



Markkula Center for Applied Ethics *at Santa Clara University*

Compassionate Release: An “Extraordinary and Compelling Problem”

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Acknowledgements

Thank you to the Markkula Center for Applied Ethics at Santa Clara University for making this paper possible. Thank you also to Professor Joan Harrington for providing thoughtful guidance throughout the process of researching and writing this paper. Thank you also to Dr. Brian Buckley for raising helpful points about Aristotle and Dr. Meilin Chinn for providing feedback on this paper's discussion of Mencius and Buddhist philosophy.

Introduction

The only sound in the room was the beeping of a heart monitor. Jason Yaeger sat at the bedside of his ten-year-old daughter, Jayci, who had been diagnosed with terminal brain cancer.¹ Despite the fact that Jayci only had a few days left to live, Yaeger's visit was astonishingly short, lasting only twenty minutes.² This is all the more tragic considering that this was the last time Yaeger would see Jayci; she died two days after his visit.³

It is heart-breaking that Yaeger, a loving father, was not able to be at his daughter's side when she died. Indeed, when reflecting on the ordeal Jayci's aunt noted that Yaeger "was denied the proper good-bye."⁴ At the same time, however, Yaeger was lucky to be able to see his daughter before her death. In 2003, Yaeger was convicted of possession and distribution of methamphetamines and was sentenced to five-and-a-half years in a federal prison camp in Yankton, South Dakota.⁵ Four years later, Jayci received the diagnosis of terminal brain cancer.⁶ Jayci missed her father badly, so badly, in fact, that the only time her mother saw her cry was when she was on the phone with him.⁷ Indeed, Jayci's dying wish "was to spend what time she had left with her father."⁸

At the time of Jayci's diagnosis, Yaeger had only one year left to serve, and plans were already in the works to allow him to serve the final seven months of his sentence in a halfway

¹ William W. Berry III, "Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release," *Maryland Law Review* 68, no. 4 (2009). 856-58.

² Berry, "Extraordinary and Compelling," 858; Christopher Francesceni and Scott Michels. "Girl Succumbs to Cancer After Visit From Inmate Dad," *ABC News*, February 9, 2009, Last accessed on April 18, 2021 at: <https://abcnews.go.com/TheLaw/story?id=4543459&page=1>.

³ Berry, "Extraordinary and Compelling," 858; Francesceni and Michels, "Girl Succumbs."

⁴ Berry, "Extraordinary and Compelling," 858; Francesceni and Michels, "Girl Succumbs."

⁵ Berry, "Extraordinary and Compelling," 856; Kendra Waltke. "Family appeals to allow dying girl to see father," *Lincoln Journal Star*, March 20, 2008. Last accessed on April 20, 2021 at: https://journalstar.com/news/local/family-appeals-to-allow-dying-girl-to-see-father/article_3ae20902-8bec-5fbb-8ea-e-666c30fa254a.html.

⁶ Berry, "Extraordinary and Compelling," 856.

⁷ Berry, "Extraordinary and Compelling," 856.

⁸ Berry, "Extraordinary and Compelling," 856; Waltke, "Family appeals."

house.⁹ Jayci was rapidly getting worse, so Yaeger petitioned for compassionate release so he could spend whatever time Jayci had left with her.¹⁰ However, despite the “extraordinary and compelling” circumstances (the basis on which compassionate release is supposed to be granted), the prison warden, J.D. Whitehead, determined that Yaeger did not meet the criteria for compassionate release.¹¹ Thus, not only did he deny Yaeger’s petition for compassionate release “and his request to be released to the halfway house five months earlier than planned,”¹² but Whitehead also “denied Yaeger’s requests for a furlough to spend time with his daughter.”¹³ The only conciliation Whitehead offered was allowing Yaeger to speak to Jayci daily via telephone.¹⁴ However, within a few months, Jayci was too weak to talk.¹⁵

There was understandably a large amount of media and public attention surrounding the case, and as a result, the prison officials eventually agreed to allow Yaeger to visit Jayci in the hospital.¹⁶ In the end, Yaeger saw Jayci four times during her final six months of her life.¹⁷ The final visit in March 2008 was supervised by prison officials and lasted only twenty minutes.¹⁸

What happened to the Yaeger family is clearly an injustice, and it unfortunately is not the only time compassionate release has been denied despite the “extraordinary and compelling” circumstances. Another such story is that of Victor Elliott (a pseudonym), who had a mandatory minimum sentence as a result of his involvement in a heroin distribution conspiracy that led to three people overdosing and subsequently dying.¹⁹ Two years later, Elliott had a brain tumor, two

⁹ Berry, “Extraordinary and Compelling,” 856-57.

¹⁰ Berry, “Extraordinary and Compelling,” 857.

¹¹ Berry, “Extraordinary and Compelling,” 857.

¹² Berry, “Extraordinary and Compelling,” 857.

¹³ Berry, “Extraordinary and Compelling,” 857; Waltke, “Family appeals.”

¹⁴ Berry, “Extraordinary and Compelling,” 857.

¹⁵ Berry, “Extraordinary and Compelling,” 857.

¹⁶ Berry, “Extraordinary and Compelling,” 857-58.

¹⁷ Berry, “Extraordinary and Compelling,” 857.

¹⁸ Berry, “Extraordinary and Compelling,” 858; Francescani and Michels, “Girl Succumbs.”

¹⁹ Human Rights Watch and Families Against Mandatory Minimums, “The Answer Is No: Too Little Compassionate Release in US Federal Prisons,” 2012. 38. Last accessed on April 18, 2021 at: <https://fammm.org/wp-content/uploads/The-Answer-is-No-compassionate-release.pdf>.

ruptured disks, and was confined to a wheelchair.²⁰ Notably, Elliott also spent a majority of his time asleep.²¹ His doctor told him that he had less than one year to live, and Elliott’s oncologist advised him to seek compassionate release.²² Unfortunately, Elliott was close to illiterate, and no one on the prison staff helped him with his application.²³ Ultimately, Elliott managed to complete the application and submitted it to a committee for review.²⁴ The committee denied it, noting in the denial that “due to the severity of your crime and the fact that you have only served a small portion of your sentence, the committee expressed concerns about the possibility of your ability to re-offend.”²⁵

The Covid-19 pandemic has made finding better solutions to the problems with compassionate release all the more urgent. Indeed, the observations of one Rikers inmate, Michele Evans, is representative of the experience that many inmates have had in federal and state prisons across the United States throughout the pandemic.²⁶ There are many similarities between what has happened in the outside world and the things that Evans observed inside Rikers. For instance, just as schools were shut down across the country, Rikers stopped holding programs like Alcoholics Anonymous.²⁷ Furthermore, both inmates and people in the outside world were attempting to hoard toilet paper.²⁸ A final similarity is that guards at Rikers, like so many other Americans, refused to wear masks at the beginning of the pandemic.²⁹ Despite the many similarities, there is, however, one critical difference between prisons like Rikers and the

²⁰ Human Rights Watch and Families Against Mandatory Minimums, “The Answer Is No,” 38.

²¹ Human Rights Watch and Families Against Mandatory Minimums, “The Answer Is No,” 38.

²² Human Rights Watch and Families Against Mandatory Minimums, “The Answer Is No,” 38.

²³ Human Rights Watch and Families Against Mandatory Minimums, “The Answer Is No,” 38.

²⁴ Human Rights Watch and Families Against Mandatory Minimums, “The Answer Is No,” 38.

²⁵ Human Rights Watch and Families Against Mandatory Minimums, “The Answer Is No,” 38.

²⁶ Michele Evans, “I Got Covid At Rikers. I’m Still Suffering,” *New York Times*, February 4, 2021. Last accessed on April 18, 2021 at <https://www.nytimes.com/2021/02/04/opinion/rikers-jail-covid.html?smid=em-share>.

²⁷ Evans, “I Got Covid At Rikers.”

²⁸ Evans, “I Got Covid At Rikers.”

²⁹ Evans, “I Got Covid At Rikers.”

outside world: the (in)ability to practice social distancing.³⁰ In the outside world, people are more or less able to socially distance, a factor that scientists have identified as critical for stopping the spread. In contrast, social distancing is next to impossible in prisons.³¹ In Rikers, for instance, as many as fifty inmates share one dorm.³² Thus, it is no wonder that Covid-19 has spread through prisons across the country like a wildfire and is responsible for the deaths of at least 2,300 inmates.³³

Although global pandemics are (hopefully) once in a generation events, the problem of compassionate release is not going to magically disappear at the end of the pandemic. This is because the prison population is rapidly aging.³⁴ For instance, the number of individuals serving life sentences who were between 55 years old and 65 years old increased by over 150% between 1993 and 2015.³⁵ People who are at least or over the age of 55 constitute 12% of state prison populations and 30% of the population of individuals who received a life sentence.³⁶ As a result of this dramatic increase in the number of aging prisoners, we will soon have an even greater number of inmates reaching the end of their lives.³⁷ Since most states' compassionate release policies are geared towards terminally ill or extremely ill inmates, it is all the more important that we improve our compassionate release policies and procedures.

³⁰ Evans, "I Got Covid At Rikers."

³¹ Evans, "I Got Covid At Rikers."

³² Evans, "I Got Covid At Rikers."

³³ Evans, "I Got Covid At Rikers."

³⁴ Andreas Mitchell and Brie Williams. "Compassionate Release Policy Reform: Physicians as Advocates for Human Dignity," *AMA Journal of Ethics* 19, no. 9 (2017): 854; Mary Price, "Everywhere and Nowhere: Compassionate Release in the States," Families Against Mandatory Minimums, June 2018, 8 and 9, last accessed on May 2, 2021 at <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf>; Lindsey Wylie, Alexis K. Knutson, and Edie Greene. "Extraordinary and Compelling: The Use of Compassionate Release Laws in the United States." *Psychology, Public Policy, and Law* 24, no. 2 (2018): 217-18.

³⁵ Ashley Nellis. "No End in Sight: America's Enduring Reliance on Life Imprisonment." *The Sentencing Project*. February 17, 2021. 20. Last accessed on April 18, 2021 at: <https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/>.

³⁶ Nellis, "No End in Sight," 40.

³⁷ Nellis, "No End in Sight"; Mitchell and Williams, "Compassionate Release Reform Policy."

This paper argues that a variety of philosophical and ethical frameworks from across the globe yield the same conclusion: we need to grant compassionate release more than we currently do. However, although we seem to agree that granting compassionate release is the ethical thing to do, the US federal and state legislatures are failing to live up to the ethics and fix the administrative problems that bar so many individuals from receiving compassionate release. To make this argument, this paper first discusses the legislative history of federal compassionate release policies in Section I. Then, in Section II, this paper discusses what compassionate release currently looks like at the federal level, including how often it is granted and challenges that prevent it from being granted more frequently. In Section III, this paper proceeds to discuss the frequency with which compassionate release is granted and challenges in the process at the state level. Next, this paper approaches the ethics of compassionate release in Sections IV, V, and VI. Section IV presents the ethical questions raised by compassionate release and conducts a stakeholder analysis. Section V evaluates what Mencius (an ancient Chinese philosopher), Indian and Tibetan Buddhism, and Aristotelian common good approach would say about the ethics of compassionate release. Section VI brings the stakeholder analysis and discussion of ethical lenses to argue that compassionate release should be granted more often than it currently is. This paper concludes in Section VII with a discussion of the key takeaways from this paper.

Section I. Legislative History of Federal Compassionate Release

Congress first enacted compassionate release at the federal level in the Sentencing Reform Act (Berry 2009). A part of the Comprehensive Control Act (1984),³⁸ the Sentencing Reform Act (SRA) “called for the creation and adoption of a federal sentencing commission

³⁸ Berry, “Extraordinary and Compelling,” 851; Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 183 (1984).

charged with creating mandatory sentencing guidelines for federal judges to use in the sentencing of violators of federal law.”³⁹ The SRA had three aims related to its overarching goal of being tough on crime.⁴⁰ First, it aimed to reduce disparity in sentencing or different treatment of people of color.⁴¹ Second, it increased the likelihood that people who were convicted of a federal offense would face certain punishment.⁴² For instance, it limited the possibility that people could enter into plea deals that would allow them to avoid severe punishment.⁴³ Finally, legislators intended for the SRA to “[i]ncrease[] rationality and transparency of punishment.”⁴⁴ In practice, this translated to “replacing the unguided discretion of the preguidelines era with a system of binding legal rules that specif[ied] in advance the effect of most offense circumstances.”⁴⁵

In order to understand how compassionate release fits into the SRA, it is necessary to understand the punishment rationale that influenced the SRA. As a result of the SRA’s imposition of mandatory minimums and elimination of parole for all federal prisoners who committed a federal offense on or after November 1, 1987, Congress recognized that it was likely that some sentences would be unfair.⁴⁶ Thus, Congress created “safety valves” that courts could use to prevent such unjust sentences.⁴⁷ To that end, “18 U.S.C. Section 3582(c) defines the circumstances under which a federal court may modify an imposed term of imprisonment.”⁴⁸ The language establishing compassionate release notes that:

³⁹ Berry, “Extraordinary and Compelling,” 858.

⁴⁰ U.S. Sentencing Commission, “Chapter One: Introduction to the Sentencing Reform Act,” 11-12. Last accessed on May 2, 2021 at: <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/chap1.pdf>.

⁴¹ U.S. Sentencing Commission, “Chapter One,” 11.

⁴² U.S. Sentencing Commission, “Chapter One,” 11-12.

⁴³ U.S. Sentencing Commission, “Chapter One,” 11-12.

⁴⁴ U.S. Sentencing Commission, “Chapter One,” 12.

⁴⁵ U.S. Sentencing Commission, “Chapter One,” 12.

⁴⁶ Berry, “Extraordinary and Compelling,” 858-59.

⁴⁷ Berry, “Extraordinary and Compelling,” 858-59.

⁴⁸ 18 U.S. Code § 3582(c); Berry, “Extraordinary and Compelling,” 859.

“a federal court [may] ‘upon motion of the Director of the Bureau of Prisons’ [] reduce the term of a sentence if it finds that: (1) ‘extraordinary and compelling reasons warrant such a reduction,’ or (2) ‘the defendant is at least 70 years of age, has served at least 30 years in prison,’ and the Director determines that ‘[the defendant] is not a danger to the safety of any other person or the community,’ and that ‘reduction is consistent with [the] applicable policy statements issued by the Sentencing Commission.’”⁴⁹

The phrase “extraordinary and compelling” is extremely vague, but one can glean more clarity about the types of situations Congress thought might fit the bill from the legislative history.⁵⁰ More specifically, the Senate Judiciary Committee’s Report on the SRA clearly describes the circumstance that it envisioned compassionate release would apply to:

“The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment... The bill... provides... for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is a justification for reducing a term of imprisonment in situations such as those described.”⁵¹

Additional guidance about the circumstances that Congress intended compassionate release to apply to comes from the Department of Justice’s *Prosecutors Handbook on Sentencing Guidelines and Other Provisions of the Sentencing Reform Act of 1984*:

““The value of the forms of "safety valves" contained in this section lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment for "extraordinary and compelling" reasons and to respond to changes in the guidelines. The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.””⁵²

⁴⁹ Berry, “Extraordinary and Compelling,” 859-860.

⁵⁰ Berry, “Extraordinary and Compelling,” 858-870.

⁵¹ Berry, “Extraordinary and Compelling,” 860.

⁵² Berry, “Extraordinary and Compelling,” 860-861; William F. Weld, “Prosecutors Handbook on Sentencing Guidelines: November 1, 1987,” *Federal Sentencing Reporter* 6, no. 6. (May-June 1994): 333-341.

The U.S. Sentencing Commission more clearly defined what constitutes an “extraordinary and compelling” circumstance in the *Commentary to the Sentencing Guidelines*, released in November 2007.⁵³ This Commentary explicitly noted three sets of circumstances that could be considered extraordinary and compelling: terminal illness, debilitating conditions that might prevent the inmate from caring for themselves, and “death or incapacitation of the only family member able to care for a minor child.”⁵⁴ Additionally, the Commentary creates the option for the Director of the Bureau of Prisons to identify additional circumstances (i.e., other than the three sets of circumstances listed above) that can be viewed as extraordinary and compelling.⁵⁵

All this taken together demonstrates that Congress clearly intended for compassionate release to apply to two sets of circumstances: medical and non-medical.⁵⁶ Legal scholars have thus concluded that, consistent with Congress’s intentions, circumstances that are “extraordinary and compelling” include, but are not limited to, terminal illness, severely debilitating illness, and family emergencies, such as “leave to care for a child where no other family member can do so.”⁵⁷ However, for reasons that this paper will explore further in Section II, compassionate release was (and still is) a seldom-used tool at the federal level.

⁵³ Berry, “Extraordinary and Compelling,” 853.

⁵⁴ Berry, “Extraordinary and Compelling,” 853; U.S. Sentencing Commission. “U.S.S.C. Guidelines Manual § 1B1.13,” Last accessed on April 19, 2021 at: <https://guidelines.usc.gov/gl/§1B1.13>.

⁵⁵ Berry “Extraordinary and Compelling,” 853; U.S. Sentencing Commission “U.S.S.C. Guidelines Manual.”

⁵⁶ Berry, “Extraordinary and Compelling,” 850-888.

⁵⁷ Berry, “Extraordinary and Compelling,” 871.

Section II: What Compassionate Release Looks Like Right Now at the Federal Level

There are numerous challenges associated with the federal compassionate release process. One such challenge is the lack of clear standards.⁵⁸ As a result, many inmates do not fully understand the eligibility requirements or the complex process of applying for compassionate release. In fact, one study of severely ill inmates found that almost half of the inmates that the researchers interviewed either incorrectly thought they were ineligible or did not know enough about compassionate release policies to apply.⁵⁹ Additionally, there is no effective procedure for informing inmates about compassionate release programs.⁶⁰ What is more, for many decades there were no official or formal timeliness standards for reviewing requests.⁶¹ In fact, the process was so sluggish that several terminally ill inmates died while waiting for their cases to be reviewed and moved through the courts.⁶² Another related problem is that the timeliness standards for reviewing inmate appeals do not consider the unique circumstances for requests for medical compassionate release.⁶³ A final problem is that there is no official system to track compassionate release requests, how long the review process takes, whether decisions are consistent across regions and jurisdictions, and whether decisions are consistent with other Bureau of Prisons (BOP) policies.⁶⁴

⁵⁸ Office of the Inspector General, “The Federal Bureau of Prisons’ Compassionate Release Program,” April 2013, last accessed on April 20, 2021 at <https://oig.justice.gov/reports/2013/e1306.pdf>.

⁵⁹ Alexa Kanbergs et al. “‘No One Wants to Die Alone’: Incarcerated Patients’ Knowledge and Attitudes About Early Medical Release.” *Journal of Pain and Symptom Management* 57, no. 4 (2018): 809-815; Stephanie Grace Prost and Brie Williams, “Strategies to Optimize the Use of Compassionate Release From US Prisons,” *American Journal of Public Health* 110, no. 51 (2020): S25.

⁶⁰ Office of the Inspector General, “The Federal Bureau of Prisons’ Compassionate Release Program.”

⁶¹ Office of the Inspector General, “The Federal Bureau of Prisons’ Compassionate Release Program.”

⁶² Jalila Jefferson-Bullock. “Are You (Still) My Great and Worthy Opponent?: Compassionate Release of Terminally Ill Offenders,” *UMKC Law Review* 83, no. 3 (2015): 525.

⁶³ Office of the Inspector General, “The Federal Bureau of Prisons’ Compassionate Release Program.”

⁶⁴ Office of the Inspector General, “The Federal Bureau of Prisons’ Compassionate Release Program.”

Given the many problems with compassionate release, it is perhaps unsurprising that the little data that is available demonstrates it is infrequently granted.⁶⁵ For instance, between 1990 and 2000, only 21 inmates or 0.01% of the federal prison population were granted compassionate release annually.⁶⁶ Additionally, of the data that are available, 211 requests for compassionate release were sent to the Director of the BOP between 2006 and 2011.⁶⁷ Of those, only 142 were approved.⁶⁸ Data from August 2013 to September 2014 indicate that “two inmates had been released on the basis of age alone, and 83 inmates were released based on chronic or terminal illness unrelated to age.”⁶⁹ The infrequency with which compassionate release is granted is especially concerning since Congress envisioned it as a safety valve that would protect inmates from unjust sentences.

Notably, the First Step Act of 2018 attempted to resolve some of the problems that the Inspector General’s report identified. For instance, before the First Step Act, only the Director of the Bureau of Prisons could file a petition for compassionate release.⁷⁰ The First Step Act changed this to allow the inmate seeking compassionate release to file a petition with the court themselves.⁷¹ The First Step Act also introduced measures to expedite the review process.⁷² For instance, the First Step Act permits an inmate to go directly to the courts to file a motion for

⁶⁵ At least as of 2013, the Bureau of Prisons tracked only the number of reviewed requests, rather than the total number of requests filed (Wylie, Knutson, and Greene, “Extraordinary and Compelling,” 217).

⁶⁶ Berry, “Extraordinary and Compelling,” 858.

⁶⁷ Office of the Inspector General, “The Federal Bureau of Prisons’ Compassionate Release Program,” 34; Wylie, Knutson, and Greene, “Extraordinary and Compelling,” 217.

⁶⁸ Office of the Inspector General, “The Federal Bureau of Prisons’ Compassionate Release Program,” 34; Wylie, Knutson, and Greene, “Extraordinary and Compelling,” 217.

⁶⁹ Office of the Inspector General, “The Impact of an Aging Inmate Population on the Federal Bureau of Prisons,” last updated in February 2016, 44, last accessed on April 22, 2021 at <https://oig.justice.gov/reports/2015/e1505.pdf>; Wylie, Knutson, and Greene, “Extraordinary and Compelling,” 218.

⁷⁰ National Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities during COVID-19: Advancing Health, Equity, and Safety* (Washington, DC: The National Academies Press, 2020), 58; 18 USC § 3582(c)(1)(A); United States Sentencing Guidelines Manual § 1B1.13.

⁷¹ National Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities*, 58.

⁷² Federal Bureau of Prisons. “First Step Act - Frequently Asked Questions.” n.d., last accessed on March 9, 2021 at https://www.bop.gov/inmates/fsa/faq.jsp#fsa_compassionate_release.

compassionate release if the BOP has not responded to their request within thirty days or all administrative options have been exhausted.⁷³

The First Step Act was doubtlessly a step in the right direction. Indeed, it is worth noting that the number of petitions granted tripled after the passage of the First Step Act.⁷⁴ In 2017, the year prior to Congress passing the First Step Act, twenty-four petitions were granted.⁷⁵ In 2019, the year after Congress passed the First Step Act, 145 petitions were granted.⁷⁶ Nevertheless, the fact remains that compassionate release is still a woefully underutilized tool. Clearly, we must do more to ensure that compassionate release is utilized at the federal level.

Section III: What Compassionate Release Looks Like Right Now at the State Level

Although there are many problems with compassionate release at the federal level, there are even more problems with state compassionate release policies. This is significant considering that 226,000 inmates were incarcerated in federal prisons and jails as of 2019, which is a tiny number compared to the 1,291,000 inmates incarcerated in state prisons.⁷⁷ As a result, the messy state compassionate release policies impact far more inmates than the federal compassionate release policies do.

All 49 states and the District of Columbia have some form of compassionate release, but states often have different names for these policies.⁷⁸ For instance, Hawaii calls compassionate

⁷³ National Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities*, 59; 18 USC § 3582(c)(1)(A).

⁷⁴ National Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities*.

⁷⁵ National Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities*, 59.

⁷⁶ National Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities*, 59.

⁷⁷ Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2020,” Prison Policy, March 24, 2020, last accessed on April 22, 2021 at <https://www.prisonpolicy.org/reports/pie2020.html>.

⁷⁸ Price, “Everywhere and Nowhere,” 8 and 12.

release “Medical Release.”⁷⁹ Other states including New Jersey, Maryland, New York, and New Hampshire call compassionate release “Medical Parole.”⁸⁰ Additionally, some states, such as California, have more than one compassionate release policy.⁸¹

There are three main areas that state compassionate release policies focus on. First, the most common compassionate release policy is for those with chronic illnesses, with 48 out of 49 states having such policies.⁸² 44 out of the 49 states also have policies that grant compassionate release to inmates with terminal illnesses.⁸³ In contrast, only 24 states have compassionate release policies that grant compassionate release solely on the basis of age.⁸⁴

There are a few other eligibility criteria that are worth noting. First, a few states evaluate the cost of continuing to incarcerate an inmate.⁸⁵ Many states also require the people evaluating compassionate release policies to consider the risk the inmate poses to the community.⁸⁶ Additionally some states require prisoners to have served a certain portion of their sentence.⁸⁷ Finally, some states make certain crimes (such as sex offenses and murder offenses) and sentences (such as capital sentences) ineligible for compassionate release.⁸⁸

It is difficult to know how often compassionate release is granted at the state level because “[o]nly 13 states are required by state law to keep track of and report compassionate release statistics.”⁸⁹ However, the few figures that are available suggest that compassionate

⁷⁹ Hawaii Department of Public Safety, Corrections Administration Policy and Procedures 10.1G.11, § 3; Price, “Everywhere and Nowhere,” 29.

⁸⁰ Md. Code Ann., Corr. Servs. § 7-309; N.H. Rev. Stat. Ann. § 651-A:10-a; N.J. Admin. Code § 10A:71-3.53; N.Y. Exec. Law § 259-s (1)(a); Price, “Everywhere and Nowhere,” 29-31.

⁸¹ Wylie, Knutson, and Greene, “Extraordinary and Compelling,” 219.

⁸² Price, “Everywhere and Nowhere,” 28-33.

⁸³ Price, “Everywhere and Nowhere,” 28-33.

⁸⁴ Price, “Everywhere and Nowhere,” 28-33.

⁸⁵ Price, “Everywhere and Nowhere,” 12; Wylie, Knutson, and Greene, “Extraordinary and Compelling,” 219.

⁸⁶ Wylie, Knutson, and Greene, “Extraordinary and Compelling,” 230.

⁸⁷ Wylie, Knutson, and Greene, “Extraordinary and Compelling,” 219.

⁸⁸ Wylie, Knutson, and Greene, “Extraordinary and Compelling,” 219, 225.

⁸⁹ Price, “Everywhere and Nowhere,” 12.

release is rarely granted.⁹⁰ Pennsylvania granted only nine compassionate releases between 2010 and June 2015.⁹¹ The Kansas Prisoner Review Board reviewed just two requests for compassionate release between fiscal year 2016 and fiscal year 2018.⁹² New Jersey has granted medical parole at most two times per year between 2010 and August 2017.⁹³ In fiscal year 2016, 2,000 applications for medical parole were screened in Texas.⁹⁴ Of those 2,000 applications, the Texas Board of Pardons and Parole reviewed 176 and granted 86.⁹⁵

There are four challenges in the process that limit state compassionate release policies. One of the largest problems is vague eligibility requirements.⁹⁶ One form of vagueness is failing to provide clear definitions. For instance, one of Montana’s eligibility criteria for prisoners with non-terminal illnesses is that the prisoner requires “extensive medical attention.”⁹⁷ However, Montana provides no explanation of what is considered to be “extensive medical attention.”⁹⁸ Another problematic form of vagueness is missing guidelines. For instance, Michigan’s compassionate release policy is only two sentences long, with no accompanying guidelines,

⁹⁰ Price, “Everywhere and Nowhere,” 8 and 12-3.

⁹¹ Jeffrey Benzing, “Prison release rarely an option for dying inmates,” Public Source, June 10, 2015, last accessed on April 22, 2021 at: <https://www.publicsource.org/prison-release-rarely-an-option-for-dying-state-inmates/>; Price, “Everywhere and Nowhere,” 13.

⁹² Kansas Department of Corrections, “Annual Report: Fiscal Year 2016,” last accessed on April 22, 2021 at: <https://www.doc.ks.gov/publications/Reports/Archived/2016/view>; Kansas Department of Corrections, “Annual Report: Fiscal Year 2017,” last accessed on April 22, 2021 at: <https://www.doc.ks.gov/publications/Reports/Archived/2017/view>; Kansas Department of Corrections, “Annual Report: Fiscal Year 2018,” last accessed on April 22, 2021 at: <https://www.doc.ks.gov/publications/Reports/Archived/2018/view>; Price, “Everywhere and Nowhere,” 13.

⁹³ Nicole Leonard, “State assemblymen pass health bills on medical parole, disability and more,” Press of the Atlantic City, August 6, 2017, last accessed on April 22, 2021 at: http://www.pressofatlanticcity.com/news/state-assemblymen-pass-health-bills-on-medical-parole-disability-and/article_d06634da-3d26-5ced-8e21-abc6e3df21b4.html; Price, “Everywhere and Nowhere,” 13.

⁹⁴ Rebecca Silber, Alison Shames, and Kelsey Reid, *Aging Out: Using Compassionate Release to Address the Growth of Aging and Infirm Prison Populations* (New York: Vera Institute of Justice, 2017), 8. <https://www.vera.org/downloads/publications/Using-Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirm-Prison-Populations—Full-Report.pdf>.

⁹⁵ Silber, Shames, and Reid, *Aging Out*, 8.

⁹⁶ Price, “Everywhere and Nowhere,” 13-4.

⁹⁷ Mont. Code Ann. §§ 46-23-210 (1)(c)(i) and (ii); Montana Department of Corrections Policy Directive 4.6.7, § IV.A.1.d.; Price 2018, “Everywhere and Nowhere,” 13.

⁹⁸ Price, “Everywhere and Nowhere,” 13.

rules, or policies.⁹⁹ Likewise, Georgia’s compassionate release policy offers “no rules or regulations explaining how the Department of Corrections is supposed to approve, process, or refer eligible prisoners to the Georgia Board of Pardons and Paroles, which is the decision-maker, for medical reprieves.”¹⁰⁰

A second challenge in state compassionate release is inconsistent guidance.¹⁰¹ For instance, one of Arizona’s eligibility requirements is that the prisoner is facing “imminent death,” but Arizona’s policy and guidance offer three different definitions of what constitutes imminent death.¹⁰² Similarly, the eligibility criteria listed in Maryland’s medical parole statute differ from those listed in the regulation used to implement the statute.¹⁰³

A third problem is that some states have unrealistic timelines in instances of terminal illness.¹⁰⁴ For instance, Kansas’s eligibility requirements require that eligible terminally ill prisoners to be within 30 days of death.¹⁰⁵ Setting aside the challenges of predicting whether a prisoner is actually within 30 days of dying, it is likely that petitions will take longer than 30 days to review.¹⁰⁶ This in practice thus bars most terminally ill patients from receiving compassionate release.

⁹⁹ Mich. Comp. Laws § 791.235 (10) (2016); Price, “Everywhere and Nowhere,” 14.

¹⁰⁰ Ga. Code Ann. § 42-9-43(b) (1)(B); Ga. Comp. R. & Regs. 475-3-.10 (1)(a); Price, “Everywhere and Nowhere,” 14.

¹⁰¹ Price, “Everywhere and Nowhere,” 14.

¹⁰² Arizona Board of Executive Clemency, “Frequently Asked Questions,” Last accessed May 2, 2021 at: <https://boec.az.gov/helpful-information/frequently-asked-questions>; Arizona Board of Executive Clemency, “Commutation of Sentence Application,” Last accessed May 2, 2021 at: <https://boec.az.gov/sites/default/files/documents/files/Commutation%20Application%20202-28-19.pdf> (link changed from the one the Price cited); Ariz. Board of Executive Clemency, “Pardon Application,” Last Accessed May 2, 2021 at: https://boec.az.gov/sites/default/files/documents/files/Pardon%20Application_0.pdf (link changed from the one the Price cited); Price, “Everywhere and Nowhere,” 14.

¹⁰³ Md. Code Ann., Corr. Servs. § 7-309(b); Md. Code Regs. § 12.02.09.04; Price, “Everywhere and Nowhere,” 14.

¹⁰⁴ Price, “Everywhere and Nowhere,” 15-6.

¹⁰⁵ Kan. Stat. Ann. § 22-3729 (a)(2); Kansas Department of Corrections, Internal Management Policies and Procedures 11-110-Application for Release of Functionally Incapacitated Inmates or Release Pending Imminent Death (2011); Price, “Everywhere and Nowhere,” 16.

¹⁰⁶ Kan. Stat. Ann. § 22-3729 (a)(2); Kansas Department of Corrections, Internal Management Policies and Procedures 11-110-Application for Release of Functionally Incapacitated Inmates or Release Pending Imminent Death (2011); Price, “Everywhere and Nowhere,” 16.

A fourth problem is the multi-layered review process, which in practice prevents many inmates from having their cases reviewed before it is too late.¹⁰⁷ For instance, Washington requires that the Health Service Department must determine things including whether the applicant is seriously ill, whether the applicant poses a threat to the community, and whether the applicant will have access to community funding and support if released.¹⁰⁸ After this documentation is collected, “the case is referred to four different offices, two for additional investigation...and two to meet notice requirements.”¹⁰⁹ Assuming the case clears all of those hurdles, it is then left to the Secretary of Corrections to make the final decision.¹¹⁰ Notably, “the prisoner can be denied at almost every step of the process, and there are no required time frames.”¹¹¹

Section IV: The Ethics of Compassionate Release - Establishing the Facts

Having discussed the legislative history of federal compassionate release policies, the problems surrounding state and federal compassionate release policies, and the frequency with which compassionate release is granted, the remaining sections of the paper will discuss the ethics of compassionate release policies using the Markkula Center for Applied Ethics’s Framework for Ethical Decision Making (which will be referred to as “the Framework” going forward).¹¹² In doing so, this paper aims to provide a model and assess how legislatures can make

¹⁰⁷ Price, “Everywhere and Nowhere,” 15.

¹⁰⁸ Price, “Everywhere and Nowhere,” 15; Wash. Rev. Code § 9.94A.728 (1)(c); State of Washington Department of Corrections Policy 350.270-Extraordinary Medical Placement; State of Washington Department of Corrections Policy 350.270 §§ III.A.1 - 4.

¹⁰⁹ Price, “Everywhere and Nowhere,” 15; State of Washington Department of Corrections Policy 350.270 §§ III.A.1 - 4.

¹¹⁰ Price, “Everywhere and Nowhere,” 15; State of Washington Department of Corrections Policy 350.270 §§ III.A.1 - 4.

¹¹¹ Price, “Everywhere and Nowhere,” 15.

¹¹² Markkula Center for Applied Ethics. “The Framework for Ethical Decision Making,” Last modified August 1, 2015, Last accessed April 30, 2021, <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/a-framework-for-ethical-decision-making/>.

decisions going forward about how they will address the ethics of compassionate release going forward.

The Framework lays out steps for individuals and entities faced with ethical decision making, where ethical decision making is understood as a process for making decisions that could hurt people and/or involve conflicting choices.¹¹³ Based on this definition, compassionate release is clearly an ethical issue.

Once a decision maker recognizes there is an ethical issue, the next step in the process is to collect the facts.¹¹⁴ Importantly, there are two possible decision-makers here, and thus at least two different sets of facts to consider. First, there are individual decision-makers, such as the warden. Individual decision makers will focus on facts in specific cases of someone requesting compassionate release, such as the crime the person is incarcerated for, whether they pose a risk to the public, etc. Second, there are group-level decision-makers, such as legislators and policymakers. These decision-makers collect facts related to making policy, such as how frequently compassionate release is granted and the state of current policies, in order to determine how to ethically approach the issue in terms of a policy position. This paper will focus on the latter group of decision makers.

An important part of gathering facts is considering the interests of the relevant stakeholders.¹¹⁵ In the case of compassionate release, the stakeholders include the inmates, the victims, the inmates' families, physicians working in prisons, the state, the public, and nurses and other individuals providing end-of-life care. Before digging into the stakeholder analysis, however, it is important to acknowledge that not all stakeholders have the same stake in deciding

¹¹³ Markkula Center for Applied Ethics. "The Framework for Ethical Decision Making."

¹¹⁴ Markkula Center for Applied Ethics. "The Framework for Ethical Decision Making."

¹¹⁵ Markkula Center for Applied Ethics. "The Framework for Ethical Decision Making."

the ethics of compassionate release. To put it more bluntly, it is impossible to equally weigh everyone's interests, and some interests matter more than others.

One of the most important stakeholders are obviously inmates. As this paper mentioned in the introduction, the prison population is rapidly aging.¹¹⁶ As a result, many inmates will soon reach the end of their lives. However, there is a lack of access to sufficient palliative care in prison.¹¹⁷ This combined with dying while incarcerated violates inmates' human dignity.¹¹⁸ It is for this reason that inmates have a substantial stake in deciding the ethics of compassionate release.

Another important stakeholder is the victim(s) of the crime the inmate was convicted of. The inmate landing in jail and being stripped of their freedom is meant in some small way to provide justice to the victim. Thus, the victim must be consulted when deciding whether to grant compassionate release.

Likewise, the families of inmates seeking compassionate release are another important group of stakeholders. Looking first at compassionate release for medical reasons, an inmate might need a place to stay, and it is natural for that inmate to look to their family. However, an inmate's family might not want anything to do with them. Conversely, the family might be willing to care for them. It is also important to consider the family in the case of a prisoner being released to care for a minor who would otherwise become a ward of the state. Thus, whether it be for medical reasons or family emergencies, an inmate's family plays a significant role in deciding whether it is ethical to grant an inmate's request for compassionate release.

¹¹⁶ Mitchell and Williams, "Compassionate Release Policy Reform," 854; Price 2018, "Everywhere and Nowhere," 8-9; Wylie, Knutson, and Greene, "Extraordinary and Compelling," 216-17.

¹¹⁷ Mitchell and Williams, "Compassionate Release Policy Reform," 855.

¹¹⁸ Mitchell and Williams, "Compassionate Release Policy Reform," 855-56.

One other stakeholder group that is worth considering is physicians working in prisons. According to the American Medical Association (AMA), “[a] physician shall be dedicated to providing competent medical care, with compassion and respect for human dignity and rights.”¹¹⁹ However, for the reasons discussed above, it can be difficult for prison physicians to provide end-of-life care that respects human dignity when palliative care in prisons is so lacking.¹²⁰ Thus, physicians have an ethical interest in demonstrating compassion for their patients and respecting human dignity by working with inmates to secure them compassionate release for medical reasons.

Some physicians may deny this ethical obligation to encourage and pursue compassionate release on the grounds that physicians do not play a large role in prisons. However, this objection goes to show that in order to comply with their AMA oath and responsibilities, physicians need to do more to advocate for improving medical conditions within prisons.¹²¹ After all, citizenship and being a physician overlap. As a result, there needs to be more of a focus in the medical profession on bridging the gap between the role that one plays and the life that one leads.¹²²

Yet another important stakeholder is the state.¹²³ One of the state’s primary interests is in preventing crime and creating a peaceful environment that allows citizens to thrive.¹²⁴ The state also has an interest in recognizing and responding to harmful behaviors and conduct.¹²⁵

Furthermore, the state has an interest in justice and in providing “a response *on behalf* of its

¹¹⁹ American Medical Association, “Principles of Medical Ethics,” last revised June 2001, last accessed April 22, 2021 at: <https://www.ama-assn.org/about/publications-newsletters/ama-principles-medical-ethics>; Mitchell and Williams, “Compassionate Release Policy Reform,” 856.

¹²⁰ Mitchell and Williams, “Compassionate Release Policy Reform,” 855.

¹²¹ Thank you to Dr. Charles Binkley for raising this question during an interview.

¹²² Thank you to Dr. Charles Binkley for raising this question during an interview.

¹²³ Berry, “Extraordinary and Compelling,” 872-88.

¹²⁴ Berry, “Extraordinary and Compelling,” 873.

¹²⁵ Berry, “Extraordinary and Compelling,” 873.

citizens.”¹²⁶ Notably, however, “a state’s interest in the punishment of criminal offenders is generally independent of its interest in the *quantity* of punishment for a given offender.”¹²⁷

Similar to the state, the public is also a stakeholder. More specifically, taxpayers have a stake because they pay for prisons and any palliative care the prisons provide.¹²⁸

The last stakeholders are nurses and other individuals providing end-of-life care. This is an important group of stakeholders because caring for others, especially when those individuals are nearing the end of their lives, takes a toll on one’s physical, mental, and spiritual health.

Now that this paper has established the facts of compassionate release, it is important to evaluate the ethics of compassionate release using various philosophical frameworks.¹²⁹ This paper will explore three frameworks from around the globe in Section V.

Section V: The Ethics of Compassionate Release - The Ethical Lenses

Mencius

The first framework this paper will consider is an ethical approach proposed by the Chinese philosopher, Mencius.¹³⁰ A renowned Confucian and often referred to as the “Second Sage” of Confucianism, Mencius argued that human nature¹³¹ is innately good.¹³² The reason why we do not see more goodness in the world, however, is because not every human has the

¹²⁶ Berry, “Extraordinary and Compelling,” 873.

¹²⁷ Berry, “Extraordinary and Compelling,” 874.

¹²⁸ Felicia Cohn, “The Ethics of End-of-Life Care for Prison Inmates,” *Journal of Law, Medicine, and Ethics* 27 (1999): 257.

¹²⁹ Markkula Center for Applied Ethics. “The Framework for Ethical Decision Making.”

¹³⁰ Thank you to Dr. Meilin Chinn for providing feedback and comments on this section.

¹³¹ Importantly, Mencius does not think human nature is essential or unchanging. In fact, a large part of Mencius’s ethics relies on people’s ability to change and grow. For Mencius, human nature is better understood as a natural human disposition that tends to strongly lean towards goodness. Thank you to Dr. Meilin Chinn for raising these points.

¹³² Bryan Van Norden, “Mencius,” *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, fall 2019 edition, last modified September 6, 2019, last accessed on April 27, 2021 at: <https://plato.stanford.edu/entries/mencius/>.

opportunity to develop their innate goodness.¹³³ To explain this, compare natural human nature to a garden of roses. When you plant a rose seed, it has the potential to become a rose bush.

However, if the seed does not receive the proper care – enough water, for example – it will not grow into a rose bush. According to Mencius, human nature is similar. Although human nature is innately good, it will not grow and develop if it does not receive proper care.¹³⁴

Continuing with the garden metaphor, Mencius conceived of four innate ethical dispositions that constituted the “sprouts” of virtue.¹³⁵ Moreover, each ethical disposition has a corresponding emotion.¹³⁶ The first sprout, benevolence, “is manifested in the affection one has for his or her own kin, as well as compassion for the suffering of other humans, and even concern for non-human animals.”¹³⁷ To that end, benevolence’s corresponding emotion is compassion.¹³⁸ The second sprout is righteousness, which involves feelings of contempt when an injustice is done.¹³⁹ For instance, someone who is righteous will feel contempt when others are subject to inhumane or degrading treatment.¹⁴⁰ Thus, although it is somewhat counterintuitive, disdain is righteousness’s corresponding emotion.¹⁴¹ The third sprout is wisdom, which relates to recognizing the particular importance of the previous two innate ethical dispositions.¹⁴²

Somewhat similarly to how disdain corresponds with righteousness, the feeling of approval and disapproval corresponds with wisdom.¹⁴³ The fourth and final sprout is propriety, which involves

¹³³ Van Norden, “Mencius.”

¹³⁴ Van Norden, “Mencius.”

¹³⁵ Mengzi, *The Works of Mencius*, trans. by James Legge, 2A6, last accessed on April 27, 2021 at: <https://ctext.org/mengzi>; Van Norden, “Mencius”; Mengzi: *With Selections from Traditional Commentaries*, trans. by Bryan W. Van Norden, (Indianapolis: Hackett Publishing, 2008), 149.

¹³⁶ Van Norden, “Mencius.”

¹³⁷ Van Norden, “Mencius.”

¹³⁸ Mengzi, *The Works of Mencius*, 6A6; Van Norden, “Mencius”; Van Norden (trans.), *Mengzi*, 149.

¹³⁹ Mengzi, *The Works of Mencius*, 6A6; Van Norden, “Mencius”; Van Norden (trans.), *Mengzi*, 149.

¹⁴⁰ Van Norden, “Mencius.”

¹⁴¹ Mengzi, *The Works of Mencius*, 6A6; Van Norden, “Mencius”; Van Norden (trans.), *Mengzi*, 149.

¹⁴² Mengzi, *The Works of Mencius*, 4A27; Van Norden, “Mencius”; Van Norden (trans.), *Mengzi*, 101.

¹⁴³ Mengzi, *The Works of Mencius*, 6A6; Van Norden, “Mencius”; Van Norden (trans.), *Mengzi*, 149.

deference toward and respect for authority figures and one's elders.¹⁴⁴ Fittingly, the emotion that corresponds with propriety is respect.¹⁴⁵

Importantly, according to Mencius, feeling the emotion corresponding with a sprout is not sufficient for cultivating that sprout.¹⁴⁶ Instead, it also involves “cognitive and behavioral aspects.”¹⁴⁷ One good example of the sort of “cognitive and behavioral aspects” that Mencius has in mind is a famous parable about a ruler talking to Mencius.¹⁴⁸ The ruler saw an ox being led to its slaughter, and he felt so overwhelmed with compassion for the ox that he ordered a lamb be sent in its place.¹⁴⁹ Mencius recognizes that the ruler spared the ox because he had compassion for it and encourages the ruler to extend this compassion to his people, who were suffering as a result of “the ruler's wars of conquest and exorbitant taxation.”¹⁵⁰ Thus, it was not enough for the ruler to feel compassion for the suffering of others. Instead, he needed to act on his compassion in order to cultivate benevolence.¹⁵¹

Applying Mencius's ethics to compassionate release, it seems clear that Mencius would argue that compassionate release is ethical. Compassionate release is rooted in compassion for other people's suffering, and thus is intimately related to benevolence. What is more, just as the ruler needed to extend his compassion to his people in order to cultivate his innately good nature, we must extend our compassion as a society to suffering inmates in order to cultivate our innately good nature. Additionally, similar to how the king's feeling compassion for the suffering of others was not sufficient to cultivate benevolence, merely feeling compassion for inmates is not sufficient for developing our benevolence. Instead, we must allow our compassion to move

¹⁴⁴ Mengzi, *The Works of Mencius*, 2A6 and 6A6; Van Norden, “Mencius”; Van Norden (trans.), *Mengzi*, 46 and 149.

¹⁴⁵ Mengzi, *The Works of Mencius*, 6A6; Van Norden, “Mencius”; Van Norden (trans.), *Mengzi*, 149.

¹⁴⁶ Van Norden, “Mencius.”

¹⁴⁷ Van Norden, “Mencius.”

¹⁴⁸ Mengzi, *The Works of Mencius*, 1A7; Van Norden, “Mencius”; Van Norden (trans.), *Mengzi*, 14.

¹⁴⁹ Mengzi, *The Works of Mencius*, 1A7; Van Norden, “Mencius”; Van Norden (trans.), *Mengzi*, 14.

¹⁵⁰ Van Norden, “Mencius,” citing Mengzi, *The Works of Mencius*, 1A7; and Van Norden (trans.), *Mengzi*, 14.

¹⁵¹ Van Norden, “Mencius.”

us to action. This could take the form of granting compassionate release for inmates who are suffering from terminal illness, a debilitating disease, family emergencies, or other truly extraordinary and compelling situations.

Interestingly, Mencius's view of the innate goodness of human nature has larger implications for why people end up in prison. As a reminder, Mencius argues that without proper care, humans will not be able to cultivate their innately good nature.¹⁵² Thus, if people are hungry and afraid for their safety, it is no wonder that they will turn to violence.¹⁵³ Indeed, Mencius says that, "When they thereupon sink into crime, to go and punish the people is to trap them. When there are benevolent persons in positions of authority, how is it possible for them to trap the people?"¹⁵⁴ Mencius argues that it is the government's job to make sure people have the support and resources they need to cultivate their innately good nature.¹⁵⁵ Applying this to compassionate release, Mencius would point out that perhaps we would not need compassionate release if the government fulfilled its obligation to provide people with the resources they need to extend their innately good nature.

Indian and Tibetan Buddhism

Indian and Tibetan Buddhist ethics has interesting implications for compassionate release and the criminal justice system. Before diving into these implications, however, it is first necessary to provide a brief background on Indian and Tibetan Buddhism. Buddhists believe that desire is the root of all suffering.¹⁵⁶ This desire arises as a result of a lack of awareness about

¹⁵² Van Norden, "Mencius."

¹⁵³ Mengzi, *The Works of Mencius*, 1A7; Van Norden, "Mencius"; Van Norden (trans.), *Mengzi*, 14.

¹⁵⁴ Van Norden, "Mencius," citing Mengzi, *The Works of Mencius*, 1A7; and Van Norden (trans.), *Mengzi*, 14.

¹⁵⁵ Van Norden, "Mencius."

¹⁵⁶ Goodman, Charles, "Ethics in Indian and Tibetan Buddhism." *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, spring 2017 edition, last modified February 1, 2017, last accessed on April 27, 2021 at: <https://plato.stanford.edu/entries/ethics-indian-buddhism/>.

interdependence.¹⁵⁷ Interdependence is the idea that all things are inseparable and connected to all other things.¹⁵⁸ The ultimate goal of Buddhism is to see the world as it truly is, which involves rejecting warped views about reality and eliminating our desires.¹⁵⁹ Only when we do this will free ourselves from suffering.¹⁶⁰

Wisdom and compassion have central places in Buddhist philosophy.¹⁶¹ In fact, Buddhist philosophers compare wisdom and compassion to the two wings of the bird. Wisdom arises from correctly understanding reality and interdependence. Compassion follows wisdom in two respects. First, compassion involves seeing the shared suffering of all sentient things. Second, compassion in Buddhism is not an emotion - it is a way of acting. Thus, compassion follows from wisdom in the sense that compassion is a way of acting that comes from an understanding of interdependence.

Critically, Buddhist ethics (in the broader sense of the word) does not neatly translate to any Western ethical theory.¹⁶² Indeed, there are some key differences between Buddhist approaches to ethics and Western ethical theories. First, there is no equivalent for the concept of moral obligation in Buddhist ethics.¹⁶³ Second, although there are no technical terms for “intrinsic value” or “extrinsic value,” these concepts are expressed in some Buddhist texts.¹⁶⁴ Third, ethical statements in Buddhist philosophy can also be understood in a non-normative way, meaning that they are also “descriptions of how a spiritually developed being actually behaves.”¹⁶⁵ Finally, Buddhist texts tend to focus more on establishing guidelines for good

¹⁵⁷ Thank you to Dr. Meilin Chinn for raising this point.

¹⁵⁸ Thank you to Dr. Meilin for raising this point.

¹⁵⁹ Goodman, “Ethics in Indian and Tibetan Buddhism.”

¹⁶⁰ Goodman, “Ethics in Indian and Tibetan Buddhism.”

¹⁶¹ Thank you to Dr. Meilin Chinn for raising the points contained in this paragraph when providing feedback on an earlier draft.

¹⁶² Goodman, “Ethics in Indian and Tibetan Buddhism.”

¹⁶³ Goodman, “Ethics in Indian and Tibetan Buddhism.”

¹⁶⁴ Goodman, “Ethics in Indian and Tibetan Buddhism.”

¹⁶⁵ Goodman, “Ethics in Indian and Tibetan Buddhism.”

actions than addressing “the question of the general theoretical principles that differentiate between good and bad, or right and wrong.”¹⁶⁶

Additionally, it is important to note that there are multiple branches of Buddhism, and each branch holds different views about ethics.¹⁶⁷ Thus, there is no one ethical structure that sums up Buddhist philosophy’s contributions to ethics, just as there is no one ethical approach that sums up Western philosophy’s views on ethics.¹⁶⁸ That being said, one generalization that can be drawn about Buddhist ethics is the role of intention and that the intention behind an action is more important than “the benefit or harm that actually resulted.”¹⁶⁹

Turning to the ethics of compassionate release, interdependence and compassion have important implications.¹⁷⁰ Recall that we must first develop wisdom by learning to see reality, meaning that we are all deeply connected. As a result of interdependence, the suffering of inmates is our suffering, and vice versa. Once we see that interdependence, compassion will follow if we recognize this shared suffering and take action. Moreover, compassion is an antidote to anger. Thus, denying compassionate release (or, more broadly, punishing people) out of anger is at odds with compassion.

Buddhist philosophers’ discussions about the ethics of punishment also have critical implications for compassionate release. Although there is limited discussion of the ethics of punishment, the writing that is available on the topic suggests that granting compassionate release is the ethically right thing to do.¹⁷¹ Nāgārjuna, a renowned Buddhist philosopher, said in a correspondence with a king that although punishment is unfortunately a necessary evil for

¹⁶⁶ Goodman, “Ethics in Indian and Tibetan Buddhism.”

¹⁶⁷ Goodman, “Ethics in Indian and Tibetan Buddhism.”

¹⁶⁸ Goodman, “Ethics in Indian and Tibetan Buddhism.”

¹⁶⁹ Goodman, “Ethics in Indian and Tibetan Buddhism.”

¹⁷⁰ Thank you to Dr. Meilin Chinn for raising the points contained in this paragraph when providing feedback on an earlier draft.

¹⁷¹ Goodman, “Ethics in Indian and Tibetan Buddhism.”

maintaining an order in society, the king should not inflict punishment out of anger or for the purpose of seeking vengeance.¹⁷² Rather, punishment should come from a place of compassion, “especially compassion for the criminals themselves, whose destructive actions may have condemned them to many lifetimes of suffering [as a result of reincarnation].”¹⁷³ What is more, punishment should be only as severe as is necessary for achieving the goal of maintaining order in society.¹⁷⁴ Finally, and perhaps most importantly for the purposes of the ethics of compassionate release, Nāgārjuna argued that prisoners should be treated humanely, and that “those prisoners who are physically weak, and therefore pose less danger to society, should be released early.”¹⁷⁵

This all suggests that granting compassionate release for severe or terminal illness is the ethically right thing to do. Keeping someone who is terminally or severely ill incarcerated does nothing to further deter people from committing crimes, which is the intention behind punishment. Additionally, prisons often lack the palliative or specialist care that is required for the ill inmates to be treated humanely. It is best to recognize our shared suffering, find compassion in our hearts for ill inmates, and release them early.

Buddhist ethical approaches can also justify compassionate release in family emergencies, such as when a parent is released to take care of a minor who otherwise would become a ward of the state. Some Buddhist philosophers argue that punishment coming from a place of compassion is justified because it gives offenders an opportunity to be rehabilitated.¹⁷⁶

¹⁷² Charles Goodman, *Consequences of Compassion: An Interpretation and Defense of Buddhist Ethics* (Oxford: Oxford University Press, 2009); Goodman, “Ethics in Indian and Tibetan Buddhism”; Jeffrey Hopkins (trans.), *Buddhist Advice for Living & Liberation: Nāgārjuna’s Precious Garland* (Ithaca, NY: Snow Lion, 1998).

¹⁷³ Goodman, “Ethics in Indian and Tibetan Buddhism,” citing Goodman, *Consequences of Compassion*, “Chapter 9: Punishment”; and Hopkins (trans.), *Buddhist Advice*.

¹⁷⁴ Goodman, “Ethics in Indian and Tibetan Buddhism”; Goodman, *Consequences of Compassion*, “Chapter 9: Punishment”; and Hopkins (trans.), *Buddhist Advice*.

¹⁷⁵ Goodman, “Ethics in Indian and Tibetan Buddhism”; Goodman, *Consequences of Compassion*, “Chapter 9: Punishment”; and Hopkins (trans.), *Buddhist Advice*.

¹⁷⁶ Goodman, “Ethics in Indian and Tibetan Buddhism.”

Applying this to compassionate release, it has been argued that releasing inmates to take care of minor children can instill in them a sense of responsibility that helps rehabilitate them.¹⁷⁷

Additionally, the suffering of both the offender and a minor child forced into the foster care system could be prevented if the offender is granted compassionate release. Thus, in instances where the intention of punishment is rehabilitation, some Buddhist philosophers would say that it is ethically correct to grant compassionate release.

Aristotle and the Common Good

The final philosophical framework this paper will use to assess the ethics of compassionate release comes from Aristotle's common good.¹⁷⁸ To understand Aristotle's political philosophy, one must start in an unconventional place: Aristotle's metaphysics.¹⁷⁹

Aristotle believed that everything in the world has an innate essence.¹⁸⁰ Further, Aristotle conceived of the process of change in a teleological sense, meaning that everything has a natural end towards which it develops.¹⁸¹ A thing becomes fully developed when that thing's potential is actualized.¹⁸² For instance, a caterpillar is a butterfly with potential.¹⁸³ That potential is actualized when the caterpillar transforms into a butterfly. Similarly, human beings have the potential to become fully developed.¹⁸⁴ The only way, Aristotle thought, to actualize a human being's

¹⁷⁷ Berry, "Extraordinary and Compelling," 887.

¹⁷⁸ Thank you to Dr. Brian Buckley for suggesting looking at Aristotle and for helping to refine an interpretation of the Aristotelian common good.

¹⁷⁹ Christopher Shields, "Aristotle." *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, fall 2020 edition, last modified August 25, 2020, last accessed on April 29, 2021 at: <https://plato.stanford.edu/entries/aristotle/>.

¹⁸⁰ Shields, "Aristotle."

¹⁸¹ Shields, "Aristotle."

¹⁸² Shields, "Aristotle."

¹⁸³ Thank you to Dr. Brian Buckley for providing this example.

¹⁸⁴ Aristotle, *The Politics*, trans. T. Sinclair (Penguin Classics), 59-61.

potential is to live in a polis or community that has the structures to live well.¹⁸⁵ This in turn allows humans to flourish and thrive.¹⁸⁶

For Aristotle, this relationship between humans and the polis is also linked to justice, equal treatment, and the law.¹⁸⁷ Justice is closely related to equality because justice is about ensuring that everyone is treated equally.¹⁸⁸ In other words, justice and equality are related because justice is about making sure that everyone receives their fair share of benefits and burdens.¹⁸⁹ Indeed, Aristotle argues that a central part of the law's purpose is to ensure that everyone gets their fair share.¹⁹⁰ When the law works as it should, and when the polis has structures in place such as education in virtues that allow people to live the good life, the polis becomes a fully developed community and has achieved the common good.¹⁹¹

Aristotle's notion of the common good and everyone getting their fair share helps explain the ethics of compassionate release. Assuming that Aristotle would support incarceration (which is a big assumption, but the reasons why are beyond the scope of this paper), denying compassionate release does not ensure justice or the equal distribution of benefits. To see this, consider that:

“Incarceration serves as punishment, not for punishment. Sentences do not mandate that the incarcerated individual be subject to certain additional punishments once confined, according to constitutional requirements... To suggest that inmates deserve to suffer when they become seriously ill and approach death is to use prison unjustly as a forum for additional retribution.”¹⁹²

¹⁸⁵ Aristotle, *The Politics*, 59.

¹⁸⁶ Aristotle, *The Politics*, 59-61.

¹⁸⁷ Thank you to Dr. Brian Buckley for pointing out this connection.

¹⁸⁸ Aristotle, *The Nicomachean Ethics*, trans. J.A.K. Thomson (Penguin Classics), 129; Aristotle, *The Politics*, 189 and 226.

¹⁸⁹ Aristotle, *The Nicomachean Ethics*, 129; Aristotle, *The Politics*, 189 and 226.

¹⁹⁰ Aristotle, *The Nicomachean Ethics*, 129.

¹⁹¹ Aristotle, *The Politics*, 59-61 and 197-98.

¹⁹² Cohn, “The Ethics of End-of-Life Care for Prison Inmates,” 257.

Thus, using punishment as an additional retribution gives inmates more than their fair share of burdens. This is significant because according to Aristotle, everyone in the community is worse off when someone does not get justice or their fair share. It is in this way that failing to grant compassionate release not only harms the inmate, but also the community.

Section VI: The Ethics of Compassionate Release - Making a Decision

Having considered the relevant stakeholder interests and evaluating what different philosophical traditions from across the globe can tell us, it is time to make a decision regarding the ethics of compassionate release.¹⁹³ To briefly recap, Mencius would argue that granting compassionate release is ethical because we must extend our compassion as a society to suffering inmates in order to cultivate our innately good nature.¹⁹⁴ Likewise, granting compassionate release is also ethical under an Indian and Tibetan Buddhist framework.¹⁹⁵ Philosophers such as Nāgārjuna argued that prisoners should be treated humanely, and that “those prisoners who are physically weak, and therefore pose less danger to society, should be released early.”¹⁹⁶ Furthermore, other Buddhist philosophers argue that punishment coming from a place of compassion is justified because it gives offenders an opportunity to be rehabilitated.¹⁹⁷ Lastly, granting compassionate release is also ethical using an Aristotelian common good approach because denying compassionate release denies people their fair share, which in turn creates a worse society.¹⁹⁸ Thus, the approaches of Mencius, Indian and Tibetan Buddhism, and

¹⁹³ Markkula Center for Applied Ethics. “The Framework for Ethical Decision Making.”

¹⁹⁴ Van Norden, “Mencius.”

¹⁹⁵ Goodman, “Ethics in Indian and Tibetan Buddhism.”

¹⁹⁶ Goodman, “Ethics in Indian and Tibetan Buddhism”; Goodman, *Consequences of Compassion*, “Chapter 9: Punishment”; and Hopkins (trans.), *Buddhist Advice*.

¹⁹⁷ Goodman, “Ethics in Indian and Tibetan Buddhism.”

¹⁹⁸ Thank you to Dr. Brian Buckley for raising this point.

Aristotelian common good yield the same conclusion: we need to grant compassionate release more than we currently are.

What is more, we seem to recognize that granting compassionate release is often the ethical choice, especially considering that 49 states, the District of Columbia, and the federal government all have compassionate release policies.¹⁹⁹ Despite recognizing the ethics of compassionate release, we continue to allow administrative challenges at the state and federal level to prevent us from doing what we know is right.²⁰⁰ This is all the more concerning considering that it seems that the administrative challenges barring individuals from receiving compassionate release are simple to fix relative to the many great policy challenges lawmakers face.²⁰¹ That we do not follow through and make these changes suggests that we view compassionate release as more of a token ethical policy than as something we truly believe in.

Section VII: Conclusion

In conclusion, this paper argued that a variety of philosophical and ethical frameworks from across the globe yield the same conclusion: we need to grant compassionate release more than we currently do. However, although we seem to agree that granting compassionate release is the ethical thing to do, the US federal and state legislatures are failing to live up to the ethics and fix the administrative problems that bar so many individuals from receiving compassionate release.

To make this argument, this paper discussed the legislative history of federal compassionate release policies in Section I. In Section II, this paper evaluated what

¹⁹⁹ Price, “Everywhere and Nowhere,” 8 and 12.

²⁰⁰ Human Rights Watch and Families Against Mandatory Minimums, “The Answer Is No.”; Price, “Everywhere and Nowhere.”

²⁰¹ Human Rights Watch and Families Against Mandatory Minimums, “The Answer Is No,” 8-12; Price, “Everywhere and Nowhere,” 20-21.

compassionate release currently looks like at the federal level, including how often it is granted and challenges that prevent it from being granted more frequently. Next, in Section III, this paper discussed the frequency with which compassionate release is granted and challenges in the process at the state level. This paper approached the ethics of compassionate release in Sections IV, V, and VI. Section IV presents the ethical questions raised by compassionate release and conducts a stakeholder analysis. Section V evaluates what Mencius (an ancient Chinese philosopher), Indian and Tibetan Buddhism, and Aristotelian common good approach would say about the ethics of compassionate release. Section VI brings the stakeholder analysis and discussion of ethical lenses to argue that compassionate release should be granted more often than it currently is.

As Bryan Stevenson wrote in *Just Mercy*, “simply punishing the broken--walking away from them or hiding them from sight--only ensures that they remain broken and we do, too. There is no wholeness outside of reciprocal humanity.”²⁰² We are currently faced with a choice: what type of society do we want to be? Do we want to continue to treat compassionate release as a token ethical act, or do we want to make real change? Change is within reach, so long as we recognize and act on the “extraordinary and compelling” nature of compassion and reciprocal humanity.

²⁰² Bryan Stevenson, *Just Mercy* (New York: One World, 2014), 290.

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