INTERNATIONAL LEGAL COOPERATION AND THE PRINCIPLES OF RECOGNITION AND ENFORCEMENT: LESSONS FROM HEALTHCARE LAW

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ABSTRACT

This research paper discusses the delivery of adequate healthcare in prisons in the context of compassionate release procedures, which typically allow prisoners to seek early release from prison due to ill-health. It provides an overview of procedures in the United States and England and Wales, and urges that the two jurisdictions co-operate to model best practices for compassionate release.

Keywords: International cooperation; recognition and enforcement, healthcare law.

Contents: 1. Introduction. 2. International co-operation: pursuing shared interests. 3. Compassionate release in the United States and England and Wales. 4. Modelling best practices [together]. 5. Conclusion.

1. INTRODUCTION

International co-operation describes interactions to achieve common objectives. Where common interests emerge, co-operation can develop and sustain. Grappling with the challenges of delivering adequate healthcare in prison systems supporting ageing and medically-complex populations, with limited resources and infrastructures, the United States (US) and England and Wales (E&W) both have an interest in determining best practices for determining what circumstances, if any, warrant the early release of prisoners on account of ill-health. Both jurisdictions have established compassionate release procedures, which typically allow for early release because of ill-health, but various reforms are urged. This short paper suggests that, motivated by their shared interest, the US and E&W should co-operate to model best practices for compassionate release, and suggests a series of questions to catalyse discussions.

2. INTERNATIONAL CO-OPERATION: PURSUING SHARED INTERESTS

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International co-operation describes "interactions to achieve common objectives when actors' preferences are neither identical (harmony) nor irreconcilable (conflict)."[2] It can refer to a range of interactions, including "sharing research results, production, commerce, protection of investments, and industrial know-how…."[3] and can occur across bi-lateral, multilateral, regional, and global levels, involving a diversity of intergovernmental and/or transnational agents and institutions.[4] With an objective of promoting the interests of the "greater community,"[5] international co-operation "requires the existence of community interests"[6] in order to gain traction. Where such interests emerge, co-operation can develop and sustain. This is reflected across issues where international co-operation currently exists, including security, criminal investigations, environmental protection, the use of shared spaces (e.g., outer space), economics, healthcare, and the protection and promotion of human rights. International co-operation recognizes that there is value in, as Griffin describes in this volume, "the openminded exchange of ideas, values, and choices among nations, each respecting the other's contributions."[7]

Given the routine use of imprisonment as a punishment world-wide and the inherent challenges of delivering adequate healthcare in prison systems, one interest shared — generally — by the international community is in determining what circumstances, if any, warrant the early release of a prisoner on account of ill-health. This task requires stakeholders to decide on when the disadvantages associated with a prisoner not serving their full sentence are offset by the advantages of early release. This task comes with "many distractions."[8] Healthcare professionals, as well as criminal justice scholars, have recognized the inherent tensions involved. As two UK-based healthcare professionals researching palliative care in prison, describe:

> Prisoners have the right to healthcare equal to that of any other patient, but not at the expense of risk of harm to society. Tensions inevitably arise in trying to respect the autonomy of people who have had their

I would like to thank panellists at the Roundtable on General Principles of International Legal Cooperation at the Law and Society Association 2020 Annual Conference for inviting me to contribute this paper and discussing its themes. Thank you to Birmingham City University L.L.B student, Emily Mouland, for her helpful research assistance.

[2] Sebastian Paulo, *International Cooperation and Development: A Conceptual overview*, DISCUSSION PAPER 13/2014, GERMAN DEVELOPMENT INSTITUTE 3 (2014).

[3] VASILII EROKHIN et al., HANDBOOK OF RESEARCH ON INTERNATIONAL COLLABORATION, ECONOMIC DEVELOPMENT, AND SUSTAINABILITY IN THE ARTIC 23 (2019).

[4] Paulo, *supra* note 2.

[5] Rüdiger Wolfrum, *International Law*, *in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 9 (2012).

[6] *Id*.

[7] *See*, Professor Lissa Griffin, this volume.

[8] Robert B. Greifinger, *Commentary*: *Is It Politic to Limit Our Compassion?* 27 J.L. MED. & ETHICS (3) 234 (1999).

> freedom curtailed by the state, especially when considering the preferred place of death of a prisoner…imprisonment provides public protection, prevention of recidivism, and rehabilitation. For the infirm prisoner approaching the end of life it could be argued that further incarceration serves no purpose; physical frailty makes recidivism and public harm unlikely and impending death makes rehabilitation largely irrelevant.[9]

Compassionate release procedures — when related to medical issues — typically allow for early release on account of serious terminal, non-terminal, and/or age-related ill-health. As such, they seek to navigate these tensions, and balance relevant interests. These procedures are present in justice systems around the world, including in the US and E&W.

3. COMPASSIONATE RELEASE IN THE UNITED STATES AND ENGLAND AND WALES

Compassionate release procedures in the US and E&W share in the typical make-up of compassionate release, namely they comprise a method, label, eligibility criteria, bespoke process, involve multi-agent interaction, and have reported outcomes.[10]

In the US, federal prisoners may apply for compassionate release (also referred to as a 'reduction in sentence') in two instances. First, if they have "extraordinary or compelling reasons," which can relate to medical condition(s), age, family circumstances, or other reasons. Or, second, if they are aged seventy or above, have served thirty years in prison, and the Director of the Bureau of Prisons ("BOP") determines s/he is not a danger to others. Following a process involving federal corrections and the BOP, the prisoner's federal sentencing court (directed by U.S. Sentencing Commission guidelines) makes a final decision.[11] Across US states, research shows all but one state (Iowa)[12] to have at least one compassionate release procedure.[13] Compassionate release methods include parole, executive clemency/commutation, reprieves, sentence modifications, extended confinement with supervision, respite programs, and furloughs, with around 50 different labels in use. Exclusions practices can include on the basis of offence, parole eligibility, and sentencing requirements.

[9] James Burtonwood & Karen Forbes, *Early Release Rules for Prisoners at End of Life Need Reform*, THE BMJ OPINION (June 12, 2019).
[10] *See*, generally, for a breakdown of procedures by reference to this framework, Sarah L. Cooper, *A Case for Broadening Arizona's Approach to Compassionate Release*, 13 LAW JOURNAL FOR SOCIAL JUSTICE 3-23 (2020).
[11] 18 U.S.C. § 3582(c)(1)(A)(i)(ii) (2018). *See also*, U.S. Dep't of Justice, Fed. Bureau of Prison, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(G) (Jan. 17, 2019).
[12] *See* FAMILIES AGAINST MANDATORY MINIMUMS (FAMM), IOWA STATE MEMO 2 (2018). Note, however, as the memo indicates, the media reports there has been a compassionate release case in Iowa, but there are no identifiable procedures.
[13] *See* generally, Mary Price, *Everywhere and Nowhere: Compassionate Release in the States*, FAMILIES AGAINST MANDATORY MINIMUMS (June 2018); and the 'State Memos' associated with the report *Find your state´s compassionate release policy*, FAMM.

Eligibility for non-terminal conditions typically requires that a prisoner be subject to serious medical conditions/disabilities that significantly incapacitate them, and terminal procedures can range from requiring that death be "imminent", to that it must occur within 24 months. Age is referenced in various ways, including as the main criteria for eligibility. Risk to public safety, prisoner well-being, and cost can also inform eligibility decision-making. Processes generally involve sequenced multi-stakeholder interaction, including petitioners (and/or their representatives), corrections, medical professionals, and releasing authorities. Release conditions can range from agreeing to the public release of medical records and placements and being subject to periodic medical evaluations, to intensive supervision and fee payments. A change in circumstances can also result in revocation. Generally, procedures lack comprehensive reporting and tracking systems.[14] Reports suggest compassionate release procedures are used "sparingly."[15]

In E&W, Early Release on Compassionate Grounds (ERCG), allows for the Secretary of State to release a determinate sentenced prisoner on licence at any point in the sentence if justifying "exceptional circumstances" exist.[16] This process does not expressly require consultation with the Parole Board. By contrast, ERCG for an indeterminate sentence prisoner,[17] which operates under the same criteria, does require consultation.[18] HM Prison Service's Prison Service Order (PSO) 6000 for 'Parole Release and Recall' sets out the extended procedure for determinate sentence prisoners,[19] and suggests exceptional circumstances include "terminal illness [where] death is likely to occur soon…"[20] (noting three months as an "appropriate period"[21]) and "where the prisoner is bedridden or severely incapacitated."[22] The application process involves an interaction between the prisoner, Governor, Medical Officer, Probation, and Department of Health.[23] Considerations of risk to public safety, information known by the trial and sentencing court, and the purpose(s) served

[14] See for authorities and an expanded summary of this overview, Cooper, *supra* note 10.
[15] Edward E. Rhine et al. *The Future of Parole Release*, 46 CRIME & JUST. 279 (2017) at n.11: "These include compassionate release or 'medical parole', mainly available to inmates with disabling or terminal illnesses, and the executive's clemency powers, which in most jurisdictions are used sparingly (Barkow 2009; Love 2009; American Law Institute 2011, § 305.7)".
[16] s. 248(1) Criminal Justice Act 2003: "The Secretary of State may at any time release a fixed-term prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds".
[17] s. 30(1) Crime (Sentences) Act 1997: "The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds".
[18] s. 30(2) Crime (Sentences) Act 1997: "Before releasing a life prisoner under subsection (1) above, the Secretary of State shall consult the Parole Board, unless the circumstances are such as to render such consultation impracticable".
[19] HM Prison Service, PSO 6000, Parole Release and Recall (2005), Chapter 12.
[20] *Id.* at Chapter 12, page 3, para. 12.4.1.
[21] *Id*.
[22] *Id.* at Chapter 12, page 3, para. 12.4.2.
[23] *Id.* at Chapter 12, page 3, paras 12.5 - 12.5.3.

by granting release guide the process. PSO 6000 underscores that ERCG "is granted in only the most exceptional cases."[24] Reports suggests this is the case.[25] HM Prison Service's Prison Service Order 4700 sets out the extended procedure for indeterminate sentenced prisoners.[26] It applies the same terminology in terms of terminal illness, time, and incapacity,[27] but involves specific consideration of the risk of re-offending; whether future imprisonment would reduce the prisoner's life expectancy; external care and treatment arrangements; and whether early release will bring some significant benefit to the prisoner or their family.[28] The process involves interaction with the Public Protection Casework Section and the Parole Board.[29]

4. MODELLING BEST PRACTICES [TOGETHER]

Reform of compassionate release is an ongoing conversation in both the US and E&W. In both jurisdictions (and beyond), such discussions have been associated with the need to address the challenges of delivering adequate healthcare in prisons, where there are limited medical infrastructures, finite staffing and funding resources, challenging conditions, a range of serious medical problems suffered across diverse groups, and varying policy considerations.[30] Across these conversations minds have focussed on various ideas, including the need to harness expertise across methods available, use lay-friendly labels, generate medically-informed and appropriate eligibility criteria for terminal and non-terminal illness, establish appeal mechanisms, narrow exclusion practices, construct efficient processes, provide education and training across agents, implement reporting and tracking systems, tailor release requirements, and take account of the aims of penal policy (including public safety) and human

[24] *Id.* at Chapter 12, page 1, para. 12.1: "Early release on compassionate grounds may be considered on the basis of a prisoner's medical condition or as a result of tragic family circumstances. It is granted in only the most exceptional cases".
[25] *See*, for example, House of Commons Debate, *Column 208WH*, UK PARLIAMENT (Oct. 20, 2009): "Maria Eagle: Some 28 per cent. of applications for compassionate release are granted in England and Wales".
[26] HM Prison Service, PSO 4700, Indeterminate sentence prisoners compassionate release on medical grounds, Chapter 12 (2010).
[27] *Id.* at page 1, para. 12.2.1
[28] *Id*.
[29] *Id.* at pages 1-2, paras 12.3.1 -12.4.
[30] For a selection of relevant literature *see*, generally, AM. CIVIL LIBERTIES UNION, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY (2012); NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 230 (Jeremy Travis et al. Eds., 2014); David Cloud, *On life support: Public health in the age of mass incarceration*, VERA INSTITUTE OF JUSTICE 5 (Nov. 2014); Cooper, *supra* note 10; Price, *supra* note 13; Burtonwood, *supra* note 9; Eva Steiner, *Early release for seriously ill and elderly prisoners: Should French practice be followed?* 50 THE JOURNAL OF COMMUNITY AND CRIMINAL JUSTICE (3) 267–76 (2003); Violet Handtke et al., *The collision of care and punishment: Ageing prisoners' view on compassionate release*, 19 PUNISHMENT & SOCIETY 5–22 (2017); Directorate General Human Rights and Rule of Law, *European Committee on Crime Problems, White Paper on Prison Overcrowding* (Council of Europe, June 30, 2016); House of Commons Debate, *Prisoner Release Decisions, Column 201WH*, UK PARLIAMENT (Oct. 20, 2009); House of Commons Debate, *Column 229WH*, UK PARLIAMENT (Oct. 20, 2009).

rights standards.[31] Notably, COVID-19 has illuminated the challenges of delivering adequate healthcare in prisons.[32]

Given their shared interest in addressing these challenges, the US and E&W should co-operate to model best practices. Through careful co-operation, these models can be both sensitive to the legal and cultural idiosyncrasies of the specific jurisdictions, but also the more universal principles that emerge in compassionate release cases, such as the application of medical science and the pursuit of protecting health[33] and prisoners' rights,[34] as promulgated through international human rights frameworks. They can take advantage of the full diversity of co-operation interactions, ranging from the sharing of research methodologies and evidence-bases, to the exchange of comparative stakeholder 'know-how', and co-investment in evaluation exercises. They can encourage interaction across various levels (e.g., joint engagement with the World Health Organization), institutions (e.g., facilitating dialogues between 'twin' institutions, such as the BOP and HM Prison Service), and disciplines (e.g., healthcare, corrections, law, and parole).

With this in mind, the following questions are presented as a catalyst for stakeholder discussion:

1. What aims and objectives should compassionate release procedures pursue? What interests should they take account of, and how can these be balanced?

2. What methods are most appropriate for co-ordinating compassionate release, and how should relevant procedures be labelled?

3. What exclusion criteria (unrelated to health), if any, should be applied, and on what basis?

4. Should eligibility criteria be informed by relevant medical science criteria, and, if so, how can this be achieved?

5. How can efficient and clear processes be constructed to take account of evidence requirements, standards of proof, decision-maker competencies, and the need for expedited review?

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[31] *Id*.

[32] *See*, for example, in relation to the US, *We must urgently do more to address COVID-19 behind bars and avoid mass infection and death: Guidance for Attorney General Barr, governors, sheriffs, and corrections administrators*, VERA INSTITUTE OF JUSTICE (May 11/12, 2020). *See*, for example, in relation to E&W, *Tackling the Spread of Coronavirus in Prison*, PRISON REFORM TRUST (2020).

[33] Article 12 of International Covenant on Economic, Social and Cultural Rights: "...the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

[34] The vulnerability of prisoners is recognized across international human rights instruments. Article 10 of the International Covenant on Civil and Political Rights, specifically provides that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person..." More broadly, the Standard Minimum Rules for the Treatment of Prisoners – 'The Nelson Mandela Rules (NMRs)' - promulgate various standards, including in relation to the administration of corrections facilities and personnel, prisoners' living standards, and health(care).

6. Should those granted compassionate release be subject to release requirements, and, if so, what form should them take and why?

7. What aims and objectives should tracking and reporting systems serve, who should co-ordinate them, should they be mandatory, and what form should they take?

8. What support do stakeholders (including prisoners and their families, lawyers, medical professionals, corrections personnel and releasing authorities) need, in order to engage effectively in compassionate release procedures? How, in particular, can stakeholders be supported to develop an understanding of the roles, competencies, and aims of other stakeholders?

5. CONCLUSION

Given their shared interests and common practices, this short paper urges that the US and E&W co-operate to model best practices for compassionate release, suggesting a series of questions to catalyse stakeholder conversations. Given the broad relevance of compassionate release to jurisdictions around the world, this call to co-operate could usefully be extended. No matter the breadth of the co-operative endeavour, however, the questions presented should serve as a useful starting point.

LIST OF ABBREVIATIONS

BOP - Director of the Bureau of Prisons

E&W - England and Wales

ERCG - Early Release on Compassionate Grounds

PSO - Prison Service Order

US - United States

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