

Elderly and Incarcerated: Preventing the Medical Deaths of Older People in Texas Prisons

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I. INTRODUCTION

In Texas, the older population in prison¹ has grown in both number and percentage of the overall prison population in recent years, with the population that is fifty years of age or older increasing from 18,067 (11.9 percent) in 2005 to 30,131 (20.3 percent) in 2015.² This growth trend is mirrored across the United States.³ Experts point to several factors contributing to the rise in the number of older people in prison, including the aging of the U.S. population as a whole, the tendency of people to live longer, and, importantly, the effects of the “tough-on-crime” sentencing practices of the 1980s and 1990s.⁴ As people sentenced under those laws continue to sit in prison without release, it is likely that this population will only continue to grow.

The large number of older people in Texas prisons causes logistical challenges for the Texas Department of Criminal Justice (TDCJ) as well as for the people in prison themselves. Older people have different challenges in prison than their younger counterparts, including mobility prob-

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¹ This Note uses the term “older people in prison” to refer to those fifty-five years of age or older unless otherwise indicated. While this term is used throughout this Note, a common if not consistently defined term in literature and practice is “geriatric.” The Texas Department of Criminal Justice (TDCJ) uses the latter term to refer to those fifty-five years of age or older. See, e.g., TEX. DEP’T OF CRIM. JUST., CORRECTIONAL MANAGED HEALTH CARE POLICY MANUAL: ADMISSION TO A GERIATRIC CENTER (2017), http://tdcj.state.tx.us/divisions/cmhc/docs/cmhc_policy_manual/G-51.02.pdf [<https://perma.cc/A28T-RPY2>] (stating that “[a]ge will be 55 or older” in the admission criteria for geriatric units). Some states categorize people in their prisons as “geriatric” beginning as early as age forty-five or as late as age seventy, and others do not categorize at all. TINA CHIU, VERA INST. OF JUST., IT’S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 7 (2010). Most states use “geriatric” to refer to someone at least age fifty or older. See *id.* at 4. People in prison are also commonly considered to have physical characteristics approximately ten years older than their chronological age, due to a lack of preventative care, a risky lifestyle before coming to prison, and the stresses of prison life. See, e.g., Mike Mitka, *Aging Prisoners Stressing Health Care System*, 292 JAMA 423, 423 (2004).

² TEX. DEP’T OF CRIM. JUST., TEXAS DEPARTMENT OF CRIMINAL JUSTICE STATISTICAL REPORT: FISCAL YEAR 2005 8 (2006), https://www.tdcj.state.tx.us/documents/Statistical_Report_FY2005.pdf [<https://perma.cc/BT96-Z33E>]; TEX. DEP’T OF CRIM. JUST., TEXAS DEPARTMENT OF CRIMINAL JUSTICE STATISTICAL REPORT: FISCAL YEAR 2015 8 (2016), https://www.tdcj.state.tx.us/documents/Statistical_Report_FY2015.pdf [<https://perma.cc/AR7R-MZ2K>].

³ See Carrie Abner, *Graying Prisons: States Face Challenges of an Aging Inmate Population*, STATE NEWS, Nov./Dec. 2006, at 9, <http://www.csg.org/knowledgecenter/docs/sn0611GrayingPrisons.pdf> [<https://perma.cc/78YK-ZHG7>].

⁴ *Id.* at 9.

lems, other physical and mental disabilities, and a variety of medical issues.⁵

Although Texas has a responsibility to protect public safety and appropriately punish people for their crimes, the data clearly indicates that crime decreases with age, and older people are less likely to be a public safety risk. According to one study, those over the age of fifty-five have a one-year recidivism rate of just 3.2 percent, compared to forty-five percent for people between the ages of eighteen and twenty-nine.⁶ Despite these facts, many older people in Texas prisons will never be released and will instead die in custody. Between 2005 and 2015, 2,286 people over the age of fifty-five died in Texas prisons.⁷ All but fifty-five of these deaths were due to natural causes.⁸

This Note explores current conditions for older people in Texas prisons and analyzes data on older people who died of natural causes in prison. It addresses research questions that ask what the demographic characteristics and criminal histories of these people are and what policy options can be implemented to reduce the number of their deaths in prison.

II. THE COSTS OF LIFE AND DEATH IN PRISON

The costs incurred by older people in prison are very high compared to the costs of incarcerating younger people with fewer medical issues. According to a 2012 report from the American Civil Liberties Union (ACLU), the average cost to incarcerate an older person is approximately \$68,000 per year, which is twice the cost of incarcerating the average person in prison.⁹ If the older person has serious medical problems, however, this cost can be much higher; for example, TDCJ spent almost \$2 million

⁵ See generally B. JAYE ANNO ET AL., NAT'L INST. OF CORR., CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 9 (2004).

⁶ Emily Ramshaw, *Few Texas Inmates Get Released on Medical Parole*, TEX. TRIB. (Jun. 3, 2010), <https://www.texastribune.org/2010/06/03/few-texas-inmates-get-released-on-medical-parole/> [<https://perma.cc/3YN2-8GT6>].

⁷ See Erika Parks, *Analysis of Texas Justice Initiative (TJI) Dataset from 2005 through 2015* (2018) (unpublished analysis, on file with author); see also *infra* Appendix (highlighting results of the analysis). This Note makes significant use of data compiled by the TJI regarding deaths of people in TDCJ custody between 2005 and 2015, specifically regarding people who died in a prison while in TDCJ custody. The TJI is funded by organizations at the University of Texas at Austin and “seeks to build narratives around who is dying in Texas’[s] criminal justice system, bring attention to the lives that have been lost, and provide a foundation for research toward solutions that will save lives.” *About Us*, TEX. JUST. INIT., <http://www.texasjusticeinitiative.org/about/> [<https://perma.cc/8TDE-LFZT>]. Amanda Woog, TJI project director, originally provided the data to the author for analysis after compiling and organizing the records, which were provided by the Texas Attorney General’s Office and other entities. *Id.* The author recoded and analyzed the variables presented in the dataset, and takes responsibilities for any errors within. A user-friendly version of this data is available for public download on the TJI website. See *Overview*, TEX. JUST. INIT., <http://www.texasjusticeinitiative.org> [<https://perma.cc/J6FN-RC4T>].

⁸ *Id.*

⁹ AM. C.L. UNION, AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY xiv (2012).

in 2011 on medical expenses for the ten most ill people in its prisons.¹⁰

Because many people in prison do not have the support of family members outside, their deaths can also incur costs to the state. In 2015, 104 people died in Missouri prisons, and the remains of fifty-five of them were not claimed by family members.¹¹ This cost the state \$62,000 in burial expenses.¹² By comparison, 416 people died in Texas prisons in 2015,¹³ and the remains of perhaps 100 went unclaimed.¹⁴ Burial for these 100 likely cost the state around \$100,000.¹⁵

III. OLDER PEOPLE IN TEXAS PRISONS

TDCJ houses older people in prison within regular units as well as in several specific geriatric units.¹⁶ An older person in Texas prisons may be referred to a geriatric unit when, among other criteria, the person would “be able to function in sheltered general population setting and able to independently perform all activities of daily living” and when “[h]ousing” the person “with general population is difficult due to age and/or general health condition.”¹⁷ The Robert H. Duncan Geriatric Facility, which has a capacity of 606 people, is the only standalone unit in TDCJ designed specifically for older people in prison.¹⁸ Most of the geriatric-specific units are embedded in larger facilities.¹⁹ The W.J. Estelle Unit, home of the Region 1 Medical Center, also has an embedded geriatric facility, as do the C.T. Terrell Unit, Wallace Pack Unit, John Montford Unit, L.V. Hightower Unit, Louis C. Powledge Unit, and Allan B. Polunsky Unit.²⁰ These embedded geriatric facilities have all services available on a single level, with assisted disability services showers and housing to accommodate

¹⁰ Matt Clarke, *Medical Parole for Texas Prisoners on the Decline*, PRISON LEGAL NEWS (Feb. 15, 2015), <https://www.prisonlegalnews.org/news/2014/feb/15/medical-parole-for-texas-prisoners-on-the-decline/> [<https://perma.cc/K24D-BBCH>].

¹¹ K. Erickson, *Missouri seeks way to cut cost of burying prisoners*, ST. LOUIS POST-DISPATCH (Nov. 27, 2016), http://www.stltoday.com/news/local/govt-and-politics/missouri-looking-for-way-to-cut-burial-costs-on-dead/article_9774b122-c035-5ad9-be14-f23a3b37c604.html [<https://perma.cc/XM83-VETK>].

¹² *Id.*

¹³ Parks, *supra* note 7.

¹⁴ See Robyn Ross, *Laid to Rest in Huntsville*, TEX. OBSERVER (Mar. 11, 2014), <https://www.texasobserver.org/prison-inmates-laid-rest-huntsville/> [<https://perma.cc/25YL-B5T6>] (“Of the roughly 450 inmates who die in Texas prisons each year, about 100 are laid to rest in Captain Joe Byrd Cemetery.”).

¹⁵ See *id.* (“When family members can’t be located, or when they decline to claim the body, the state picks up the tab for the funeral and buries the body in TDCJ’s Byrd Cemetery. . . . [It] costs about \$2,000 per inmate.”).

¹⁶ See *Unit Directory*, TEX. DEP’T OF CRIM. JUST., http://tdcj.state.tx.us/unit_directory/ [<https://perma.cc/98JT-RNVR>] (listing available geriatric facilities and information about each facility).

¹⁷ TEX. DEP’T OF CRIM. JUST., *supra* note 1, at 1.

¹⁸ See *id.*

¹⁹ See *Unit Directory*, *supra* note 16.

²⁰ *Id.*

breathing machines.²¹ The only unit available to women with these needs is the Carole S. Young Medical Facility, which houses the majority of women in TDCJ with special medical needs.²²

TDCJ also contracts with the University of Texas Medical Branch (UTMB) to run hospital facilities within its prisons²³ and with a freestanding hospital in Galveston specifically for those in TDCJ custody.²⁴ Of the 4,219 people who died of medical causes in TDCJ custody between 2005 and 2015, nearly a quarter died in this hospital in Galveston.²⁵

IV. DATA ON DEATHS IN STATE CUSTODY NATIONWIDE

According to national data from a report published by the federal Bureau of Justice Statistics' (BJS) Deaths in Custody Reporting Program, the top four causes of death in state prisons between 2001 and 2004 were heart diseases, cancer, liver diseases, and AIDS; together, these four causes accounted for two-thirds of deaths in state prisons.²⁶

Although the vast majority of deaths in state prison are categorized as "natural" or due to illness,²⁷ some people contend that the underlying cause of a portion of these deaths is medical neglect, lack of appropriate health care, or even guard brutality.²⁸ Although there is no way of knowing how many deaths categorized as "natural" could have actually been prevented, short of intensive investigations, it is clear from the research that simply being an older person in prison leads to higher mortality. BJS researchers found that those fifty-five or older died in prison at a rate three times that of people aged forty-five to fifty-four, and eleven times the rate of those aged thirty-five to forty-four.²⁹ Although the death rate in prison is actually lower than the rate in the overall population for most people, for those over age fifty-five, it is fifty-six percent higher.³⁰

²¹ See, e.g., *Pack (PI)*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.state.tx.us/unit_directory/p1.html [<https://perma.cc/W3S8-8SXG>] (noting that as a "Type I Geriatric Facility" it has "[a]ll services on a single level, including assisted disability services (ADS) showers and CPAP accommodating housing").

²² See *Unit Directory*, *supra* note 16; *Young Medical Facility (GC)*, TEX. DEP'T OF CRIM. JUST., http://tdcj.state.tx.us/unit_directory/gc.html [<https://perma.cc/U8ZL-SMLW>].

²³ *Texas Correctional Managed Health Care Committee*, TEX. DEP'T OF CRIM. JUST., <http://www.tdcj.texas.gov/divisions/cmhc/index.html> [<https://perma.cc/Z7SR-2KPQ>].

²⁴ See *UTMB TDCJ Hospital*, UTMB HEALTH, <https://www.utmb.edu/tdcj/mission.asp> [<https://perma.cc/T3KT-KFM5>].

²⁵ Parks, *supra* note 7.

²⁶ C.J. MUMOLA, BUREAU OF JUST. STATS., MEDICAL CAUSES OF DEATH IN STATE PRISONS, 2001–2004 1 (2007), <https://www.bjs.gov/content/pub/pdf/mcdsp04.pdf> [<https://perma.cc/67YD-MKW8>].

²⁷ MARGARET E. NOONAN, BUREAU OF JUST. STATS., MORTALITY IN STATE PRISONS, 2001–2014 – STATISTICAL TABLES 2 (2016), <https://www.bjs.gov/content/pub/pdf/msp0114st.pdf> [<https://perma.cc/4ZEA-RWLL>].

²⁸ See, e.g., Joseph Dole, *Death in Prison: The Top 3 Killers*, PRISON WRITERS (Jun. 4, 2017), <http://prisonwriters.com/death-in-prison-the-top-3-killers/> [<https://perma.cc/Q8CY-JBNU>].

²⁹ MUMOLA, *supra* note 26, at 2.

³⁰ *Id.* at 3.

The mortality rate for those released from prison who have served ten or more years in prison is more than triple the mortality rate of people who have served fewer than five years,³¹ which reflects the toll that prison itself takes on a person's health. Jeffrey Ian Ross, a criminologist at the University of Maryland, reviewed research indicating that prison sentences increasingly lead to death in custody due to four interrelated factors: unsanitary prison conditions, below-average healthcare, high levels of violence, and people with chronic diseases living in close proximity.³² The former director of the Florida Department of Corrections' Office of Health Services remarked, "The stress of incarceration—including lack of support systems and a lack of trust in fellow prisoners—leads to chronically stressful and debilitating environments."³³ This stress of living in prison, combined with traumatic previous experiences and lack of access to healthcare throughout the lifespan all contribute to accelerated aging, susceptibility to disease, and increases risk of death for older people in prison.³⁴

Texas's large prison population makes it unsurprising that the state had the highest number of deaths in custody nationally between 2001 and 2004. Texas had 1,582 deaths in state custody during these years, followed by California with 1,306. Florida, New York, and Pennsylvania were the next highest with a combined forty-one percent of deaths in state prisons during those years.³⁵ In terms of the number of deaths per 100,000 people in prison, Texas ranked fourteenth among states, with 241 deaths per 100,000 people in prison, behind most other southern states but ahead of many states in other regions.³⁶ Although this data is somewhat outdated, it provides a good baseline for examining deaths in custody in Texas between 2005 and 2015.

³¹ *Id.* at 2.

³² Jeffrey Ian Ross, *Why a Jail or Prison Sentence is Increasingly Like a Death Sentence*, 15 CONTEMP. JUST. REV. 309, 309 (2012).

³³ Abner, *supra* note, at 3 (quoting Dr. David Thomas, Former Director of the Florida Department of Corrections' Office of Health Services).

³⁴ *Id.* at 9–10 (“[Some commentators] point to a number of factors contributing to this phenomenon [of inmates appearing physically and medically older than they are], including lack of access to health care services prior to entry, poor dietary and exercise habits, and substance abuse. . . . A 2000 study by the Florida Department of Corrections' Office of Health Services found that almost two-thirds of inmates received their first significant health care experience, defined as any surgery or filled and started prescription, while in prison. . . . As a result [of accelerated aging caused by stress], older inmates tend to develop age-related health problems earlier. According to [the director of the Project for Older Prisoners], an elderly inmate will experience an average of three chronic illnesses during his or her term. The National Institute of Corrections lists arthritis, hypertension, ulcer disease, prostate problems and myocardial infarction among the most common chronic diseases among elderly inmates. Diabetes, Hepatitis C and cancer are also common.”).

³⁵ MUMOLA, *supra* note 26, at 3.

³⁶ *Id.*

V. ANALYSIS OF DEATHS IN TDCJ CUSTODY

This Note makes use of the Texas Justice Initiative (TJI) dataset.³⁷ The TJI was able to collect this data in part because Texas law requires TDCJ, as well as county jails and police departments, to report deaths in custody to the Texas Attorney General's Office.³⁸ While TDCJ generally appears to be compliant, there are some concerns about compliance by local jails and police departments.³⁹

In general, few states have a publicly available record of deaths in custody.⁴⁰ The federal Deaths in Custody Act of 2000 allowed the federal Bureau of Justice Statistics (BJS) to begin collecting this information from states,⁴¹ but prior to the law's passage, only Texas and California were actively reporting deaths in custody.⁴² Providers of aggregate data may also vary among states. For example, while aggregate data is accessible in California on a state government website,⁴³ aggregate data in Texas is currently only available to the public on a non-governmental website hosted by the TJI.⁴⁴

The TJI dataset is detailed in some ways and insufficiently detailed in others. For many of the people whose deaths are listed as natural causes or illness, there is a specific cause of death listed. In most cases, however, there is no information about the details leading up to someone's death, including the quality and timing of medical treatment they received, whether the death was expected, and whether anything could have been done to prevent it. In fact, it is not necessarily even the case that a death listed as natural causes or illness was not influenced by the behavior of an officer or other person in prison. For example, the 2015 death of Michael Sabbie in a Texas prison made state news and was described as a natural death, even though video released of guards being physically aggressive and information about the lack of medical assistance he received point to

³⁷ Parks, *supra* note 7.

³⁸ TEX. CODE OF CRIM. PROC. § 49.18(b) ("If a person dies while in the custody of a peace officer or as a result of a peace officer's use of force or if a person incarcerated in a jail, correctional facility, or state juvenile facility dies, the director of the law enforcement agency of which the officer is a member or of the facility in which the person was incarcerated shall investigate the death and file a written report of the cause of death with the attorney general no later than the 30th day after the date on which the person in custody or the incarcerated person died.").

³⁹ See, e.g., Lise Olsen, *In Texas and California, police fail to record use-of-force-fatalities from 2005-2015*, HOUS. CHRON. (Oct. 9, 2016), <https://www.houstonchronicle.com/news/houston-texas/houston/article/In-Texas-and-California-police-fail-to-report-9958631.php> [<https://perma.cc/DWU2-A7YV>].

⁴⁰ *Id.* ("Texas and California are the only states to require the reporting of all in-custody deaths . . .").

⁴¹ ZHEN ZENG ET AL., BUREAU OF JUST. STATS., ASSESSING INMATE CAUSE OF DEATH: DEATHS IN CUSTODY REPORTING PROGRAM AND NATIONAL DEATH INDEX 1 (2016).

⁴² Olsen, *supra* note 39.

⁴³ See OPEN JUSTICE, <http://www.openjustice.doj.ca.gov> [<https://perma.cc/JAN2-NTUQ>].

⁴⁴ TEX. JUST. INIT., *supra* note 7.

additional causes of his death.⁴⁵ Because of these limitations, the TJI dataset analysis is confined primarily to characteristics of the people who died rather than the circumstances surrounding their deaths.

VI. OVERALL DATA

Analysis of the TJI dataset shows that between 2005 and 2015, 4,221 people died in Texas prisons of natural causes or illness.⁴⁶ Of these, just over half (2,231) were fifty-five years of age or older, with an average age of death of sixty-four years old.⁴⁷ All but fifty-five of these deaths were listed as due to natural causes or illness during this period.⁴⁸ See Figure 1, below.

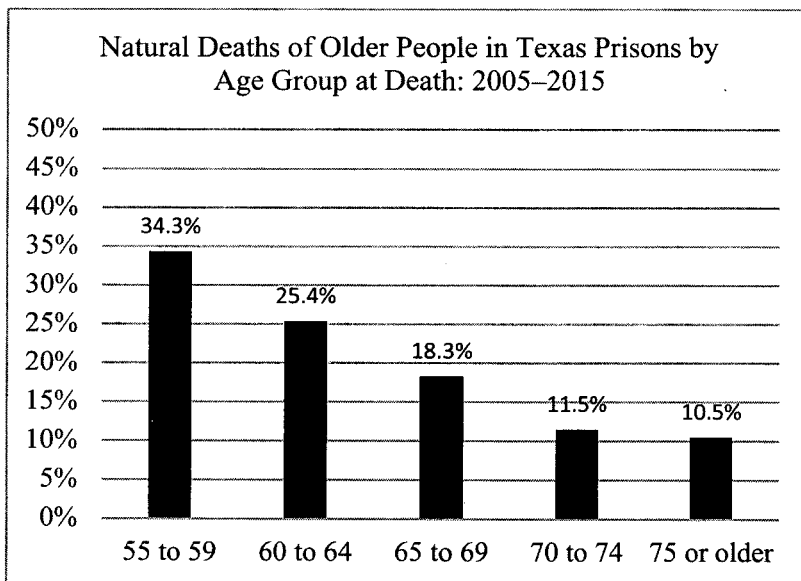


Figure 1

Of these older person deaths, more than ninety-seven percent were men, fifty percent were white, twenty-six percent were black, and twenty-three percent were Hispanic. By comparison, the racial breakdown of the general Texas prison population in 2015 was thirty-two percent white,

⁴⁵ Elliott C. McLaughlin, *Texas prisoner's death casts spotlight on privatized health care*, CNN (Nov. 1, 2016), <http://www.cnn.com/2016/10/27/us/michael-sabbie-death-private-prison-health-care/> [<https://perma.cc/2GDD-9HBH>].

⁴⁶ Parks, *supra* note 7.

⁴⁷ *Id.*

⁴⁸ *Id.*

thirty-four percent black, and thirty-three percent Hispanic.⁴⁹ This comparison reveals a higher death rate among white people in prison. This mirrors national statistics: BJS found that the mortality rate for black and Hispanic people in prison was 206 deaths per 100,000 people, while for white people it was 343 per 100,000, a rate sixty-seven percent higher.⁵⁰ This disparity is likely due to the fact that white people in prison are more likely to be older.⁵¹

Though analysis of this TJI dataset is limited to deaths in TDCJ custody rather than information about those who are living but at risk for death, the data is likely useful in predicting future mortality rates for people currently in prison based on demographic characteristics such as age, criminal history, length of time in prison, and type of offense. The following sections examine this population on those measures and begin to discuss policy options for reducing the rate of their deaths.

VII. ELDERLY PEOPLE ENTERING PRISON

Before making recommendations on policy options to reduce the rate of older people dying in custody, it is important to examine the characteristics of those who died, including whether they entered prison at an advanced age or grew old there. Just under fifty percent of older people who died in prison entered after the age of fifty-five, and nearly eight percent were first incarcerated after the age of seventy.⁵² See Figure 2, below. This points to a misperception that the majority of older people in prison are serving long sentences, but it also suggests a policy to prevent the incarceration of older people.

⁴⁹ TEX. DEP'T OF CRIM. JUST. 2015, *supra* note 2, at 8. The author adjusted the TJI dataset to recategorize ethnicities initially categorized as "other" based on offered ethnic descriptions, including recategorizations of "Belize," "Brazilian," and "Cuban" as Hispanic; "Caucasian," "white," and "white nonhispanic" as white; and "Sudanese black" as black. "Arabian" and "Anglo & Middle East" remained as other.

⁵⁰ See MUMOLA, *supra* note 26, at 2.

⁵¹ See Michael Schwartz, Michael Winerip, & Robert Gebeloff, *The Scourge of Racial Bias in New York State's Prisons*, N.Y. TIMES (Dec. 3, 2016), <http://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html>.

⁵² Parks, *supra* note 7 (analyzing data showing that of the 2,231 older people in prison who died in custody, 0.7 percent entered when they were younger than twenty-five, 11.1 percent entered between ages twenty-five and thirty-nine, 38.0 percent entered between ages forty to fifty-four, 42.5 percent entered between ages fifty-five to sixty-nine, 7.7 percent entered after reaching seventy years of age, with the remainder missing the data necessary to calculate these statistics).

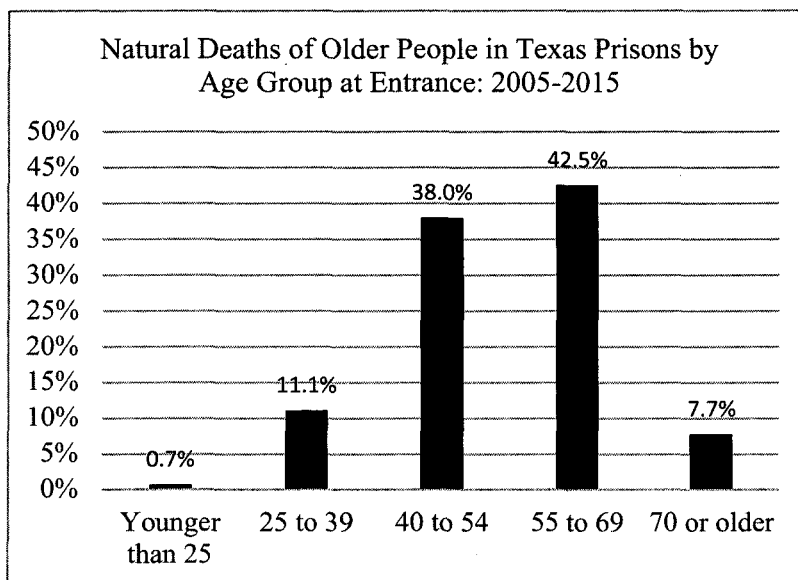


Figure 2

Texas judges and lawmakers should consider whether prison makes sense as a punishment for people over a certain age. Some older people may be of sufficiently sound body and mind for whom prison might be the right option. However, others may not be. Infirmities may make prison inappropriate as a punishment for these older perpetrators because it may exacerbate their conditions.⁵³

Some of those who entered prison after reaching the age of seventy—approximately 43.7 percent—committed crimes against children, the majority of which were sex crimes.⁵⁴ These crimes are undoubtedly serious and the perpetrators must be held accountable, but in most cases, the perpetrators are not a threat to adults, and precluding their access to children can ensure public safety. There are options that will allow for this while incurring fewer costs for the state and holding people in more appropriate placements. One option is to sentence frail older people to intensive supervision and apply restrictions like those for people who have committed sex offenses, preventing them from accessing potential victims. Less restrictive options may sufficiently ensure public safety in some cases.

For those people entering custody after reaching seventy years of age, analysis shows that a significant part of this population—up to 20 percent—committed crimes of a non-violent, non-sexual nature.⁵⁵ These

⁵³ See *infra* Part XII.

⁵⁴ *Id.*

⁵⁵ Parks, *supra* note 7. The analysis indicated 19.54 percent of people incarcerated after reaching the age of seventy committed crimes of a non-violent, non-sexual nature. This analysis was subject to variability due to data quality concerns and limitations; the author used only the official indicator of

individuals should also not be sentenced to prison in most cases, as probation restrictions are frequently enough to hold them accountable for their crimes. For individuals who are sentenced as younger people and grow old in prison, however, different concerns are present.

VIII. GROWING OLD IN PRISON

While not all people who died in Texas prisons between 2005 and 2015 were serving long sentences, many were. Among people who died in Texas prisons after the age of fifty-five, a plurality had served less than five years.⁵⁶ Nearly thirty percent had served at least fifteen years, while nearly forty percent had served less than five years.⁵⁷ Of those who had served at least fifteen years, more than ninety percent entered prison before the age of fifty-five,⁵⁸ with an average age at prison entry of about forty years old.⁵⁹ See Figure 3, below.

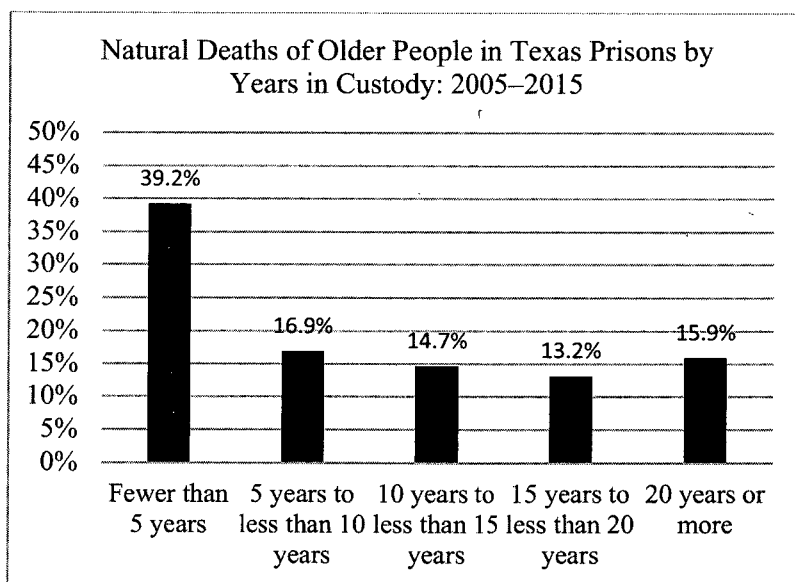


Figure 3

violence in determining whether a crime committed was violent. The dataset did not flag sex crimes, however, so the author analyzed the non-standard fields describing the crimes to determine common words tied to crimes of a sexual nature. The author used variations on the following words to indicate a sex crime: “sex,” “rape,” “indecent,” “porn,” or “minor.”

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

As indicated by their lengthy sentences, the crimes committed by people who had served at least fifteen years at the time of their deaths were in many cases quite serious. Nearly seventy percent of this group had committed a violent crime, and almost thirty-eight percent had committed a sex crime.⁶⁰ Because these individuals had been in prison for so long, however, many of these people may have completed extensive programming and been rehabilitated. This reality, along with the recidivism rate of just 3.2 percent for those over the age of fifty-five, indicates that these older people in prison are very unlikely to be a threat to public safety if they were to be released.⁶¹

IX. FALLING ILL AND DYING IN PRISON

Most older people who died in Texas prison between 2005 to 2015 had a known medical condition. Of the 2,284 people who died in Texas prisons, roughly 63.1 percent had a cause of death related to a reported pre-existing condition: 57.6 percent were categorized as having a medical condition when they entered prison, and an additional 5.5 percent were listed as developing a medical condition after admission.⁶² In addition, just over eighty percent received medical treatment related to their fatal illness before their death, though only 42.8 percent received a medical evaluation after death, i.e., an autopsy.⁶³ Mirroring the national statistics, the majority of causes of death listed were related to heart disease, cancer, or liver diseases.⁶⁴ The high rate of medical conditions among older people in Texas prisons again shows that these individuals are less likely to pose a serious threat to public safety if released early.

X. GERIATRIC RELEASE IN TEXAS

Like a number of other states, Texas allows for geriatric release,⁶⁵ which allows for the release of people with significant medical problems.

⁶⁰ *Id.*

⁶¹ Ramshaw, *supra* note 6.

⁶² Parks, *supra* note 7.

⁶³ *Id.*

⁶⁴ *Id.* This analysis was done by searching through the causes of death and classifying them as follows: first, those containing the terms “heart,” “cardi,” or “coronary” (heart disease); second, those containing the terms “cancer” or “carcinoma” (cancer); and third, those containing the terms “liver,” “cirrhosis,” or “hepat” (liver disease); MUMOLA, *supra* note 26 (noting national data).

⁶⁵ This Note defines “geriatric release” statutes as those that either explicitly focus on elderly people in prison or that focus on medical conditions and specifically refer to age or age-related medical conditions. Others similarly define the term. *See, e.g.,* CHIU, *supra* note 1, at 6.

Texas's geriatric release program is called Medically Recommended Intensive Supervision (MRIS).⁶⁶ This law allows for the release of people serving most sentences,⁶⁷ but disallows release for certain types of crimes, including murder, aggravated robbery, kidnapping, some types of burglary, and a variety of sex crimes—crimes committed by many of the people who died in prison.⁶⁸ The program mandates a “supervision plan that requires the inmate to submit to electronic monitoring, places the inmate on super-intensive supervision, or otherwise ensures appropriate supervision of the inmate.”⁶⁹ The program allows for certain exceptions to these requirements, however, including for “elderly” people.⁷⁰ TDCJ guidelines define “elderly” as being at least sixty-five years of age.⁷¹

Under the review process, the parole panel must determine “that, based on the inmate’s condition and a medical evaluation, the inmate does not constitute a threat to public safety.”⁷² In 2015, less than five percent of individuals released pursuant to MRIS returned to TDCJ custody, and approximately two-thirds of the released individuals died shortly after release.⁷³ Processing applications for MRIS typically take a long time, and a number of people have died while their applications were pending.⁷⁴

Because of the restrictions on eligibility, the vast majority of people who apply for MRIS are denied.⁷⁵ In 2015, the Board of Pardons and Paroles received 1,738 applications for MRIS, considered 213, and ultimately approved eighty-five, for a rate of just 4.9 percent.⁷⁶ By contrast, the Texas Board of Pardons and Paroles granted parole to nearly 29,000 of the more than 82,000 cases it considered in 2015, for an approval rate of thirty-five percent,⁷⁷ up from approximately twenty-five percent in its 2001 fiscal year.⁷⁸

⁶⁶ TEX. GOV'T CODE § 508.146(a) (2017).

⁶⁷ *Id.* (excluding people sentenced to death or to life without parole).

⁶⁸ *Id.*; TEX. CODE OF CRIM. PROC. § 42A.054 (2017) (listing certain serious crimes); TEX. CODE OF CRIM. PROC. Ch. 62 (2017).

⁶⁹ GOV'T § 508.146(a)(3).

⁷⁰ See GOV'T § 508.146(a)(1)(A) (“An inmate other than an inmate who is serving a sentence of death or life without parole may be released on [MRIS] . . . except that an inmate with an instant offense that is [one of a list of severe crimes] or an inmate who has a reportable conviction or adjudication [as a sex offender] may only be considered [for MRIS] if a medical condition of terminal illness or long-term care has been diagnosed by a physician, if [the appropriate authority] identifies the inmate as being . . . elderly . . . if the inmate is an inmate with an instant offense that is [one from the list of certain serious crimes.]”).

⁷¹ TEX. DEP'T OF CRIM. JUST., PROGRAM GUIDELINES AND PROCESSES FOR MEDICALLY RECOMMENDED INTENSIVE SUPERVISION (MRIS) 10 (2014), http://tdcj.state.tx.us/documents/rid/TCOOMMI_PGP_0104_MRIS.pdf [<https://perma.cc/H8U4-8GRR>].

⁷² GOV'T § 508.146(a)(2).

⁷³ TEX. BD. OF PARDONS AND PAROLES, TEXAS BOARD OF PARDONS AND PAROLES ANNUAL STATISTICAL REPORT FY 2015 12 (2015), <https://www.tdcj.state.tx.us/bpp/publications/FY%202015%20AnnualStatisticalReport.pdf> [<https://perma.cc/JX8Y-MN34>].

⁷⁴ Clarke, *supra* note 10.

⁷⁵ TEX. BD. OF PARDONS AND PAROLES, *supra* note 73, at 12.

⁷⁶ *Id.*

⁷⁷ *Id.* at 5.

⁷⁸ *Id.*

XI. COMPARISONS WITH GERIATRIC RELEASE PROGRAMS IN OTHER STATES

The District of Columbia and fifteen states, including Texas, have laws about various types of medical or geriatric release, also called compassionate release.⁷⁹ Most of these jurisdictions require the applicant to have reached a minimum age, ranging from forty-five to sixty-five.⁸⁰ A few states require applicants to serve a minimum number of years in prison before becoming eligible, ranging from five to twenty years.⁸¹ Texas's law does not include either of these restrictions.⁸²

Unlike Texas, however, some of these states allow for more flexibility to release people who are old and infirm but not necessarily extremely ill, and in some states, people may become automatically eligible after a certain age, regardless of health status.⁸³ In Virginia, for example, people in prison can be considered for release at age sixty if they have served at least ten years, or at age sixty-five if they have served at least five years, provided the person did not commit certain types of serious felonies.⁸⁴ However, of the 500 people eligible for geriatric release in Virginia in 2007, only fifty-two individuals even applied.⁸⁵ This low application rate indicates that people in prison often lack the knowledge or means to apply for programs for which they are eligible.

Like in Texas, many states have requirements in place that exclude people with certain kinds of felonies, such as homicide or sexual assault, from eligibility for medical release.⁸⁶ As seen in the analysis above, older people, especially those who have served long sentences, are likely to have committed these kinds of violent crimes. Thus, geriatric release may not apply to the majority of people for whom it is designed.⁸⁷ Geriatric release laws, like many general parole release regulations, do not take into account the potentially rehabilitative effects of years in prison nor the desistance-inducing effects of growing older.

⁷⁹ CHIU, *supra* note 1, at 7.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See TEX. DEP'T OF CRIM. JUST., *supra* note 71 (noting age sixty-five as the minimum age for which elderly inmates qualify for special consideration under a medical release program).

⁸³ CHIU, *supra* note 1, at 6.

⁸⁴ VA. CODE § 53.1-40.01 (2009) (Class 1 felonies).

⁸⁵ CHIU, *supra* note 1, at 9.

⁸⁶ See TEX. GOV'T CODE § 508.146(a) (2017); TEX. CODE OF CRIM. PROC. § 42A.054 (2017); CRIM. Ch. 62 (2017); CHIU, *supra* note 1, at 7.

⁸⁷ See *infra* Part X (noting that elderly people in prison are not eligible for MRIS on the basis of advanced age alone if they have a life sentence or if they have a reportable adjudication or conviction as a sex offender).

XII. POLICY RECOMMENDATIONS

There are a number of policies that should be implemented to improve health care availability and quality for all people in prison. However, many older people who die in prison should not be there in the first place. The following recommendations focus on ways in which older people can be safely released into the community, or not incarcerated in the first place, thereby improving their end-of-life quality and reducing the cost burden on the state.

- 1. Loosen restrictions on eligibility for compassionate and medical release, and automatically consider eligible people for release without requiring an application.**

Texas is one of a number of states that has a medical release statute, but, like other states, does not use it often. Texas should select an age, such as sixty-five, at which people in prison who did not commit certain serious crimes will become eligible for geriatric release, regardless of their health status. Texas should also allow older people to be eligible for geriatric release even if they were convicted of serious crimes once they have served significant portions of their long prison sentences. In addition, Texas should automatically consider and continually review people in prison for release without requiring an application. Automatic review would remove the barriers that people in prison may face in accessing the knowledge and means to apply for release themselves.

- 2. Prioritize alternatives to prison for people sentenced when they are older.**

A significant number of people in prison were first incarcerated after the age of seventy for nonviolent, non-sex crimes, and these people should be strongly considered for alternative placements, as discussed below. Even those convicted for crimes against children could be considered for alternative placements, since they may not be a danger to society at large and could be appropriately restricted through requirements such as those placed on others who have committed sex crimes.

3. Establish residential facilities to safely house older people released under parole supervision or alternatively sentenced.

Most older people in prison have committed serious crimes and may not be able to safely live in the community unsupervised. By releasing these people into nursing homes and monitoring them on parole, they will be appropriately supervised while more easily receiving medical treatment and end-of-life care. In addition, the majority of the cost for their care will be supported by the federal government rather than by the state of Texas. This is because the federal government pays two-thirds of the cost of nursing home services through Medicaid, and the full cost if the older person on parole is eligible for Medicare.⁸⁸ Some estimates have projected that this could save Texas up to \$50 million per year.⁸⁹ Although there are challenges with private nursing homes accepting older people with criminal records,⁹⁰ Marc Levin of the Texas Public Policy Foundation has suggested special nursing homes that are monitored by parole officers.⁹¹

4. Reform harsh sentencing guidelines, increase the granting of parole, and improve parole release practices.

The only way to reduce the older population in prison in the long term is to make sure people who commit serious crimes when they are young are given the opportunity to parole out of prison before they reach an age when they may become seriously ill or infirm. There are a number of ways to do this, including: 1) reducing the upper limit of sentencing ranges for some crimes, which are very wide in Texas; 2) granting parole to those eligible on a more regular basis; and 3) improving parole and release services to help prevent failure on parole and recidivism more generally.

XIII. CONCLUSION

When visiting the geriatric wing of the Estelle Prison Unit, one is reminded that there are men in prison who cannot walk or take care of themselves and who are likely to die while in custody. It is neither humane nor cost-effective to hold these people in Texas prisons. By increasing the

⁸⁸ Ramshaw, *supra* note 6.

⁸⁹ *Id.*

⁹⁰ HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 80 (2012).

⁹¹ Ramshaw, *supra* note 6.

availability and use of medical and compassionate release, and by reducing the incarceration of older people to begin with, Texas can avoid significant expense while still protecting public safety and allowing people to spend the last years of their lives in a more comfortable and appropriate setting for their needs.

Appendix**Table 1:** Cause of death for people age fifty-five or older who died in Texas prisons, 2005–2015⁹²

People age fifty-five or older who died in Texas prisons, 2005-2015		2,286	
<i>Cause of death</i>		N	%
	Died of natural causes/illness	2,231	97.59%
	Died of accidental injury	18	0.79%
	Died of suicide	17	0.74%
	Died of homicide	10	0.44%
	Died of other causes	10	0.44%

⁹² Parks, *supra* note 7.

Table 2: Demographics of people age fifty-five or older who died of natural causes or illness in Texas prisons, 2005–2015⁹³

People age fifty-five or older who died of natural causes or illness in Texas prisons, 2005-2015		2,231	
<i>Age at Death</i>		N	%
	55 to 59	766	34.33%
	60 to 64	566	25.37%
	65 to 69	408	18.29%
	70 to 74	257	11.52%
	75 or older	234	10.49%
<i>Age at Custody</i>		N	%
	Younger than 25	15	0.67%
	25 to 39	247	11.07%
	40 to 54	847	37.97%
	55 to 69	948	42.49%
	70 or older	172	7.71%
	Missing data	2	0.09%
<i>Gender</i>		N	%
	Male	2,176	97.53%
	Female	55	2.47%
<i>Race/Ethnicity</i>		N	%
	White	1,117	50.07%
	Black	580	26.00%
	Hispanic	522	23.40%
	Other	12	0.54%
<i>Time in Custody</i>		N	%
	Less than 5 years	874	39.18%
	5 years to less than 10 years	378	16.94%
	10 years to less than 15 years	327	14.66%
	15 years to less than 20 years	294	13.18%
	20 years or more	355	15.91%
	Missing data	3	0.13%

⁹³ *Id.*

<i>Medical Information (not mutually exclusive categories)</i>		N	%
	Cause of death related to pre-existing medical condition at prison entry	1,285	57.60%
	Cause of death related to medical condition developed while in prison	123	5.51%
	Received medical treatment for condition related to cause of death	1,787	80.10%
	Received post-mortem evaluation to determine cause of death	955	42.81%