that he was in poor health); *Carey*, 895 F.2d at 322.

146. Long, *supra* n. 95, at 76-78 (citing *U.S. v. Anders*, 956 F.2d 907, 912 (9th Cir. 1992) (rejecting the finding that a forty-six-year-old defendant's age was extraordinary, but suggesting in dicta that other factors may be considered in finding extraordinary circumstances)); see *U.S. v. Floyd*, 945 F.2d 1096, 1102-1103 (9th Cir. 1991) (permitting a downward departure for a young defendant based on the age guidelines); *U.S. v. Bowser*, 941 F.2d 1019, 1026 (10th Cir. 1991) (permitting a downward departure for an eighteen-year-old defendant).

discussing whether age should be a factor in sentencing determinations.¹⁴⁷

Because of these financial, social, and human costs, some scholars argue for selective decarceration of certain older prisoners, particularly those who are deemed no longer dangerous.¹⁴⁸ Some law schools have started programs to seek early release of older prisoners.¹⁴⁹ Of course, these decarceration policies might become unnecessary if sentencing policies, particularly those concerning life sentences, habitual offender statutes, long-term mandatory minimums, and elimination of parole, were reevaluated. Once again, a discussion of the impact of these politically popular sentencing policies can result in a rich discussion of the goals and underlying theories for punishing persons who commit crimes.¹⁵⁰ For those interested in situating criminal justice policy within broader societal structures, a discussion of the relative costs of incarcerating an older prisoner vis-à-vis placing him in the community also is affected by governmental income, housing, and health care programs available to older persons in general.¹⁵¹

For those prisoners who become terminally ill, parole is technically an option in most jurisdictions.¹⁵² Obviously, not all terminally ill prisoners are elderly, but some of the questions about continued incarceration, particularly in relation to keeping someone incarcerated who is no longer dangerous, are similar. According to one survey, all but three jurisdictions — District of Columbia, Kansas, and Maine — have some mechanism for the early release of terminally ill prisoners.¹⁵³ However, in practice, these procedures are often cumbersome, rigid, and protracted.¹⁵⁴

147. Long, *supra* n. 95, at 89–91.

148. Kerbs, *supra* n. 123, at 231–232.

149. Tulane Law Professor Jonathan Turley founded the Project for Older Prisoners (POPS) program, which has law school chapters in Louisiana, North Carolina, Michigan, Florida, Illinois, and the District of Columbia. Ornduff, *supra* n. 119, at 194–195.

150. Kerbs, *supra* n. 123, at 239–240.

151. *Id.* at 240–244.

152. *E.g.* Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners — Is the Cure Worse Than the Disease?*, 3 *Widener J. Pub. L.* 799, 799 (1994).

153. *Id.* at 818–819 (discussing the results of a telephone survey the article's author, Marjorie P. Russell, had conducted).

154. *Id.* at 801.

IV. CONCLUSION

We live in a society that is aging rapidly. The growing number of older persons will influence the criminal justice system. There may be a growing number of older criminal victims and perpetrators as well. Unless current sentencing practices change, there certainly will be a larger number of older persons in our penal institutions. The costs of and impact on the criminal justice system and society as a whole presents challenging and difficult questions for the future. A discussion of these questions can enliven the discussion in criminal law classes. The Author's hope is that this Article has provided some helpful suggestions and supporting resources for including elder law discussions in the criminal law classroom.