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Dying with Dignity: Where is the *Compassion* in Compassionate Release Programs?

Abstract

The prison population in the United States is on the rise. The fastest growing population in prisons are those who could be considered elderly. With the graying of our prison population comes many diseases of aging that will wreak havoc not just on the inmates, but on the costs of incarceration. Prison inmates cannot acquire their own medical care; it is the responsibility of society and hence the prison system itself. If the prisons cannot adequately care for terminally ill or elderly inmates then compassionate release should be considered. Compassionate Release Programs are designed to allow those inmates who are terminally ill or elderly to apply for early release. But it is very hard to get such petitions approved, much less understand who is truly eligible. Thus, very few inmates are being released to spend whatever time they have left with loved ones. Not only would Compassionate Release Programs save money but they would allow those inmates at the lowest risk of recidivism to die with dignity.

Introduction

What does compassionate release mean? According to Black's Law Dictionary (2014), compassionate release means: "[The] release of a terminally ill prisoner to a hospital, hospice, or other healthcare facility." What does responsibility mean? Also according to Black's Law Dictionary (2014), responsibility means: "[That] for which one is answerable or accountable; a trust, duty, or obligation." Where do compassionate release and responsibility intersect? In the U.S. prison system. There is a steady graying of the prison population in the United States (Lee, 2010). This graying stems from modern medicine greatly increasing the life expectancy of many in our nation - which can be a blessing and also, at times, a curse. Longer life expectancies have resulted in reduced resources for the elderly who do not live behind prison bars. The resources are even more reduced for those elderly who happen to be incarcerated. This graying also stems from the increasing number of elderly inmates in the prison system itself (Linder & Meyers, 2009; Habes, 2011). Prison life is not easy and can age an inmate 10 to 15 years, particularly if the inmate has a history of substance abuse (Habes, 2011; Granse, 2003; U.S. Dept of Justice, 2015). Depending upon the definition, what constitutes "elderly" can range from 45 to 65 years (Linder & Meyers, 2009; Lee, 2010; U.S. Dept of Justice, 2015). The diseases of aging are much more pronounced in the elderly prison population (Linder & Meyers, 2009; Habes, 2011). Prisons are not designed to accommodate the increasing elderly inmate population, nor are they adequately equipped to deal with terminally ill inmates (Linder & Meyers, 2009; Habes, 2011; U.S. Dept of Justice, 2015).

Based on the nature of incarceration, the responsibility falls squarely on the society, and the prison system in which the society has created, to medically care for inmates (*Estelle v. Gamble*, 1976). Prison inmates must rely on prison authorities for their medical care and treatment (*Estelle v. Gamble*, 1976). Since inmates cannot acquire their own medical care, if that medical care is not provided, this represents an unmet need (*Estelle v. Gamble*, 1976). An unmet need that is the sole responsibility of the prison system (*Estelle v. Gamble*, 1976). Furthermore, the Eighth Amendment guarantees that inmates should receive "adequate care for a serious medical need" (*U.S. v. Dimasi*, 2016, p. 194). If the prison

system cannot give an inmate adequate care for their serious medical needs, whether it be due to terminal illness, or even just old age, then perhaps allowing a compassionate release is the humane thing to do.

It's not that Compassionate Release Programs are new in the state or federal prison systems (Linder & Meyers, 2009; Habes, 2011; Berry, 2009; Beck, 1999; Murphy, 2012; U.S. Dept of Justice, 2015). Compassionate Release Programs are for inmates who meet certain criteria (terminal illness, age, or other extraordinary circumstances) to petition for early release (Linder & Meyers, 2009; Habes, 2011; Beck, 1999; Murphy, 2012; U.S. Dept of Justice, 2015). Although these programs are present, they are not being widely utilized (Beck, 1999). Concerns regarding the safety of the general public with early release, as well as inconsistent administration of the programs, have led to this underutilization (Habes, 2011; U.S. Dept of Justice, 2015). However, with the value that society places on individual autonomy, particularly when it comes to healthcare and dying, why are inmates being deprived of the right to die with dignity? Underutilization has turned into non-utilization of Compassionate Release Programs, thereby violating basic human rights.

An Aging Prison Population

Our prison populations are quickly aging (Lee, 2010). The number of elderly inmates is on the rise both in the state and federal systems (Linder & Meyers, 2009; Snow, 2009; U.S. Dept of Justice, 2015). In the federal system, there has been a 25% increase in inmates aged 50 or older from 2009 to 2015 (U.S. Dept of Justice, 2015). In terms of prisoners sentenced to a year or more in state or federal prison, 11% were aged 55 or older by the end of 2015 (Carson and Anderson, 2016). With this corresponding increase in elderly inmates comes a corresponding increase in the cost to house these elderly inmates. On average it costs 8% more to incarcerate an elderly inmate as compared to a young inmate (U.S. Dept of Justice, 2015). The increased costs can be attributed to the increased costs of medical care (Habes, 2011; Murphy, 2012; U.S. Dept of Justice, 2015). Additionally, prisons are

insufficiently equipped to handle not only elderly inmates, but also those inmates who are terminally ill. Inmates who are elderly and/or terminally ill are therefore lacking in proper care.

What Contributes to the Increased Number of Elderly/Terminally Ill Inmates?

There are a myriad of reasons why the number of elderly inmates is on the rise. The first being sentencing reforms beginning in the 1980s (Habes, 2011; U.S. Dept of Justice, 2015). These reforms included elimination of federal parole, implementation of minimum mandatory sentences, as well as use of determinate sentences (Habes, 2011; U.S. Dept of Justice, 2015). The end results of these reforms were longer prison sentences (Habes, 2011; U.S. Dept of Justice, 2015). The second reason is an increased number of aging offenders who happen to be first time sex or white collar offenders (U.S. Dept of Justice, 2015). Additionally, there is an increase in the number of younger inmates who will be 50 or older upon their release (U.S. Dept of Justice, 2015).

Defining who is considered an elderly inmate is also instrumental in the determination of the number of elderly inmates. The Federal Bureau of Prisons does not have a set age for when inmates are considered aging or elderly (U.S. Dept of Justice, 2015). Some states set the age at 50 or above, some 55 or older, some 60, some 62, and some 65 (Lee, 2010). Some agencies go so far as to define “elderly” based on “degree of disability” (Lee, 2010, p. 89). Regardless of the chronological age, prison ages an inmate 10 to 15 years on top of their chronological age (Habes, 2011; Granse, 2003; U.S. Dept of Justice, 2015). This aging is due to “adjusting to prison life, financial stress related to an inmates’ family, lack of medical care, and withdrawal from substance abuse.” (Lee, 2010, p. 89). With this accelerated aging comes significant health and medical issues in this population (Habes, 2011; Granse, 2003; Murphy, 2012; U.S. Dept of Justice, 2015). It is the significant medical issues, as well as costs of medications, that lead to increased costs of care (Habes, 2011; Granse, 2003; Murphy, 2012; U.S. Dept of Justice, 2015).

Prisons Are Not Equipped to Handle the Needs of Elderly and Terminally Ill Inmates

Regardless of the number, the prison system is simply not designed to hold these elderly or terminally ill inmates (Habes, 2011; U.S. Dept of Justice, 2015). Elderly inmates have different needs than their younger counterparts. Elderly inmates have physical, as well as psychological limitations that are not seen in younger populations (Granse, 2003; Murphy, 2012; U.S. Dept of Justice, 2015). Older inmates need more nutritional food options as compared to younger inmates. Older inmates need greater medical care than younger inmates (Granse, 2003; Murphy, 2012; U.S. Dept of Justice, 2015). Older inmates suffer from such diseases of aging as: hypertension, gastrointestinal disorders, diabetes, emphysema, strokes, and forms of mental illness (Lee, 2010). A review of the literature on aging and mental health in the criminal justice system points out that serious mental illnesses such as dementia are more prevalent amongst older inmates compared to older non-incarcerated individuals (Maschi, Suftin, and O'Connell, 2012). Alzheimer's disease is the major cause of dementia in the general population, which extends to the prison population (Feczko, 2014). Prisons will need to be able to detect, and treat, this disease of aging (Feczko, 2014).

Programs in prison are designed to rehabilitate younger inmates, which does not benefit older inmates. The types of programs elderly inmates need are simply not offered (Granse, 2003; U.S. Dept of Justice, 2015). Programs related to aging and medical care would be beneficial to the elderly inmate (U.S. Dept of Justice, 2015). Programs related to available public benefits, if and when these inmates are released, would also be beneficial (Granse, 2003; U.S. Dept of Justice, 2015).

However, even if such programs were offered, the prison itself would need to be physically accessible for these inmates to be able to participate. Prisons are not designed for wheel chairs or walkers. Funding the costs involved in making the prisons accessible is simply not available (U.S. Dept of Justice, 2015). Elderly and terminally ill inmates need to be on lower floors in bottom bunks. But with prison

overcrowding, this is simply not an option for all the inmates that require these accommodations (Habes, 2011; U.S. Dept of Justice, 2015).

Furthermore, there are staffing issues that contribute to a lack of proper programming and care of elderly and terminally ill inmates (Habes, 2011; U.S. Dept of Justice, 2015). Correctional officers do not have the training to successfully deal with this population of inmates. Social workers are sorely lacking in the prison system, yet would be the most equipped to deal with the needs of elderly and terminally ill inmates (Granse, 2003; U.S. Dept of Justice, 2015). Therapists who specialize in working with the terminally ill would also be helpful in the prison context (O'Connor, 2002). Therapists who understand the dying process, and the prison process, would be the best equipped to assist those inmates who do not secure some sort of conditional release as their time comes to an end (O'Connor, 2002).

Increased Medical Costs

The diseases of aging will have a much greater effect on the elderly inmate (Habes, 2011; Granse, 2003; U.S. Dept of Justice, 2015). Since elderly inmates have greater medical needs, this contributes to an increased cost of incarceration (Habes, 2011; Lee, 2010; U.S. Dept of Justice, 2015). The Federal Bureau of Prisons spent “\$1.1 million on inmate medical care, an increase of almost 30% in five years” (Horowitz, 2016). A major factor in this increase was the increased growth in elderly inmates (Human Rights Watch, 2012; Horowitz, 2016). For the elderly inmate, the costs of incarceration are three times those of a younger inmate, again contributing to the overall cost of incarceration (Williams, Sudore, Greifinger, and Morrison, 2011). Inmates over the age of 50 tend to have more serious health problems, as well as an increased need for medication, than younger inmates (Lee, 2010; U.S. Dept of Justice, 2015).

The court in *Estelle* determined that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’” (*Estelle v. Gamble*, 1976, p. 104 (citing *Gregg v. Georgia*, 428 U.S. 153, 173, 1976)). Thus, “contemporary standards of decency” mandate that

the public (i.e. prisons) are required to take care of the inmates who cannot care for themselves due to incarceration (*Estelle v. Gamble*, 1976). Therefore, if prisons fail to properly provide for medical care for their inmate population, they will run afoul of the Eighth Amendment's prohibition against cruel and unusual punishment (*Estelle v. Gamble*, 1976). Does this include compassionate release?

That may depend on how one defines "proper care?" The Eighth Amendment does not require optimal care (*U.S. v. Dimasi*, 2016). However, the care should be humane and perhaps better than what the prison system can currently provide (Lee, 2010; *U.S. v. Dimasi*, 2016). Medical care isn't always so readily available for the elderly or terminally ill inmate (Habes, 2011; Granse, 2003; U.S. Dept of Justice, 2015). Prisons do not have sufficient medical staff to deal with the number or needs of elderly or terminally ill patients (Habes, 2011; Granse, 2003; U.S. Dept of Justice, 2015). Elderly and terminally ill inmates wait weeks, months, and sometimes years for care (Habes, 2011; U.S. Dept of Justice, 2015). If they need medical care from outside institutions, the costs are greatly increased due to the necessity of having guards accompany the prisoners at all times, as well as increased travel expenditure (Habes, 2011; U.S. Dept of Justice, 2015). Thus, many older inmates wait to get needed medical care until their problem becomes critical (Habes, 2011). The more serious the medical condition, the greater the costs. At some point state and federal prisons will need to develop "nursing home environments to handle the influx of the elderly" (Lee, 2010). There will have to be money invested into palliative care for any terminally ill or elderly inmates by the prison system (Williams, Sudore, Greifinger, and Morrison, 2011). All of this comes at a cost. But there is a way to lower costs as well as show compassion to those who are elderly and/or terminally ill in prison waiting to die: increased utilization of Compassionate Release Programs (Murphy, 2012; U.S. Dept of Justice, 2015).

Compassionate Release Programs

Compassionate Release Programs are designed to allow inmates to petition for early release based on listed criteria (Linder & Meyers, 2009; Habes, 2011; Berry, 2009; U.S. Dept of Justice, 2015). The criteria differs slightly between jurisdictions, but generally speaking include being terminally ill, being elderly (with consideration for terminal illness), and having extraordinary and compelling circumstances (Linder & Meyers, 2009; Habes, 2011; Berry, 2009; U.S. Dept of Justice, 2015). Other criteria that are considered include the nature of the crimes committed as well as the length of time the inmate has been incarcerated (Linder & Meyers, 2009; Habes, 2011; Berry, 2009).

There seems to be a great aversion to Compassionate Release Programs. The biggest problem deals with consistency in the administration of these programs (U.S. Dept of Justice, 2015). When it comes to petitions for compassionate release, the potential releasee must survive differing levels of review (Berry, 2009). These differing levels of review give plenty of opportunity for denial, with inmates dying before learning the outcome of their petitions (Berry, 2009; Beck, 1999). Furthermore, even the criteria are not clearly defined, thus causing confusion about who is eligible and who is not (U.S. Dept of Justice, 2015; Beck, 1999). Although the federal system has recently revised their Compassionate Release Program requirements to increase the number of potentially eligible inmates, there are still very few inmates being released to home confinement (U.S. Dept of Justice, 2015). The revised Compassionate Release/Reduction in Sentence statute can be found at 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g). Hence, there is an interesting intersection, or more like a dead-end road, where eligibility and approval meet.

Compassionate Release Programs are just not widely utilized. Only a small percentage of dying inmates are being approved (Williams, Sudore, Greifinger, and Morrison, 2011). For instance, “In 2008, 399 deaths occurred in the Federal Bureau of Prisons and 27 requests for compassionate release were approved” (Williams, Sudore, Greifinger, and Morrison, 2011, p. 123). Since the changes to the federal Compassionate Release Program in 2013, the Federal Bureau of Prisons only moved for the

compassionate release of 11 inmates in the “Elderly with Medical Conditions” category according to the court in *U.S. v. Dimasi* (2016). For elderly inmates, the court noted that 216 inmates applied for compassionate release and yet none were granted (*U.S. v. Dimasi*, 2016). In 2014, there were 206 applications with only 16 being granted, four of which were “Elderly Inmates with Medical Conditions” (*U.S. v. Dimasi*, 2016), p.184). It is not as though there were thousands of inmates seeking and obtaining approval from the Federal Bureau of Prisons for early release under this program. Part of this could be a flaw in determining who is eligible (Williams, Sudore, Greifinger, and Morrison, 2011). Eligibility can depend on an inmate’s prognosis (Williams, Sudore, Greifinger, and Morrison, 2011). Elderly inmates with dementia may not qualify for release due to not having a terminal illness with a short prognosis (Williams, Sudore, Greifinger, and Morrison, 2011). Therefore, more needs to be done to concretely determine who is eligible, so appropriate motions can be filed, given the unique circumstances of the prison system.

The U.S. Sentencing Commission has “encouraged the Bureau of Prisons to be more liberal in creating opportunities for judges to consider whether compassionate release is justified” (*U.S. v. Dimasi*, 2016, p. 183). The federal process requires the inmates to get approval from the Bureau of Prisons prior to petitioning the sentencing court (*U.S. v. Dimasi*, 2016). The sentencing court cannot examine the request for compassionate release and apply the statutory factors without that approval (*U.S. v. Dimasi*, 2016). Hence the court cannot evaluate whether or not the inmate would pose any further risk to society, and that the inmate has paid their debt to society. It is the court’s role to determine any public safety concerns regarding early release of an inmate, regardless of whether or not they are elderly or terminally ill (Human Rights Watch, 2016). Denials by the Bureau of Prisons to file a motion for compassionate release is not reviewable by the sentencing court (*Engle v. U.S.*, 2001; *Hazel v. Ormond*, 2016; *U.S. v. Banda*, 2016).

Allowing those terminally ill and elderly inmates who meet the criteria to be at home with family and friends when their time of death is near should be the goal of Compassionate Release Programs

(Granse, 2003). In this population of inmates, the rate of recidivism is very low (Human Rights Watch, 2012; U.S. Dept of Justice, 2015). Inmates who have secured an early, compassionate release have a “recidivism rate of 3.5 percent,” whereas the recidivism rate for federal prisoners overall is estimated to be as high as 41 percent (Horowitz, 2016, p. 3). Therefore, this isn’t simply a cry for open season when it comes to compassionate release. There should be clear-cut criteria regarding who is eligible for the program. But there also needs to be an open-mindedness that there *are* eligible inmates for compassionate release.

Terminally ill or elderly inmates should not be allowed to die horribly alone as part of their “punishment” (Granse, 2011). Continuing to allow this to happen is cruel, and hence a violation of the Eighth Amendment (*Estelle v. Gamble*, 1976). There comes a point where it should be the responsibility of the prison system to re-examine its policies on compassionate release for the benefit of terminally ill and elderly inmates (Human Rights Watch, 2016). There comes a point where punishment needs to change to reflect terminal illness as well as old age (Human Rights Watch, 2012). Despite changes in the federal Compassionate Release Program, there remain eligible inmates who are not being considered (U.S. Dept of Justice, 2011). Again, this is not a plea to open the doors of the prisons to release all terminally ill or elderly inmates; but the prison system needs to take a stronger approach to identifying those inmates who do qualify, filing the appropriate motions, and letting the court system make the ultimate determination as to whether compassionate release is justified. Consequently, responsibility has turned into inaction.

Conclusion

For those inmates nearing the end of their lives due to age or illness, dying alone in prison is an inhumane reality. Our society cannot continue to ignore the growing elderly population in our prisons. There is an inherent, increased cost with this elderly and terminally ill prison population that could be remedied by the consistent use of Compassionate Release Programs. “[An] efficiently-run Compassionate

Release Program combined with modifications to the program's eligibility criteria could expand the pool of eligible candidates, reduce overcrowding in the federal prison system, and result in cost savings for the [Bureau of Prisons]" (Horowitz, 2016, p. 3). Compassionate Release Programs should be used to afford these inmates, if they are no longer threats to society, the opportunity to spend whatever time they have left with their families. Giving such inmates some aspect of control and autonomy over their end of life doesn't mean that prison doors should open and inmates be pushed out. The inmates that are to be released need to be given assistance so that they can function outside of prison walls. If not, those inmates would arguably be worse off than if they had remained incarcerated. To not allow these inmates to die with dignity is a violation of basic human rights, regardless of where those inmates die (Human Rights Watch, 2012). There needs to be an emphasis on compassion for those who are elderly and terminally ill, even if they have violated our laws. Thought must be given to assuming responsibility to care for those elderly and terminally ill inmates, even if that means releasing them to some sort of home confinement. Ultimately, let the punishment fit the crime.

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