

HOW COMPASSIONATE IS IT?: SUGGESTIONS FOR IMPROVING THE COMPASSIONATE RELEASE STATUTES IN KANSAS

By: Audrey Nelson*

I. INTRODUCTION

In a chaotic video taken on a cell phone by an inmate at Lansing Correctional Facility and posted to YouTube, one inmate can be heard yelling, “Y’all want to give us no healthcare? This is what we do!”¹ The inmates took over their cell block and ransacked the correctional officer’s office in protest of the poor conditions within the prison and lack of medical treatment they were receiving.² Inmates have never received the best medical treatments while incarcerated.³ The standard of care in prisons “lags far behind community health standards,” and the COVID-19 crisis is currently highlighting this unfortunate reality.⁴ Prisons are the ultimate breeding ground for spreading disease. This is due to the close confinement with others, the lack of available hygienic options, and the lack of access to preventative care, amongst other things.⁵

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¹ Reddebek, *Inmate Video of Riot in Lansing Correctional Facility Kansas (Strong Language)*, YOUTUBE (Apr. 10, 2020), <https://www.youtube.com/watch?v=2qN6ntbmU8> [<https://perma.cc/5U8Q-JYJT>].

² *Id.*

³ See generally B. JAYE ANNO, NAT’L COMM’N ON CORR. HEALTH CARE, *Historical Overview: The Movement to Improve Correctional Health Care*, in CORRECTIONAL HEALTH CARE 10 (2001) (putting the medical treatment of inmates in a historical context).

⁴ JUSTIN HANSFORD, TASNIM MOTALA, CHIJINDU OBIOFUMA & NATALIE LAROCHE, THE CONTRADICTION OF COLORBLIND COVID-19 RELIEF: BLACK AMERICA IN THE AGE OF A PANDEMIC 21 (Lauren Jenkins & Billi Wilkerson eds., 2020), <https://docs.google.com/document/d/1vEX8NVdrNlmPjCubnptLZHm58bqtTuf65TJ0oniaEc/edit> [<https://perma.cc/G6XU-LLGJ>].

⁵ Burton Bentley II, *The Growing Litigation Battle Over COVID-19 in the Nation’s Prisons and Jails*, LAW (Aug. 25, 2020, 6:00 PM), <https://www.law.com/2020/08/25/the-growing-litigation-battle-over-covid-19-in-the-nations-prisons-and-jails/> [<https://perma.cc/A6JH-54ZH>].

Since the COVID-19 crisis began in March 2020, sixteen Kansas correctional facility residents have died and over 6,200 inmates have tested positive for the virus.⁶ A fifty-year-old man with significant underlying health conditions was one of the first victims taken by COVID-19 at the Lansing Correctional Facility.⁷ Kansas Governor Laura Kelly released six inmates in early May 2020, but these release efforts were halted when the COVID-19 outbreaks began in the prisons.⁸ By June 2021, over 200 inmates sought relief through clemency applications, which are submitted to the Prisoner Review Board (“PRB”), then passed to Governor Kelly for her consideration.⁹ Governor Kelly only granted eight of those applications.¹⁰ Kansas’s poor response to the COVID-19 crisis in prisons led the American Civil Liberties Union (“ACLU”) to file a class-action lawsuit against the State on behalf of the inmates in April 2020.¹¹ Additionally, in the midst of the COVID-19 crisis, Kansas terminated its contract with Corizon, the medical care provider for its correctional facilities.¹² Corizon not only failed to properly care for inmates during the COVID-19 crisis,

⁶ NANCY BURGHART, KAN. DEP’T OF CORR., KDOC COVID-19 STATUS, <https://www.doc.ks.gov/kdoc-coronavirus-updates/kdoc-covid-19-status> [https://perma.cc/7BXD-6996]. This data does not include the number of COVID-19 cases and deaths in county jails across Kansas. Because jails are more transient than prisons, it is more likely than not that the numbers of COVID-19 cases are higher in jails compared to in prisons. See Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, PEW CHARITABLE TRS. (July 1, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities> [https://perma.cc/69JE-EC4P].

⁷ Stuart Harmon, *Prison Officials in Kansas Ignored the Pandemic. Then People Started Dying*, YOUTUBE (July 2, 2020), <https://www.youtube.com/watch?v=3HsJOixMvVs> [https://perma.cc/QB6E-SQK9].

⁸ Kan. City Star Ed. Bd., Editorial, *Only 6 Kansas Inmates Released Amid COVID-19 Outbreak. Why Hasn’t Gov. Kelly Done More?*, KAN. CITY STAR (May 4, 2020), <https://www.kansascity.com/article242477236.html> (last visited Sept. 20, 2020).

⁹ See Sherman Smith, *Kansas Governor Grants Clemency to 8, Embracing ‘Political Risk’ in Rare Use of Power*, KAN. REFLECTOR (June 24, 2021, 3:00 PM), <https://kansasreflector.com/2021/06/24/kansas-governor-grants-clemency-to-8-embracing-political-risk-in-rare-use-of-power/> [https://perma.cc/492V-3DBZ]. See *The Clemency Project: Clemency Explained and Filing for Clemency*, AM. C.L. UNION KAN., <https://www.aclukansas.org/en/campaigns/clemency-project-clemency-explained-and-filing-clemency> [https://perma.cc/5YTX-T3J9], for a discussion on what clemency is and a breakdown of the clemency process in Kansas.

¹⁰ Smith, *supra* note 9. One of the eight inmates was Christopher McIntyre, a man with terminal stage four cancer, whose application was granted based on functional incapacitation. Noah Taborda, *Kansas Man Battling Terminal Cancer Released from Lansing Prison*, KAN. REFLECTOR (Apr. 13, 2021, 6:04 PM), <https://kansasreflector.com/2021/04/13/kansas-man-battling-terminal-cancer-released-from-lansing-prison/> [https://perma.cc/YP53-GA9S].

¹¹ *Hadley et al. v. Zmuda et al.*, AM. C.L. UNION KAN. (Apr. 2020), <https://www.aclukansas.org/en/cases/hadley-et-al-v-zmuda-et-al> [https://perma.cc/WQ8E-XYTL]. The Prison Policy Initiative and the ACLU conducted a study that graded states’ responses to the COVID-19 crisis in jails and prisons, and Kansas received an F+. EMILY WIDRA & DYLAN HAYRE, *FAILING GRADES: STATES’ RESPONSES TO COVID-19 IN JAILS & PRISONS* (2020), https://www.prisonpolicy.org/reports/failing_grades.html [https://perma.cc/249V-4A5W].

¹² Nicole Asbury, *Kansas Switches its Medical Provider for Prisons After Years of Sharp Criticism*, KAN. CITY STAR (Apr. 19, 2020), <https://www.kansascity.com/article242084326.html> (last visited Oct. 1, 2020).

but the company also failed to meet its contractual obligations to care for inmates over the past several years.¹³

The treatment in Kansas prisons is poor for an average, healthy inmate. Elderly and sick inmates are dealing with this poor care in addition to their numerous health problems. So, what options are available for these more vulnerable inmates? Kansas currently has two compassionate release statutes, sections 22-3728 and 3729 of the Kansas Statutes Annotated, through which inmates may apply to seek relief.¹⁴ Although the name compassionate release implies the state is showing inmates some sort of mercy in their old age or infirm conditions, arguably no real compassion is being shown to these inmates.

The state of Kansas must change its compassionate release statutes in light of the COVID-19 crisis, which has only illuminated inmates' poor medical treatment in state correctional facilities. This mistreatment significantly impacts elderly inmates, inmates with potentially life-threatening pre-existing conditions, and chronically ill inmates. Kansas's current compassionate release statutes do not provide a clear and effective path for these inmates to seek relief, therefore the Kansas State Legislature must add new language and amend the existing language of the current statutes.

Section II of this article examines the history of compassionate release in the United States and in Kansas. Section III identifies the current literature discussing compassionate release and the relevant arguments for and against it. Section IV discusses the current issues regarding medical mistreatment in Kansas correctional facilities and the inefficacy of the current compassionate release laws.

In Section V, this article proposes several amendments to sections 22-3728 and 3729 based on compassionate release laws in other states and the FIRST STEP Act at the federal level. This article argues that changing the language of the current compassionate release statutes is the most effective solution. The current statutes are vague and permit the PRB and its chairperson too much discretion which leads to ineffectual laws that do not fulfill their intended purposes. The proposal set forth in this article aims to amend the language within the current statutes to set specific age requirements for elderly inmates and expand the compassionate release application time frame available to terminally ill inmates. This article also suggests adding new provisions to enhance clarity: language including chronically ill inmates, a time frame for the PRB to adhere to, allowing inmates to appeal a PRB decision, creating notification procedures to inform inmates of their compassionate release eligibility, and a reporting requirement for the PRB to increase legislative accountability. Section V of this article also explores the implications of amending the current compassionate release statutes and the potential for pushback from prosecutors who often

¹³ *Id.*; Nicole Asbury, 'No Consideration': Kansas Criticizes Prison Medical Provider's COVID-19 Response, KAN. CITY STAR (Apr. 21, 2020), <https://www.kansascity.com/news/politics-government/article242177371.html> (last visited Oct. 1, 2020).

¹⁴ KAN. STAT. ANN. § 22-3728 (2014); KAN. STAT. ANN. § 22-3729 (2012).

oppose inmates' pleas for compassionate release.

II. BACKGROUND

A. *Compassionate Release in the United States*

Congress passed the first compassionate release statute during the tough-on-crime era in the Sentencing Reform Act of 1984.¹⁵ This Act removed the possibility of parole for federal inmates and created the U.S. Sentencing Commission, which then published the Federal Sentencing Guidelines.¹⁶ These guidelines led to a substantial increase in incarceration due to mandatory minimum sentencing.¹⁷ In an attempt to strike a balance, this Act allowed federal courts to reduce inmates' sentences based on "extraordinary and compelling circumstances" that arose over the course of their incarceration, including age or terminal illness.¹⁸ It was up to the Bureau of Prisons ("BOP") to identify inmates who qualified and then bring that to the attention of the court by filing a motion for sentencing reduction on the inmate's behalf.¹⁹ The court ultimately made the final decision on the motion based on criteria found under 18 U.S.C. § 3582(c)(1)(A).²⁰ In this sense, the power the BOP held to initially file those motions gave them a gatekeeping role in compassionate release cases.²¹

Former President Donald Trump signed the FIRST STEP Act of 2018 into law with the strong bipartisan support of twenty-eight senators co-signing the bill.²² Groups across the political ideological spectrum supported passage of the FIRST STEP Act, including the Koch brothers on the right and the ACLU on

¹⁵ FAMS. AGAINST MANDATORY MINIMUMS, COMPASSIONATE RELEASE AND THE FIRST STEP ACT: THEN AND NOW 1, <https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf> [<https://perma.cc/9EQK-6J7D>]; see generally *Criminal Justice Facts*, SENT'G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/XB8G-GPD5>] (citing statistics comparing incarceration rates between 1980 and 2018).

¹⁶ Lynn S. Adelman, *The Tough-on-Crime Law Democrats are Overlooking*, WASH. POST (June 30, 2019), <https://www.washingtonpost.com/opinions/2019/06/30/theres-another-tough-on-crime-law-democrats-should-focus-their-criticism/> [<https://perma.cc/Q8GE-S9AP>].

¹⁷ *Id.*; *The FIRST STEP Act: What & Why*, RED, https://stoprecidivism.org/the-first-step-act-what-why/?gclid=EAIaIQobChMI-ZrXr7OZ7AIVgobACH0FiwHvEAAYASAAEgK5YPD_BwE [<https://perma.cc/9P5Q-G23M>]. Mandatory minimum sentencing led to lengthened time served. "Before reform, inmates served between 40-70% of their sentences, but after reform they served between 87-100% of their sentences." Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATL. MAG. (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [<https://perma.cc/PXP8-SJCG>].

¹⁸ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 15, at 1.

¹⁹ *Id.*

²⁰ *Id.*; 18 U.S.C.A. § 3582(c)(1)(A) (West 2018).

²¹ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 15, at 1.

²² USA Today Ed. Bd., Opinion, *Vote on FIRST STEP Act to Reform 'Out of Whack' Prison Sentences*, USA TODAY (Dec. 4, 2018, 1:36 PM), <https://www.usatoday.com/story/opinion/2018/12/03/first-step-act-let-senate-vote-prison-sentences-editorials-debates/2143884002/> [<https://perma.cc/5AV8-3QZ4>].

the left.²³ FIRST STEP stands for “Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person.”²⁴ This Act’s goal was to undo some of the damage created by harsh sentencing guidelines.²⁵ It did so by updating and expanding the compassionate release terms first created in the Sentencing Reform Act.²⁶

The FIRST STEP Act gave inmates the option to apply for compassionate release directly with the courts, rather than wait for the BOP to initiate the process.²⁷ Inmates gained the ability to appeal the denial or neglect of their compassionate release application after thirty days of no response from the BOP.²⁸ The Act updated the “extraordinary and compelling circumstances” language from the Sentencing Reform Act of 1984.²⁹ It changed the age requirements for elderly inmates and differentiated between debilitating and terminal medical conditions.³⁰ The FIRST STEP Act requires the BOP to notify the families of inmates who have been diagnosed with a terminal condition within seventy-two hours of the diagnosis.³¹ The BOP must also assist with a request for compassionate release if asked by the inmate, their family, partner, or attorney.³² The changes made in the FIRST STEP Act increased federal inmates’ accessibility to compassionate release.

B. Compassionate Release in Kansas

Compassionate release is well over forty years old at the federal level, but the Kansas compassionate release statutes are less than twenty years old. The Kansas State Legislature passed the first compassionate release statute in 2002 with section 22-3728, and section 22-3729 followed eight years later in 2010.³³ These two statutes cover separate types of compassionate release: that based on functional incapacitation and that based on terminal illness. These statutes are relatively similar, but they establish two different mandatory processes for the inmates to apply. Substantively, both statutes have remained mostly unchanged since the legislature passed them in 2002 and 2010.

1. Compassionate Release based on Functional Incapacitation

Section 22-3728 allows for the early release of inmates who are considered

²³ *Id.*

²⁴ *The FIRST STEP Act: What & Why*, *supra* note 17.

²⁵ *Id.* Mandatory minimum sentencing, the three-strike rule, and the war on drugs all contributed to mass incarceration. Marginalized communities, especially Black people, feel the impact of these laws at disproportionate rates and they continue to be decimated by the effects. *See Coates, supra* note 17.

²⁶ First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194.

²⁷ *Id.*

²⁸ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 15, at 3.

²⁹ *Id.* at 2–3.

³⁰ *Id.*

³¹ *Id.* at 4.

³² *Id.*

³³ KAN. STAT. ANN. § 22-3728 (2014); KAN. STAT. ANN. § 22-3729 (2012).

so functionally incapacitated they are no longer considered a threat to the public.³⁴ Senator U.L. Gooch originally introduced this statute 2001 to help chronically ill inmates at the end of their lives so that they would not have to die in prison.³⁵ An important provision of this statute is the exclusion of people who are imprisoned for off-grid offenses, people serving life sentences without the eligibility of parole, or those who have received the death penalty.³⁶ Off-grid offenses include the most serious criminal offenses: capital murder, first-degree murder, treason, terrorism, illegal use of weapons of mass destruction, and certain sexual offenses.³⁷ Inmates incarcerated for any of those crimes are not eligible for compassionate release.

The PRB has the discretion to determine whether an inmate is functionally incapacitated.³⁸ No specific guidelines are in place to determine an inmate's functional incapacitation. The statute merely identifies factors that the PRB must consider when reaching this determination:

- whether the person's current condition has been confirmed by a doctor;
- the person's age and their personal history;
- their criminal history;
- the length of their sentence and how long they have served;
- the nature and circumstances of the offense;
- the risk or threat to the community if the inmate is released;
- whether a release plan has been established; and
- any other factors it finds relevant.³⁹

The mandatory process under section 22-3728 requires the inmate to first apply for a functional incapacitation finding with the Secretary of Corrections.⁴⁰ If the Secretary of Corrections approves the application, the PRB then reviews it and a final decision regarding the inmate's release is made.⁴¹ If granted, the PRB creates a supervised release plan for each inmate to adhere to upon their release. The PRB can revoke an inmate's compassionate release if the terms of their release plan are violated, their functionally incapacitated condition

³⁴ § 22-3728.

³⁵ *Hearing on S.B. 339 Before the S. Fed. & State Affs. Comm. Meeting*, 2001-2002 Leg. Sess. (Kan. 2001) (statement of Sen. Gooch, Member, S. Fed. & State Affs. Comm.).

³⁶ § 22-3728(d)–(e).

³⁷ KAN. SENT'G COMM'N, KANSAS SENTENCING GUIDELINES DESK REFERENCE MANUAL 2019, at 14 (2019), https://www.sentencing.ks.gov/docs/default-source/publications-reports-and-presentations/2019-drm-text-final.pdf?sfvrsn=8152fd3f_0 [<https://perma.cc/42DW-CHQ5>].

³⁸ § 22-3728.

³⁹ § 22-3728(a)(8)(A)–(H).

⁴⁰ FAMS. AGAINST MANDATORY MINIMUMS, KANSAS 1 (2018), https://famm.org/wp-content/uploads/Kansas_Final.pdf [<https://perma.cc/TJP9-222C>].

⁴¹ *Id.*

significantly diminishes, or the inmate becomes a threat to public safety.⁴² The Secretary of Corrections acts as a gatekeeper to those considered for compassionate release, much like the BOP in the Sentencing Reform Act. Furthermore, the PRB can deny an application for essentially any reason, creating a secondary hurdle to an inmate's compassionate release.

2. Compassionate Released based on Terminal Illness

Section 22-3729 allows for the release of inmates who have terminal medical conditions that will likely cause death within thirty days.⁴³ Representative Bill Feuerborn introduced this statute to the Kansas State Legislature in 2010.⁴⁴ A father's testimony about his daughter—who was an inmate with terminal cancer—was the catalyst to pass this new statute.⁴⁵ The father described that three to four weeks before his daughter's death she could hardly stand.⁴⁶ When she finally was released, her condition deteriorated to the point that her family did not think she was even aware that she was home.⁴⁷ She was released with the extraordinary assistance of the Secretary of Corrections, but she died the following day.⁴⁸ Her father went on to say, "it serves no purpose to hold a dying person in prison when they cannot even stand alone."⁴⁹

The limitations of the functional incapacitation statute were another impetus for enacting this statute. Section 3728 requires the PRB to wait a minimum thirty-day period before making a decision.⁵⁰ Within those thirty days the prosecutor, court, and victim or victim's family are given notice of the compassionate release application and notice of the application is also published in the newspaper.⁵¹ Section 22-3729 provides a procedure for an inmate who will likely not survive that thirty-day waiting period.⁵²

As with the functional incapacitation statute, compassionate release based on terminal illness excludes people who are imprisoned for off-grid offenses.⁵³ Under this statute, an application must be submitted to the PRB's chairperson and they choose to grant or deny the application.⁵⁴ The chairperson has the sole

⁴² § 22-3728(a)(5)–(6).

⁴³ KAN. STAT. ANN. § 22-3729 (2012).

⁴⁴ *Hearing on H.B. 2412 Before the H. Comm. on Corr. & Juv. Just.*, 2009-2010 Leg. Sess. (Kan. 2010) (statement of Rep. Feuerborn).

⁴⁵ KAN. LEG. RSCH. DEP'T, REPORT OF THE JOINT COMMITTEE ON CORRECTIONS & JUVENILE JUSTICE OVERSIGHT TO THE 2010 KANSAS LEGISLATURE 4-17 (2009).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Hearing on H.B. 2412 Before H. Comm. on Corr. & Juv. Just.*, *supra* note 44 (statement of Rep. Feuerborn).

⁴⁹ KAN. LEG. RSCH. DEP'T, *supra* note 45, at 4-17.

⁵⁰ *Hearing on H.B. 2412 Before H. Comm. on Corr. & Juv. Just.*, 2009-2010 Leg. Sess. (Kan. 2010) (statement of Roger Werholtz, Sec'y of Corr.); KAN. STAT. ANN. § 22-3728(a)(3) (2014).

⁵¹ § 22-3728(a)(3).

⁵² *Hearing on H.B. 2412 Before the H. Comm. on Corr. & Juv. Just.*, *supra* note 50 (statement of Roger Werholtz, Sec'y of Corr.).

⁵³ KAN. STAT. ANN. § 22-3729(d) (2012).

⁵⁴ § 22-3729(a)(3).

discretion in determining whether to release an inmate with a terminal medical condition. When making this determination, they must consider certain factors, such as:

- the person's age and their personal history;
- their criminal history;
- the length of their sentence and how long they have served;
- whether they are a danger to the community;
- whether a release plan has been established; and
- any other factors they deem relevant.⁵⁵

Unlike the functional incapacitation statute, the chairperson must also consider whether a physician has confirmed the person's terminal condition and whether that condition is likely to cause death within thirty days.⁵⁶ This is a difficult needle to thread because the combination of the restrictive timeline and the vagueness of the overall statute. A terminally ill inmate granted compassionate release must adhere to a post-release supervision plan upon release.⁵⁷ The statute provides for the revocation of release if the individual violates a term of the release plan, medically improves or does not die within thirty days, or the inmate is labeled a threat to the public by the PRB chairperson.⁵⁸

In February 2020, Kansas Representative Dennis "Boog" Highberger and Scott Schultz, Executive Director of the Kansas Sentencing Commission, introduced House Bill 2469 to the Committee on Corrections and Juvenile Justice in the Kansas State Legislature.⁵⁹ House Bill 2469 proposed an extension to the time frame in section 3729(a)(2) from thirty days to ninety days to increase the number of inmates who could successfully be released under the statute.⁶⁰ The committee amended the bill to allow compassionate release based on terminal illness within 120 days of expected death.⁶¹ It passed the House Committee of the Whole with a resounding 120 yeas and only five nays.⁶²

⁵⁵ § 22-3729(a)(7)(B)–(H).

⁵⁶ § 22-3729(a)(7)(A).

⁵⁷ § 22-3729(a)(4).

⁵⁸ § 22-3729(a)(4)–(5).

⁵⁹ See H.B. 2469, 2019-2020 Leg. Sess. (Kan. 2020) (as introduced to the H. Comm. on Corr. & Juv. Just.); see *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.*, 2019-2020 Leg. Sess. (Kan. 2020) (statement of Rep. Highberger, Member, H. Comm. on Corr. & Juv. Just.).

⁶⁰ H.B. 2469; *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.*, *supra* note 59 (statement of Rep. Highberger, Member, H. Comm. on Corr. & Juv. Just.).

⁶¹ H.B. 2469, 2019-2020 Leg. Sess. (Kan. 2020) (as amended and passed by the H. Comm. on Corr. & Juv. Just.).

⁶² *House-Final Action-Passed as Amended*, 2019-2020 Kan. Leg. Sess. (Kan. 2020) (Feb. 26, 2020), http://www.kslegislature.org/li_2020/b2019_20/measures/vote_view/je_20200226095449_856647/ [https://perma.cc/RR4E-6QF5].

Sadly, this bill died in the Senate Committee on the Judiciary, most likely because of the growing COVID-19 crisis occurring at the time.⁶³ However, the almost unanimous support for this bill in the House indicates the Kansas State Legislature may be willing to amend the current compassionate release statutes in the near future.

3. The Decisionmaker: Prisoner Review Board

The Prisoner Review Board (“PRB”) holds substantial power regarding granting compassionate release. The Kansas State Legislature originally established this body in 1885 as the Board of Pardons to help the governor review commutation and pardon applications and to make recommendations to the governor.⁶⁴ That board went through numerous changes over almost 150 years, including name changes, changes to the number of board members, appointment procedure, board member job duties, and the necessary qualifications to sit on the board.⁶⁵

Kansas renamed this administrative body the Prisoner Review Board in 2011.⁶⁶ Former Kansas Governor Sam Brownback abolished the Kansas Parole Board in Executive Reorganization Order No. 34 and established the PRB, which was codified in Chapter 75, Article 52, Section 152 of the Kansas Statutes Annotated.⁶⁷ This new board is comprised of three members that are appointed by the Secretary of Corrections and serve at the Secretary’s pleasure.⁶⁸ The only prerequisite for a position on the PRB is current employment within the Department of Corrections.⁶⁹ Whereas, in the past, requirements were in place to balance political ideologies, interests, and to gain input from people of various professions.⁷⁰ Previously, the governor nominated board members and they were appointed subject to Senate approval. Therefore, the process provided a check on the executive’s power.⁷¹ Currently, the Secretary of Corrections has no comparable check on their power. And while the PRB and its chairperson have all the authority to grant—or more likely deny—these applications, the statutes do not provide any check on that power either. The compassionate release statutes specifically prohibit review of the PRB’s decisions by other

⁶³ *Bill History on H.B. 2469*, 2019-2020 Kan. Leg. Sess. (Kan. 2020), http://www.kslegislature.org/li/b2019_20/measures/hb2469/ [https://perma.cc/Z8ET-678G].

⁶⁴ See CJ Perez, *Historical Overview of Kansas Paroling Authorities*, KAN. DEP’T OF CORR., <https://www.doc.ks.gov/prb/overview> [https://perma.cc/7HYZ-37LP] (last updated July 9, 2020).

⁶⁵ See *id.*

⁶⁶ *Id.*

⁶⁷ Exec. Reorg. Ord. No. 34, KAN. STAT. ANN. § 75-52-152 (2011).

⁶⁸ Perez, *supra* note 64.

⁶⁹ § 75-52-152. While it is not within the scope of this paper, it is important to note the current members of the PRB are not statutorily required to have any formal training or additional qualifications. Future legislative proposals should focus on amending the statutory requirements for a position on the PRB to include such requirements to ensure competency in the role as a PRB member.

⁷⁰ Perez, *supra* note 64.

⁷¹ *Id.*

administrative agencies and courts.⁷² Three people on the PRB decide the lives of all inmates seeking compassionate release in Kansas.

III. LITERATURE REVIEW

Compassionate release is an interesting legislative phenomenon. Political actors on both the left and the right have found different reasons to support compassionate release legislation. Conservatives favor it because of their goal of reducing government spending.⁷³ Liberals favor it because it favors human rights.⁷⁴ Either way, compassionate release is ethically and legally justifiable because the financial costs to society of incarcerating debilitately ill inmates outweigh the benefits.⁷⁵ Much of the current literature surrounding compassionate release examines its overall impact on society and financial impact on the State. This section addresses that literature and addresses other proposed solutions that have been introduced to the Kansas State Legislature.

Inmate recidivism rates are common issues in compassionate release discourse. Some are concerned with the safety risks of releasing inmates back into society. However, inmates serving sentences for dangerous and violent off-grid offenses, like murder, are ineligible for compassionate release.⁷⁶ These requirements reduce the likelihood of violent offenders being released and committing additional violent crimes. Compassionate release statutes also allow revocation of release if candidates violate the terms of the release plan, which encourages compliance with release conditions.⁷⁷

Considering the population of inmates that qualify for compassionate release, the problem of recidivism is low. Scott Schultz said, “as prisoners age or experience declining health, their threat to public safety lessens.”⁷⁸ Evidence

⁷² KAN. STAT. ANN. § 22-3728(a)(7) (2014); KAN. STAT. ANN. § 22-3729(a)(6) (2012). The PRB is currently an unchecked extension of the executive branch. The provisions discussed in this article bring up a host of constitutional issues, including the right to life and potential violations of the Fourteenth Amendment, which must be addressed. Additionally, the prohibition against judicial review is a usurpation of the court’s ability to check decisions made by an executive agency like the PRB. *See* *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (establishing the principle of judicial review, which allows courts to declare legislative and executive acts unconstitutional).

⁷³ *See generally* REPUBLICAN PLATFORM 2016, REPUBLICAN NAT’L COMM. 8 (2020) (the Republican National Committee used the same, unchanged platform in 2020 as it did in 2016).

⁷⁴ 2020 DEMOCRATIC PARTY PLATFORM, DEMOCRATIC NAT’L COMM. 38 (2020) (“Democrats believe prisoners should have a meaningful opportunity to challenge . . . unconstitutional conditions in prisons. We also believe that too many of our jails and prisons subject people to inhumane treatment . . .”).

⁷⁵ Brie A. Williams, Rebecca L. Sudore, Robert Greifinger & R. Sean Morrison, *Balancing Punishment and Compassion for Seriously Ill Prisoners*, ANNALS OF INTERNAL MED. (July 19, 2011), <https://www.acpjournals.org/doi/10.7326/0003-4819-155-2-201107190-00348> [<https://perma.cc/996K-HWJE>].

⁷⁶ § 22-3728(e)–(f); § 22-3729(d).

⁷⁷ § 22-3728(a)(5); § 22-3729(a)(4).

⁷⁸ *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.* 1, 2019–2020 Leg. Sess. (Kan. 2020) (statement of Scott Schultz, Exec. Dir., Kan. Sent’g Comm.).

shows that recidivism reduces with age.⁷⁹ Generally, inmates over the age of fifty have a recidivism rate of fifteen percent, but those released through the compassionate release program have an average recidivism rate of 3.5 percent.⁸⁰ Additionally, older inmates that do recidivate “do so later in the follow-up period, do so less frequently, and commit less serious recidivism offenses.”⁸¹ Because of their condition, it is highly improbable that terminally ill inmates would go on to commit crimes in the little time they have left if they are released. Schultz added that “the costs of housing these offenders and their dignity can be saved without sacrificing public safety.”⁸² The problem of recidivism that may be a concern for other populations of inmates is not necessarily the same for elderly and sick inmates who would be granted compassionate release under the proposed amendments.

The Supreme Court held that the Eighth Amendment imposes a duty to provide humane conditions of confinement, which includes access to adequate medical care amongst other things.⁸³ Two feasible options exist to meet this duty: 1) the State increases healthcare spending in prisons to comply with the Eighth Amendment; or 2) the State updates and modifies the compassionate release statutes. *Estelle v. Gamble*⁸⁴ and *Farmer v. Brennan*⁸⁵ are two Supreme Court cases that control procedures for the medical mistreatment of inmates. In *Estelle*, the Court held that “deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain.”⁸⁶ The Court narrowed the definition of deliberate indifference in *Farmer* and created a subjective test for determining whether deliberate indifference existed.⁸⁷ Kansas inmates with pre-existing and chronic medical conditions have an argument the State has shown them deliberate indifference during the COVID-19 crisis.⁸⁸ Courts have held that a failure to timely respond to symptoms of a dangerous disease in a high-risk patient may be grounds for an Eighth Amendment violation if the inmate becomes extremely ill, suffers complications to pre-existing diseases, or dies.⁸⁹ The State must protect vulnerable inmates’ Eighth

⁷⁹ Lindsey E. Wylie, Alexis K. Knutson & Edie Greene, *Extraordinary and Compelling: The Use of Compassionate Release Laws in the United States*, 24 PSYCH. PUB. POL. & L. 216, 217 (2018), <https://www.apa.org/pubs/journals/features/law-law0000161.pdf> [<https://perma.cc/7AES-LXEX>].

⁸⁰ *Elderly in Prison and Compassionate Release*, AM. CONSERVATIVE UNION FOUND., <https://conservativejusticereform.org/issue/elderly-in-prison-and-compassionate-release/> [<https://perma.cc/HS53-HA63>].

⁸¹ *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.*, *supra* note 78, at 2 (statement of Scott Schultz, Exec. Dir., Kan. Sent’g Comm.).

⁸² *Id.*

⁸³ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

⁸⁴ *See Estelle v. Gamble*, 429 U.S. 97 (1976).

⁸⁵ *See Farmer*, 511 U.S. at 832.

⁸⁶ *Estelle*, 429 U.S. at 104.

⁸⁷ *Farmer*, 511 U.S. at 837 (holding that for deliberative indifference to exist a “prison official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [they] must also draw the inference.”).

⁸⁸ *See Hadley et al. v. Zmuda et al.*, *supra* note 11.

⁸⁹ Michael J. Bentley, Erin D. Saltaformaggio & Michael Casey Williams, *Constitutional Lessons*

Amendment rights.

To comply with the Eighth Amendment, Kansas must increase spending on medical care inside of prisons. Healthcare costs for elderly and sick patients are significantly higher compared to their younger and healthier counterparts. Overall, forty percent of incarcerated people have at least one reported chronic health condition.⁹⁰ That percentage increases in older inmate populations, where approximately eighty-two percent of incarcerated people over the age of sixty-five have chronic health conditions.⁹¹ Moreover, inmates over the age of fifty-five have an average of three chronic health conditions.⁹² On top of treatment for numerous chronic conditions, elderly inmates may require special accommodations due to physical limitations.⁹³ In 2004, the National Institute of Corrections (“NIC”) estimated the annual cost of healthcare for elderly inmates is between \$60,000 and \$70,000 per inmate, compared to the \$27,000 it cost to care for the general population of inmates.⁹⁴ This is consistent with data showing prisons spend double for inmates with one chronic condition and five times more for inmates with at least three chronic conditions.⁹⁵ The average cost per inmate has most likely only increased since 2004, but the 2004 data published by the NIC is still used in elderly incarceration research.⁹⁶ The growing population of elderly and chronically ill inmates will make caring for these inmates even more expensive in the years to come.⁹⁷

for *Prisons Amid COVID-19 Outbreak*, LAW360 (Mar. 27, 2020), <https://www.bradley.com/insights/publications/2020/03/constitutional-lessons-for-prisons-amid-covid19-outbreak> [<https://perma.cc/G2AL-Q826>].

⁹⁰ HANSFORD ET AL., *supra* note 4, at 20.

⁹¹ Wylie et al., *supra* note 79, at 217.

⁹² TINA CHIU, IT’S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 5 (Apr. 2010), https://www.vera.org/downloads/Publications/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release/legacy_downloads/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf [<https://perma.cc/87FE-6R33>].

⁹³ B. JAYE ANNO, CAMELIA GRAHAM, JAMES E. LAWRENCE & RONALD SHANSKY, CORRECTIONAL HEALTH CARE ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 10 (2004), <https://s3.amazonaws.com/static.nicic.gov/Library/018735.pdf> [<https://perma.cc/Q8FF-63N8>]. Elderly inmates may have difficulty with narrow doorways, stairs, and a lack of handrails, they struggle to get to and from their beds if they sleep on the top bunk, and they may suffer from incontinence. TCR Staff, *The Rising Cost of Incarcerating the Elderly*, CRIME REP. (May 17, 2018), <https://thecrimereport.org/2018/05/17/the-rising-cost-of-punishing-the-elderly/> [<https://perma.cc/Q97R-XGZ7>].

⁹⁴ ANNO ET AL., *supra* note 93, at 11.

⁹⁵ PEW CHARITABLE TRS., PRISON HEALTH CARE: COSTS AND QUALITY 24 (2017), https://www.pewtrusts.org/-/media/assets/2017/10/sfh_prison_health_care_costs_and_quality_final.pdf [<https://perma.cc/KA2L-ZHJE>].

⁹⁶ E.g., AM. C.L. UNION, AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY 27 (2012), https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf [<https://perma.cc/3J33-Z8K7>].

⁹⁷ *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.*, *supra* note 78, at 1 (statement of Scott Schultz, Exec. Dir., Kan. Sent’g Comm.); MARY PRICE, FAMS. AGAINST MANDATORY MINIMUMS, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE UNITED STATES 10 (2018), <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf> [<https://perma.cc/53E9-Q78J>].

In addition to a growing number of elderly and ill inmates, studies show that incarcerated people age at a rate seven to ten years faster than their non-incarcerated counterparts.⁹⁸ Lack of access to healthcare, drug and alcohol abuse, and other patterns of unhealthy living prior to entering prison are all contributing factors to the rapid aging process of incarcerated people.⁹⁹ This means a fifty-five-year-old inmate has the health conditions of a sixty-five-year-old who is not incarcerated. A majority, close to fifty-nine percent, of state inmates who died during their incarceration were fifty-five years old or older.¹⁰⁰ Older inmates require a higher level of care earlier on than someone who is not incarcerated, costing the State more money overall.

There is a cost-shifting benefit for the State to release elderly and sick inmates. Kansas is one of seven states that revokes Medicaid coverage to individuals entering prison.¹⁰¹ Less than one percent of inmates in Kansas currently qualify for Medicaid because of the stringent restrictions currently in place.¹⁰² Consequently, the cost of medical care for ninety-nine percent of inmates is on the State. However, once Kansas releases inmates from prison, inmates can qualify and apply for Medicaid.¹⁰³ The State ends up saving money that it would have spent on the inmate's healthcare because Medicaid is partially funded through the federal government. Medicare coverage continues when an older individual is incarcerated.¹⁰⁴ To receive Medicare benefits post-release, the person must be enrolled in Medicare prior to incarceration, but Medicare will not pay for care during incarceration.¹⁰⁵ People incarcerated at a younger age but are now older most likely would not have qualified for Medicare at the time of incarceration.

Advocates often propose Medicaid expansion as a solution to this problem¹⁰⁶, but the Kansas State Legislature has consistently rejected Medicaid expansion bills for the last three years. The most recent bill introduced in the

⁹⁸ Wylie et al., *supra* note 79, at 217.

⁹⁹ *Id.* To be sure, poor medical treatment in prisons only seems to exacerbate these factors.

¹⁰⁰ MARGARET E. NOONAN, BUREAU OF JUST. STATS., MORTALITY IN STATE PRISONS, 2001-2014 at 6 (2016), <https://www.bjs.gov/content/pub/pdf/msp0114st.pdf> [<https://perma.cc/2G2D-983R>]. For context, the average life expectancy was seventy-eight years in the United States in 2018. JIAQUAN XU, SHERRY L. MURPHY, KENNETH D. KOCHANNEK & ELIZABETH ARIAS, NAT'L CTR. FOR HEALTH STATS., MORTALITY IN THE U.S., 2018 at 1 (2020), <https://www.cdc.gov/nchs/data/databriefs/db355-h.pdf> [<https://perma.cc/6ULY-4ZC7>].

¹⁰¹ Nomin Ujyediin, *How Medicaid Expansion Would Shift the Cost of Health Care in Kansas Prisons and Jails*, KAN. CITY UNIV. RADIO (Jan. 31, 2020), <https://www.kcur.org/health/2020-01-31/how-medicaid-expansion-would-shift-the-cost-of-health-care-in-kansas-prisons-and-jails> [<https://perma.cc/8RMJ-EYJG>].

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Medicare Coverage During Incarceration*, MEDICARE INTERACTIVE, <https://www.medicareinteractive.org/get-answers/medicare-health-coverage-options/medicare-and-incarceration/medicare-coverage-during-incarceration> [<https://perma.cc/URP6-JY2A>].

¹⁰⁵ *Id.*

¹⁰⁶ See LYNDIA ZELLER & JACKI PROKOP, UNDERSTANDING HEALTH REFORM AS JUSTICE REFORM: MEDICAID, CARE COORDINATION, AND COMMUNITY SUPERVISION 9 (2020).

2020 legislative session sought to expand access to Medicaid to between eighty and ninety percent of inmates.¹⁰⁷ The bill would have also increased the share of Medicaid costs that the federal government would cover.¹⁰⁸ This plan would greatly benefit inmates, but the Kansas State Legislature's historical unwillingness to expand Medicaid¹⁰⁹ makes this an implausible short-term solution. A better option is for the State to reallocate the funds spent housing elderly and dying inmates in prison towards protecting the public by releasing those inmates.¹¹⁰

In 2019, the Kansas Criminal Justice Reform Commission ("KCJRC") recommended the legislature repurpose a building within the Department of Corrections to use as a separate facility for elderly inmates.¹¹¹ The creation of a separate housing facility for elderly inmates is an alternative to amending the compassionate release statutes, but it poses some of the same barriers as the Medicaid expansion solution, like cost, and poses new barriers, like the limited number of inmates it could help. Separate housing would only scratch the surface of fixing prison conditions for elderly incarcerated people in Kansas.

The KCJRC's recommendation required the State to spend approximately ten million dollars to make the necessary renovations, and the new facility would cost about 8.3 million dollars a year to operate.¹¹² In addition to the financial impact, the facility would only add between 200 and 250 beds for elderly male inmates.¹¹³ In 2020, the Kansas Department of Corrections housed 670 inmates over the age of sixty.¹¹⁴ This means the facility would house less than one-third of the geriatric inmates serving time within the Kansas correctional system, leaving others to remain in traditional facilities that do not support their medical needs. A separate facility would not solve the actual problem of poor medical care within Kansas prisons. The State would still need to increase spending for elderly inmates' medical care. Although the conditions within an alternative facility might be a minor improvement for elderly inmates, that does not diminish the fact that they are nearing the ends of their lives. They would be alone and without family, while having a host of uncomfortable, painful medical conditions. The possibility of them dying alone in prison would be very real.

¹⁰⁷ Ujjiyediin, *supra* note 101.

¹⁰⁸ *Id.*

¹⁰⁹ See *Kansas and the ACA's Medicaid Expansion*, HEALTHINSURANCE, <https://www.healthinsuranc.org/medicaid/kansas/> [<https://perma.cc/HM84-YG38>].

¹¹⁰ *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.*, *supra* note 78, at 2 (statement of Scott Schultz, Exec. Dir., Kan. Sent'g Comm.).

¹¹¹ KAN. CRIM. JUST. REFORM COMM'N, REPORT TO THE 2020 KANSAS LEGISLATURE 0-12 (2019), <http://www.kslegresearch.org/KLRD-web/Committees/2019InterimDocs/2019-KS-Criminal-Justice-Reform-Commission-report.pdf> [<https://perma.cc/3AU5-MCFY>].

¹¹² *Id.* at 0-25.

¹¹³ *Id.* at 0-12.

¹¹⁴ KAN. DEP'T OF CORR., ANNUAL FISCAL REPORT 18 (2020), <https://www.doc.ks.gov/publications/Reports/fy-2020-annual-report> [<https://perma.cc/K9NK-GCV4>].

IV. THE CURRENT SITUATION IN KANSAS CORRECTIONAL FACILITIES

A. Problems with Medical Care in Kansas Prisons

The healthcare problems within prisons made evident by the COVID-19 crisis are not new, and Kansas must begin seriously considering the health of vulnerable inmates. The Kansas Department of Corrections entered a nine-and-a-half-year contract with Corizon in 2014, paying the company approximately seventy million dollars a year.¹¹⁵ Corizon failed to meet its contractual obligations by delaying, postponing, and failing to provide treatment to inmates one-third of the time between July 2015 and December 2018.¹¹⁶ This translates to approximately fifty-nine weeks that inmates went without proper medical care. Over the course of five years, whistleblowing former employees, inmates' families, and inmates themselves have sued Corizon 660 times nationwide for malpractice.¹¹⁷ The Department of Corrections audited Corizon for nine performance standards in 2018, and the company was only compliant in one category.¹¹⁸ Corizon was at less than ten percent compliance for sick calls, intake assessments, and care for inmates with chronic health conditions.¹¹⁹ Despite this, Kansas retained the company's services for its inmates until April 2020, when it chose to sever its contract in the middle of the COVID-19 crisis. The new healthcare provider, Centurion, may not be any better than Corizon.¹²⁰ The parent company of Centurion, Centene, and its subsidiaries have faced numerous lawsuits regarding the medical mistreatment of inmates resulting in wrongful deaths.¹²¹ It is still too early to determine the current level of care Centurion is providing Kansas inmates, but its track record is not good.¹²² Kansas inmates

¹¹⁵ Keith Bradshaw, Exec. Dir. Contract Programs & Finance, KDOC Medical Contract Presentation to House Corrections and Juvenile Justice 2 (Feb. 20, 2019), <https://www.doc.ks.gov/newsroom/legislative/2019/feb-20-2019> [<https://perma.cc/7RKK-7PE7>].

¹¹⁶ Asbury, *supra* note 13.

¹¹⁷ Matthew Clarke, *Neither Fines nor Lawsuits Deter Corizon from Delivering Substandard Health Care*, PRISON LEGAL NEWS, Mar. 3, 2020, at 24, 24 <https://www.prisonlegalnews.org/news/2020/mar/3/never-fines-nor-lawsuits-deter-corizon-delivering-substandard-health-care/#:~:text=According%20to%20the%20American%20Civil,with%20%E2%80%94usually%20for%20inadequate%20staffing> [<https://perma.cc/P48P-K5TV>]; Matthew Clarke, *Numerous Lawsuits Filed Against Corizon Nationwide; Company Loses Contracts*, PRISON LEGAL NEWS, Aug. 30, 2017, at 32, 32, <https://www.prisonlegalnews.org/news/2017/aug/30/numerous-lawsuits-filed-against-corizon-nationwide-company-loses-contracts/> [<https://perma.cc/Y342-GZ9X>].

¹¹⁸ Chad Marks, *Kansas Slaps Corizon Health with Millions in Fines for Contract Violations*, PRISON LEGAL NEWS, May 3, 2019, at 48, 48 <https://www.prisonlegalnews.org/news/2019/may/3/kansas-slaps-corizon-health-millions-fines-contract-violations/> [<https://perma.cc/7BRR-3SBJ>]. The Department of Corrections audits based on complaints it receives from inmates and their families. *Id.*

¹¹⁹ *Id.*

¹²⁰ Asbury, *supra* note 13.

¹²¹ Lauren Castle, *New Arizona Prison Health-Care Provider has History of Problems, Donations to Politicians*, AZ CENTRAL (July 10, 2019), <https://www.azcentral.com/story/news/local/arizona/2019/07/10/new-arizona-prison-health-care-provider-centurion-has-history-problems-corizon/1622620001/> [<https://perma.cc/J262-RMG5>].

¹²² See *id.*; see, e.g., Elise Kaplan, *Jail Health Care Provider Terminates Contract*, ALBUQUERQUE

deserve better.

There are numerous examples of inmates' medical needs not being met in Kansas prisons. In October 2015, Marques Davis, a diabetic inmate at El Dorado Correctional Facility, complained of an infected bug bite on his arm.¹²³ The inmate took a sick call request with him when he picked up his insulin after being given antibiotics for the infection with no follow-up or improvement.¹²⁴ It was discovered that he had contracted antibiotic-resistant MRSA.¹²⁵ In October 2017, Marques Davis, a twenty-seven-year-old inmate at the Hutchinson Correctional Facility, died from a type of meningitis that infected his brain.¹²⁶ Davis repeatedly sought out medical treatment and complained of blurry vision, numbness in his legs, and slurred speech, to name only a few symptoms.¹²⁷ He endured these symptoms for eight months before the infection inevitably caused other health problems and took his life.¹²⁸

Most recently during the COVID-19 outbreak in prisons, the Kansas Secretary of Corrections, Jeff Zmuda, accused Corizon of not providing enough personal protective equipment to inmates, not hiring enough nurses to meet the high demand of cases, and even sending inmates back to their cells with fevers.¹²⁹ Governor Kelly issued a state of emergency in mid-March 2020, but Corizon did not establish quarantining or testing procedures for COVID-19 or begin isolation management until April 8, 2020.¹³⁰ That was the first time inmates received any personal protective equipment, had their temperatures taken, or were given a COVID-19 test.¹³¹ This was the same week the riot broke out at the Lansing Correctional Facility.¹³²

An inmate at the Lansing Correctional Facility, Rachad Austin, said he

J. (Apr. 25, 2021, 10:04 PM), <https://www.abqjournal.com/2383953/jail-health-care-provider-terminates-contract.html> [https://perma.cc/8FGQ-5UB9] ("Their [Centurion's] reputation nationally is that they are in the bottom half in terms of quality. . .").

¹²³ Andy Marso, *Locked Out of Care: Brain Fungus Death Points to Extensive Problems in Kansas Prisons*, KAN. CITY STAR (Apr. 28, 2019), <https://www.kansascity.com/article229423849.html> (last visited Aug. 29, 2021).

¹²⁴ *Id.* The cost of healthcare within Kansas correctional facilities is not within the scope of this article, but a sick call costs an inmate two dollars, and prison jobs only pay nine cents per hour. Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health at Risk*, PRISON POL'Y INITIATIVE (Apr. 19, 2017), <https://www.prisonpolicy.org/blog/2017/04/19/copays/> [https://perma.cc/ST8T-PGW5]. A single sick call would require almost twenty-three hours of work. *Id.* If an inmate does not have a prison job, they must rely on family and friends to put money on their books just so they can see a doctor.

¹²⁵ Marso, *supra* note 123.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Asbury, *supra* note 13.

¹³⁰ *Id.*

¹³¹ Harmon, *supra* note 7.

¹³² See Anna Sporre, *Lansing Prisoners Riot Over Healthcare, Video Purports; Kansas Officials Investigate*, KAN. CITY STAR (Apr. 10, 2020), <https://www.kansascity.com/news/local/article241912816.html> (last visited Aug. 29, 2021); see also Reddebek, *supra* note 1 (portraying a video of the riot in Lansing Correctional Facility).

shared a space with people who tested positive for COVID-19.¹³³ Austin was serving four years for a drug charge.¹³⁴ He entered prison with a collapsed lung, which put him at greater risk of having complications if he contracted COVID-19.¹³⁵ Austin tested positive for COVID-19 less than forty days before his release date, but he was able to return home to the care of his fiancée at the end of his sentence.¹³⁶

Sherman Wright, also an inmate at the Lansing Correctional Facility, is fifty-six years old and currently serving year thirty-two of a sixty-nine-year prison sentence for multiple counts of robbery.¹³⁷ He has serious underlying health conditions such as diabetes, asthma, and high blood pressure.¹³⁸ He tested positive for COVID-19 and felt like he received a death sentence.¹³⁹

Mr. Wright does not currently qualify for compassionate release for terminal illness under section 22-3729. The broad language and vagueness of section 22-3728 makes it unclear if he would qualify for compassionate release based on functional incapacitation. Release under section 22-3728 seems relatively unlikely considering the small number of people that have been released under this statute. Furthermore, Mr. Wright was one of the over 200 inmates that applied for clemency.¹⁴⁰ Mr. Wright and his family felt confident he would be granted clemency because he used the last thirty-two years in prison building skills to be utilized upon his release, such as welding, maintenance, cooking, and public speaking.¹⁴¹ Unfortunately, Governor Kelly did not grant Mr. Wright's application for clemency.¹⁴² Sherman Wright, and the many inmates like him, do not deserve to be subjected to a medically dangerous environment. They deserve the opportunity to be in control of their health and to seek treatment for their medical conditions outside of prison.

¹³³ Harmon, *supra* note 7.

¹³⁴ KAN. DEP'T. OF CORR., *Rachad Hakeem Austin*, KAN. ADULT SUPERVISED POPULATION ELEC. REPOSITORY, <https://kdocrepository.doc.ks.gov/kasper/search/results> [<https://perma.cc/8RN2-PN> CM].

¹³⁵ Harmon, *supra* note 7.

¹³⁶ *Id.*

¹³⁷ *Id.* Mr. Wright's sentence would have only been between ten- and fifteen-years imprisonment had he been charged under Kansas's current sentencing guidelines. Katie Bernard, *Kelly Granted Clemency to Eight Kansans. Hundreds of Applications Remain on Her Desk*, KAN. CITY STAR (June 28, 2021, 6:42 AM), <https://www.kansascity.com/article252373013.html> (last visited Nov. 11, 2021).

¹³⁸ Harmon, *supra* note 7.

¹³⁹ *Id.*

¹⁴⁰ Bernard, *supra* note 137.

¹⁴¹ *Petition of the Week: March 1st-March 5th*, AM. C.L. UNION KAN. (Mar. 1, 2021), https://www.aclukansas.org/en/publications/petition-week-march-1st-march-5th?fbclid=IwAR17CmQo-KUS1Oex46lV3g8WHv6CEPJ7H1A4sjnTUbEb7mZ1xadJkIk01_E [<https://perma.cc/XA3N-VBAE>].

¹⁴² Bernard, *supra* note 137.

B. Efficacy of the Current Compassionate Release Laws

The efficacy of the current Kansas statutes requires further examination. Many more federal inmates have been released under the FIRST STEP Act compared to the number of Kansas inmates granted compassionate release under sections 22-3728 and 3729. By July 2019, under the FIRST STEP Act, 3,000 federal inmates were released, and reduced sentencing was granted for almost 1,700 federal inmates nationwide.¹⁴³

The procedural barriers of both Kansas statutes have made it next to impossible for inmates to get any relief. As of 2018, only seven inmates over the course of nine years had been released because of functional incapacitation.¹⁴⁴ Zero functional incapacitation release applications were reviewed by the PRB in 2019.¹⁴⁵ The ACLU assisted twenty inmates applying for functional incapacitation release in 2020, however the PRB reported only reviewing one functional incapacitation application.¹⁴⁶ Since the terminal illness compassionate release statute was updated in 2014, only two terminally ill inmates are known to have been released on that basis.¹⁴⁷ Kansas contends that an average of one inmate per year is granted compassionate release based on a terminal illness.¹⁴⁸ Even if this is true, one inmate per year is not enough. There is no way of knowing how many terminal illness applications were submitted and accepted or denied because Kansas does not require the PRB to disclose that information.¹⁴⁹ Inevitably, this means that terminally ill inmates have applied for compassionate release just to die in prison awaiting chairperson approval.

V. PROPOSED AMENDMENTS, FUTURE IMPLICATIONS & POTENTIAL OPPONENTS

A. What Is Missing from Sections 22-3728 and 3729?

Increasing the clarity of sections 22-3728 and 3729 will not only benefit the inmates who need it, but it will also aid the PRB and its chairperson in making more consistent compassionate release decisions. Decisionmakers, like the PRB, “have little to no incentive to grant approval for release and may err

¹⁴³ Dale Chappell & Douglas Ankney, *First Step Act Update: Over 1,600 Sentences Reduced, 3,000 Prisoners Released*, PRISON LEGAL NEWS, Sept. 9, 2019, at 54, 54 <https://www.prisonlegalnews.org/news/2019/sep/9/first-step-act-update-over-1600-sentences-reduced-3000-prisoners-released/> [https://perma.cc/N2CR-QX7S].

¹⁴⁴ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 40, at 5.

¹⁴⁵ KAN. DEP'T OF CORR., ANNUAL FISCAL REPORT 48 (2019), <https://www.doc.ks.gov/publications/Reports/fy-2019-kdoc-annual-report> [https://perma.cc/Y774-SQM9].

¹⁴⁶ *Petition of the Week: January 25th-29th*, AM. C.L. UNION KAN. (Jan. 29, 2021), <https://www.aclukansas.org/en/publications/petition-week-january-25th-29th> [https://perma.cc/DT7G-2PFC]; KAN. DEP'T OF CORR., *supra* note 114, at 67.

¹⁴⁷ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 40, at 9.

¹⁴⁸ *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.*, *supra* note 59 (statement of Rep. Highberger, Member, H. Comm. on Corr. & Juv. Just.).

¹⁴⁹ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 40, at 9.

on the side of caution. . . when [there is] no formal guidance on when to allow an application to proceed.”¹⁵⁰ With concrete guidelines, more qualified inmates will submit applications, and the PRB will be more likely to grant those applications. These proposed amendments aim to address the broad language and overall vagueness of the current statutes. This section analyzes other states’ compassionate release statutes and the federal FIRST STEP Act to provide suggestions for the Kansas State Legislature’s consideration. Kansas could implement any combination of these suggestions to improve its existing statutes, though it should really enact all of them.

1. Specific age requirement for elderly inmates

The functional incapacitation statute, section 22-3728, must be amended to include a provision specifically for elderly inmates. The inclusion of specific age requirements will enhance the clarity of this compassionate release statute. Currently, section 22-3728 does not require an inmate to be a specific age to qualify for functional incapacitation, but the PRB may take the inmate’s age into consideration when making its decision.¹⁵¹ The discretionary nature of this statute may seem like a benefit to inmates because no age requirement means that any inmate can apply for functional incapacitation release if they meet the other statutory requirements. However, the vague language of the current statute makes it difficult for inmates to determine whether they do qualify. This may deter them from applying at all. It is difficult for inmates to write and file an application on their own and their ability to secure counsel’s advice may be limited while incarcerated. An amendment creating an age requirement would help older inmates clearly identify themselves for compassionate release. Inmates and the PRB could then easily determine whether the age requirements are met.

Twenty-five states have specific compassionate release statutes for elderly inmates.¹⁵² Some states, but not all, specify age requirements for these inmates, which ranges between fifty-five and seventy years old.¹⁵³ The NIC defines an elderly inmate as being aged fifty years or older.¹⁵⁴ Several states have time served requirements in addition to a minimum age requirement.¹⁵⁵ For example, Maryland requires its elderly inmates seeking compassionate release be sixty years old and have served at least fifteen years of their sentence.¹⁵⁶ The time

¹⁵⁰ U.S. DEP’T OF HEALTH & HUM. SERVS., AGING, REENTRY, AND HEALTH COVERAGE: BARRIERS TO MEDICARE AND MEDICAID FOR OLDER REENTRANTS 11 (2018), <https://aspe.hhs.gov/system/files/pdf/260296/Reentry.pdf> [<https://perma.cc/Q6TP-MAKF>].

¹⁵¹ KAN. STAT. ANN. § 22-3728(a)(8)(B) (2014).

¹⁵² See PRICE, *supra* note 97, at 28–33.

¹⁵³ See *id.*

¹⁵⁴ Brie A. Williams, Mark F. Stern, Jeff Mellow, Meredith Safer & Robert B. Greifinger, *Aging in Correctional Custody: Setting a Policy Agenda for Older Prisoner Healthcare*, 102 AM. J. PUB. HEALTH 1475, 1476 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3464842/> [<https://perma.cc/Z7LZ-MS9B>].

¹⁵⁵ See PRICE, *supra* note 97, at 28–33.

¹⁵⁶ FAMS. AGAINST MANDATORY MINIMUMS, MARYLAND 5 (2018), https://famm.org/wp-content/uploads/Maryland_Final.pdf [<https://perma.cc/H4H9-GXM8>].

served requirement ranges amongst the states between five and thirty years.¹⁵⁷ In Oklahoma, elderly inmates can also satisfy the time served requirement by completing at least one-third of their sentence.¹⁵⁸

On the federal level, the FIRST STEP Act redefined compassionate release for elderly inmates. The Act differentiates between non-medical, medical, and other elderly inmates.¹⁵⁹ Each category of elderly inmate has different criteria required for compassionate release. Inmates who were sentenced for a violent crime after the age of sixty years old are not eligible for compassionate release under the FIRST STEP Act.¹⁶⁰

A non-medical elderly inmate is one whose medical conditions do not contribute to their need for release. These inmates fall under the new law, meaning they were sentenced after 1987.¹⁶¹ Inmates must be at least seventy years old and have served at least thirty years of their sentence to qualify under this category.¹⁶² Medical elderly inmates have other criteria to meet. They must be sixty-five years old or older, with serious or chronic medical conditions related to aging, have deteriorating mental or physical health that inhibits their ability to function while incarcerated, and conventional treatments would not promise substantial benefits to their mental or physical health.¹⁶³ They must also have served at least fifty percent of their sentence.¹⁶⁴ The BOP also considers factors related to the inmate's risk of recidivating: the age they were when they committed the crime for which they are incarcerated, whether the inmate suffered from the same medical conditions at the time of the offense, and whether the inmate suffered from the same medical conditions at the time of sentencing.¹⁶⁵ Elderly inmates that do not fall within the first two categories can still qualify for compassionate release under the other category. This applies to inmates who are at least sixty-five years old and who have served the greater of ten years or seventy-five percent of their sentence.¹⁶⁶

There are a wide range of possibilities to consider when establishing an age requirement for compassionate release. Other states and the FIRST STEP Act provide guidance for the state legislature to consider when choosing which age requirements would be the most beneficial to elderly Kansas inmates.

¹⁵⁷ See PRICE, *supra* note 97, at 28–33.

¹⁵⁸ FAMS. AGAINST MANDATORY MINIMUMS, OKLAHOMA 4 (2018), https://famm.org/wp-content/uploads/Oklaoma_Final.pdf [<https://perma.cc/7N6B-VGJB>].

¹⁵⁹ U.S. DEP'T OF JUST., COMPASSIONATE RELEASE/ REDUCTION IN SENTENCE: PROCEDURES AND IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G), at 6 (2019), https://www.bop.gov/policy/progstat/5050_050_EN.pdf [<https://perma.cc/5XVA-UMX2>].

¹⁶⁰ *Id.* at 7.

¹⁶¹ *Id.* at 6.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

2. Time frame requirements for inmates with a terminal illness

Kansas has the most restrictive time frame in the entire country for inmates with terminal illness seeking compassionate release.¹⁶⁷ The timeline in place is so severe it most likely prevents terminally ill inmates from being released before they die. Most states define a terminally ill inmate as being diagnosed with a fatal disease or having six months or less to live.¹⁶⁸ However, there is variation of time frames amongst the states of anywhere between six months and eighteen months.¹⁶⁹ Section 22-3729(a)(1) restricts terminal illness to a person who will likely pass within only thirty days.¹⁷⁰ This is in stark contrast with Arkansas's statute, which goes as far as granting medical parole or early home detention for a person who expects to live for only two more years.¹⁷¹ Although the Kansas House of Representatives took affirmative steps to amend section 22-3729(a)(1) from thirty to 120 days in the 2020 legislative session, the bill ultimately failed in the Senate.¹⁷²

The FIRST STEP Act defines a terminal medical condition as one that reduces the person's life expectancy to within eighteen months or the person must receive a diagnosis of a disease or condition with an end-of-life trajectory.¹⁷³ In conjunction with the inmate's diagnosis of a terminal disease, the BOP also takes into consideration their prognosis, other serious health conditions, and any functional impairment for the purpose of determining the inmate's ability or inability to re-offend.

A time frame longer than thirty days is not only possible but preferred by other states and the federal government, and Kansas must follow suit if it wants efficacious legislation. The reality of the lengthy compassionate release process should be considered in conjunction with inmates' terminal illnesses when amending the time frame requirement in section 22-3729.

3. Terminology defining chronically ill inmates

Chronic health conditions are more prevalent amongst incarcerated people compared to the general population.¹⁷⁴ A study conducted by the National Commission on Correctional Healthcare suggested that chronic diseases may even be underdiagnosed in correctional institutions.¹⁷⁵ An appropriate level of care for inmates with severe or debilitating illnesses is difficult, and sometimes

¹⁶⁷ PRICE, *supra* note 97, at 16.

¹⁶⁸ ANNO ET AL., *supra* note 93, at 12.

¹⁶⁹ See PRICE, *supra* note 97, at 28–33.

¹⁷⁰ KAN. STAT. ANN. § 22-3729(a)(1) (2012).

¹⁷¹ FAMS. AGAINST MANDATORY MINIMUMS, ARKANSAS 3 (2018), https://famm.org/wp-content/uploads/Arkansas_Final.pdf [<https://perma.cc/5L5F-WXBM>].

¹⁷² H.B. 2469, 2019-2020 Leg. Sess. (Kan. 2020).

¹⁷³ U.S. DEP'T OF JUST., *supra* note 159, at 4.

¹⁷⁴ I.A. Binswanger, P.M. Krueger & J.F. Steiner, *Prevalence of Chronic Medical Conditions Among Jail and Prison Inmates in the US Compared with the General Population*, 63 J. EPIDEMIOLOGY & COMTY. HEALTH 912, 914 (Aug. 2009), https://www.researchgate.net/publication/26710528_Prevalence_of_chronic_medical_conditions_among_jail_and_prison_inmates_in_the_USA_compared_with_the_general_population [<https://perma.cc/A3Q5-4RTW>].

¹⁷⁵ ANNO ET AL., *supra* note 93, at 21.

impossible, to obtain in a correctional setting.¹⁷⁶ Prison conditions also oftentimes exacerbate the experience of chronic illness.¹⁷⁷ The Centers for Disease Control and Prevention finally included incarcerated individuals among high-risk populations for COVID-19 in January 2021.¹⁷⁸ Thus, the conditions of incarceration make inmates some of the most vulnerable people in our society. For these reasons, inmates with chronic illnesses must also be eligible for compassionate release in Kansas.

The most common chronic conditions that impact inmates are:

- cancer,
- kidney, liver, heart, and lung diseases,
- hypertension or high blood pressure,
- asthma,
- an immunocompromised state—from HIV/AIDS or other autoimmune diseases,
- neurological impairments, such as dementia,
- type I and II diabetes,
- epilepsy,
- blood disorders, and
- stroke.¹⁷⁹

The FIRST STEP Act does not include chronic conditions as a stand-alone criterion that could qualify a federal inmate for compassionate release. But the Act does include debilitating medical conditions which it defines as an incurable, progressive illness or a debilitating injury from which they will not recover.¹⁸⁰ When determining whether an inmate fits either of these criteria, the BOP considers whether the inmate is completely disabled or only capable of minimal self-care with limited mobility for fifty percent of the day.¹⁸¹ The Act does not list specific diseases or illnesses that constitute, or could lead to, debilitating medical conditions.

¹⁷⁶ Andreas Mitchell & Brie Williams, *Compassionate Release Policy Reform: Physicians as Advocates for Human Dignity*, 19 AM. MED. ASS'N J. ETHICS 854, 855 (Sept. 2017), <https://journalofethics.ama-assn.org/article/compassionate-release-policy-reform-physicians-advocates-human-dignity/2017-09> [<https://perma.cc/9T8M-QRQ2>].

¹⁷⁷ HANSFORD ET AL., *supra* note 4, at 20.

¹⁷⁸ *FAQs for Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html#accordion-5fd10f075cc9c-card-1> [<https://perma.cc/2BKP-QXW5>].

¹⁷⁹ See *Hadley et al. v. Zmuda et al.*, *supra* note 11; see also *People Living in Prisons & Jails*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/living-prisons-jails.html> [<https://perma.cc/WJX3-95MD>].

¹⁸⁰ U.S. DEP'T OF JUST., *supra* note 159, at 5.

¹⁸¹ *Id.*

Chronic diseases, like aging, are progressive.¹⁸² They worsen over time, can become debilitating and painful, and can eventually cause death. In 2014, eighty-seven percent of inmate deaths in state prisons were caused by illness.¹⁸³ Heart disease and cancer are two common chronic conditions that are major causes of death in prisons across the country.¹⁸⁴ Inmates with chronic conditions should be eligible for compassionate release in Kansas and therefore, chronic illness must be added to the criteria listed in the Kansas compassionate release statutes.

4. A statutory time frame for the PRB to provide a timely answer to an inmate's request for compassionate release

Under the current Kansas statutes, the PRB and its chairperson do not have to adhere to any particular time frame when making compassionate release decisions. A time frame prevents applications from falling through the cracks because the “lack of time frame means delays are inevitable.”¹⁸⁵ A time frame gives inmates a better understanding of the compassionate release process and how long it may take to get a PRB decision. More importantly, a statutory time frame holds the PRB accountable to the inmates who seek compassionate release. The clarity of a time frame is “especially important in the cases of inmates who are nearing the end of life and for anyone else whose incarceration is more burdensome due to age or illness.”¹⁸⁶

California and Minnesota are two states in particular that include statutory time frames for compassionate release applications.¹⁸⁷ The medical parole processing statute in California outlines a time frame for every step of the compassionate release application process, including for assessments, reviews, and recommendations.¹⁸⁸ In Minnesota, the process must be initiated and completed by a case manager within twenty working days of the application.¹⁸⁹ The FIRST STEP Act gives the BOP thirty days to respond to an inmate's application for compassionate release.¹⁹⁰ If the BOP fails to respond within thirty days, the inmate has the ability to bring this to the attention of the courts by filing a motion.¹⁹¹ This increases the BOP accountability to inmates seeking compassionate release.

5. The ability to appeal a decision by the PRB and its chairperson

Currently, Kansas inmates have no chance at relief if their compassionate release application is denied by the PRB. Inmates deserve to have their

¹⁸² ANNO ET AL., *supra* note 93, at 36.

¹⁸³ NOONAN, *supra* note 100, at 5.

¹⁸⁴ *Id.*

¹⁸⁵ PRICE, *supra* note 97, at 15.

¹⁸⁶ *Id.* at 18.

¹⁸⁷ *Id.*

¹⁸⁸ CAL. CODE REGS. tit. 15, § 3359.2 (2011).

¹⁸⁹ FAMS. AGAINST MANDATORY MINIMUMS, MINNESOTA 1 (2018), https://famm.org/wp-content/uploads/Minnesota_Final.pdf [<https://perma.cc/UV7B-J2GN>].

¹⁹⁰ First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194.

¹⁹¹ *Id.*

application reviewed by another decision-making body. Inmates are either incredibly sick or elderly when they seek compassionate release. However, it is rare to find a state that does allow for inmates to appeal the decisions made on their compassionate release applications. Alaska is one state that permits inmates to seek reconsideration of their application within thirty days of the decision, and Alaska's Board must rule within sixty days afterwards.¹⁹² Despite the fact that very few states allow inmates to appeal compassionate release decisions, it is a right that is warranted under these inmates' circumstances and it must be included in amending sections 22-3728 and 3729. Not only do the current Kansas statutes limit an inmate's ability to appeal the PRB's decision, but they also prevent the judiciary from reviewing those decisions as well.¹⁹³

Under the FIRST STEP Act, federal inmates can appeal the denial or neglect of their application for compassionate release in two different ways. First, an inmate can file a motion to the court after exhausting all administrative rights available to appeal the BOP's failure to make a motion on their behalf.¹⁹⁴ All administrative rights are exhausted when the BOP rejects the warden's recommendation for it to file a motion for compassionate release or when the warden refuses to recommend the BOP file a motion for compassionate release.¹⁹⁵ The inmate can appeal the warden's denial through the Administrative Remedy Program, which allows inmates to seek a formal review of issues relating to their confinement.¹⁹⁶ Second, an inmate can appeal thirty days after delivering their request for compassionate release to the warden if the warden has not responded to the request.¹⁹⁷

6. Notification procedures to inform inmates of their eligibility to apply for compassionate release

Statutes are often difficult to read and understand, making them largely inaccessible to the average person. Inmates are at an additional disadvantage because the confines of their incarceration limit their ability to learn and research legal issues. Notification procedures would alleviate this problem by informing inmates of the compassionate release criteria and their eligibility for release. Without notification procedures, presumably many inmates currently qualify but do not know and would not know how to begin the application process. Elderly, sick, and dying inmates should be provided information about their available options. These inmates should not bear the burden of navigating the difficult compassionate release application process without guidance. Notification procedures, along with more specific criteria known to the inmates and the PRB,

¹⁹² PRICE, *supra* note 97, at 19; FAMS. AGAINST MANDATORY MINIMUMS, ALASKA 5 (2018), https://famm.org/wp-content/uploads/Alaska_Final.pdf [<https://perma.cc/8PVV-DRQC>].

¹⁹³ KAN. STAT. ANN. § 22-3728(a)(7) (2014); see *supra* note 72, for more information on judicial review and why limiting it is unconstitutional.

¹⁹⁴ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 15, at 3.

¹⁹⁵ *Id.* at 3–4.

¹⁹⁶ *Id.* at 4; U.S. DEP'T OF JUST., ADMINISTRATIVE REMEDY PROGRAM 1 (2014), https://www.bop.gov/policy/progstat/1330_018.pdf [<https://perma.cc/V7XE-L339>].

¹⁹⁷ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 15, at 3.

should increase the number of inmates applying for and being granted compassionate release.

States that notify inmates of their compassionate release eligibility do so in different ways. New Mexico, Alabama, and California are all states that have notification procedures for their incarcerated inmates who may qualify for compassionate release.¹⁹⁸ New Mexico requires its correctional facilities to provide a copy of the compassionate release policy and a form to fill out every year for every inmate over the age of sixty-five.¹⁹⁹ In Alabama, applications and release forms are provided to correctional medical care providers and are available in every facility for distribution to inmates.²⁰⁰ Alabama also requires the Department of Corrections to create an annual list of all inmates eligible for compassionate release, and that list must be updated every six months.²⁰¹ Similarly, Department of Corrections doctors in California identify and recommend individuals who might meet the eligibility criteria for compassionate release.²⁰² These are all procedures that would be relatively easy for Kansas to implement into its own compassionate release statutes.

Families Against Mandatory Minimums, the Washington Lawyers' Committee for Civil Rights and Urban Affairs, and the National Association of Criminal Defense Lawyers founded the Compassionate Release Clearinghouse ("Clearinghouse") in February 2019.²⁰³ The Clearinghouse's goal is to identify vulnerable federal inmates who are eligible for compassionate release or those who have applied and have been denied or ignored by the BOP.²⁰⁴ The Clearinghouse helped to release more than forty federal inmates in less than a year.²⁰⁵

Although the Clearinghouse is a pro-bono effort and was not enacted through Congress, the state legislature can pass legislation to create a similar organization in Kansas. One option is to establish a sub-group of the PRB to identify qualified inmates and help them through the compassionate release process. A Clearinghouse organization enacted through legislation would carry more enforcement power than the pro-bono organization operating at the federal level. This option comes with costs and benefits that must be weighed, but it should be considered as an alternative to the previously suggested notification procedures.

¹⁹⁸ PRICE, *supra* note 97, at 16.

¹⁹⁹ *Id.*; FAMS. AGAINST MANDATORY MINIMUMS, NEW MEXICO 1 (2018), https://famm.org/wp-content/uploads/New-Mexico_Final.pdf [<https://perma.cc/UXU9-SCGY>].

²⁰⁰ PRICE, *supra* note 97, at 16; FAMS. AGAINST MANDATORY MINIMUMS, ALABAMA 1–2 (2018), https://famm.org/wp-content/uploads/Alabama_Final.pdf [<https://perma.cc/5V6B-8ZB3>].

²⁰¹ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 200, at 2.

²⁰² PRICE, *supra* note 97, at 16; FAMS. AGAINST MANDATORY MINIMUMS, CALIFORNIA 1 (2018), https://famm.org/wp-content/uploads/California_Final.pdf [<https://perma.cc/FG79-J76B>].

²⁰³ *Our Work, The Compassionate Release Clearinghouse*, FAMS. AGAINST MANDATORY MINIMUMS, <https://famm.org/our-work/compassionate-release/> [<https://perma.cc/PLZ9-TBEA>].

²⁰⁴ *Id.*

²⁰⁵ *Id.*

The downside of creating something like the Clearinghouse is that it would cost the state more money than the other notification procedure alternatives because it would mean hiring more people and utilizing more resources. An upside is that some of the PRB's decision-making power would shift to other qualified individuals. The addition of a Clearinghouse organization would help ensure inmates applying for compassionate release meet the necessary qualifications. This would streamline the overall process for the PRB and cut down the time inmates spend waiting for the PRB's decision.

7. Annual reporting requirements for the PRB

The PRB should produce an annual report on the status of compassionate release applications from the previous year and present this report to the Kansas Department of Corrections and the Kansas State Legislature. This report should include how many people applied for compassionate release, how many applications were granted or denied, the PRB's reasoning for each decision, and the number of applications that went without a PRB decision. The PRB must be held accountable to the inmates and the state legislature. The legislature should check that their legislation benefits the group it intends to benefit. If not, the legislature can continue to amend the statutes and work through the problems that have not been addressed. Only thirteen states are required by statute to track and report compassionate release statistics, eight states publicly share some of those statistics, and only three states are required to make those statistics public.

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New York, New Mexico, and Massachusetts are three states that statutorily require annual reports, which are all very similar in substance.²⁰⁷ Annual reports in New York, New Mexico, and Massachusetts require information on the nature of the illnesses or conditions of the applicants being granted medical parole.²⁰⁸ All three states also must include data about inmates whose release was revoked and the reason for revocation.²⁰⁹ Massachusetts and New York require data about the total number of compassionate release applications, the number of applications granted, the number of applications denied and the reasons for the denial, and the counties inmates are released to.²¹⁰ Interestingly, the Massachusetts annual report requires the inclusion of data about the race and ethnicity of each inmate applying for medical parole and data about the race and ethnicity of each inmate granted or denied medical parole.²¹¹ Massachusetts also

²⁰⁶ PRICE, *supra* note 97, at 19; Emily Widra & Wanda Bertram, *Compassionate Release was Never Designed to Release Large Amounts of People*, PRISON POL'Y INITIATIVE (May 29, 2020), <https://www.prisonpolicy.org/blog/2020/05/29/compassionate-release/> [https://perma.cc/ABM8-5HUS].

²⁰⁷ PRICE, *supra* note 97, at 19.

²⁰⁸ N.Y. EXEC. LAW § 259-r(9) (West 2021); N.M. STAT. ANN. § 31-21-25.1(A)(3) (West 1994); MASS. GEN. LAWS ch. 127, § 119A(i)(iii) (West 2018).

²⁰⁹ § 259-r(9); § 31-21-25.1(A)(3); ch. 127, § 119A(i)(vii).

²¹⁰ § 259-r(9); ch. 127, § 119A(i)(i), (ii), (iv), (v).

²¹¹ PRICE, *supra* note 97, at 19; *see also* ch. 127, § 119A(i) (relating to this article's earlier discussion on the relationship between mandatory minimum sentencing and the impact it has on marginalized communities).

tracks inmates who have applied for medical parole more than once.²¹²

The FIRST STEP Act requires the Director of the BOP to produce an annual report and present it to the House and Senate Judiciary Committees.²¹³ The report provides a comprehensive analysis of the requests for sentence reductions from the previous year. The annual report must include the number of inmates granted and denied compassionate release, how much time elapsed between the time the warden received the request and when the final decision was made, and the number of inmates who died while their request was pending.²¹⁴

B. Implications for Inmates Granted Compassionate Release & Compassionate Release Opposition

Additional factors must be considered when amending the compassionate release statutes. One major unanswered question is what happens to inmates after they have been granted compassionate release: where they go, who are they with, what do they do, and how well are they able to adjust to life in the general population. The legislature must consider who may oppose change to the compassionate release statutes in Kansas. Prosecutors are some of the most influential opponents to compassionate release. These are tangential issues to the topic of this article, but they are necessary to consider when suggesting legislative changes.

1. Post-Release Supervision Plans & Revocation

Re-entry from prison is often characterized by “high mortality rates, homelessness, reincarceration for parole violations, and heavy use of emergency medical services.”²¹⁵ The current compassionate release statutes attempt to combat those problems by requiring that a post-release supervision plan be established before an inmate is granted compassionate release.²¹⁶ The release plan must include details of where the inmate will reside, where they will be seeking treatment, and who will provide that treatment.²¹⁷

One concern of newly released inmates is being able to stick to the terms of their release plan. Sections 22-3728 and 3729 both allow for revocation of an inmate’s release upon violation of the release plan.²¹⁸ People with felony convictions may be barred from living in public housing or living with family members already residing in low-income housing, which leads to a high-risk of residential instability for inmates post-release.²¹⁹ An inmate may also be

²¹² Ch. 127, § 119A(i)(vi).

²¹³ U.S. DEP’T OF JUST., *supra* note 159, at 16.

²¹⁴ *Id.* at 16–17.

²¹⁵ Williams et al., *supra* note 154, at 1479.

²¹⁶ KAN. ADMIN. REGS. § 45-700-1(c) (2002).

²¹⁷ *Id.*

²¹⁸ KAN. STAT. ANN. § 22-3728(a)(5)–(6) (2014); KAN. STAT. ANN. § 22-3729(a)(4)–(5) (2012).

²¹⁹ Melissa Li, *From Prisons to Communities: Confronting Re-entry Challenges and Social Inequality*, AM. PSYCH. ASSOC. (Mar. 2018), <https://www.apa.org/pi/ses/resources/indicator/2018/03/prisons-to-communities#> [<https://perma.cc/FN4K-ACUG>]; HANSFORD ET AL., *supra* note 4, at

ineligible to receive public assistance depending on why they were incarcerated.²²⁰ Oftentimes places of business will not hire people with a criminal record, leaving inmates to work low-skill jobs for very little money.²²¹ The Clearinghouse, discussed previously in this article²²², has social workers assisting inmates during re-entry, another reason to establish a similar group in Kansas.²²³ Inmates granted compassionate release require a larger safety net of resources than traditionally released inmates because of their compounded health conditions. These challenges may disrupt the re-entry process and result in an unintentional violation of a release plan.

2. Ease of Inmate Assimilation Post-Release

Inmates may face other difficulties after being granted compassionate release. It is highly probable that inmates seeking compassionate release for terminal illness or functional incapacitation have been incarcerated for decades. Society has most likely changed significantly during the course of an inmate's incarceration. This may be something the PRB should consider when making these decisions. The proliferation of technology within the past twenty years may pose a challenge for some elderly inmates. Inmates that were incarcerated for many years may find it difficult to make simple, everyday decisions.²²⁴ An inmate's ability to adapt back into modern society is vital to their success upon release.

C. A Potential Fight from Prosecutors

The PRB has the discretion to hold a formal hearing before making a final decision on a functional incapacitation compassionate release application.²²⁵ At this hearing, any prosecuting attorney, judge, crime victim, or member of the victim's family can give their comments regarding the inmate requesting release.²²⁶ At the federal level, prosecutors have voiced strong opposition to requests for compassionate release, especially during the COVID-19 crisis. The reasoning is often not because the inmate's conditions do not qualify them for compassionate release, but because the inmate failed to exhaust the

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²²⁰ Li, *supra* note 219.

²²¹ *Id.* Before the COVID-19 crisis, twenty-seven percent of formerly incarcerated people were unemployed, a rate five percent higher than the national unemployment rate in the United States. HANSFORD ET AL., *supra* note 4, at 26.

²²² See *supra* Section V.A.6., for the discussion on the Compassionate Release Clearinghouse.

²²³ *COVID-19 Compassionate Release Project*, NAT'L. ASS'N OF CRIM. DEF. LAWS. (May 4, 2020), <https://www.nacdl.org/Content/crvolunteers> [<https://perma.cc/L8SX-VK2M>].

²²⁴ Floyd Bledsoe, a Project for Innocence exoneree, spoke with my Project for Innocence class in the Fall of 2020. When asked about difficulties of life post-incarceration, Mr. Bledsoe said that even going to the grocery store and choosing which type of ketchup to buy was a challenge for him. After years of not having any choices, the vast expanse of options now available was very overwhelming to him. Mr. Bledsoe also noted that it was hard to adapt to new technology. He commented that everyone now is always on their phones.

²²⁵ KAN. STAT. ANN. § 22-3728(a)(4) (2014); KAN. ADMIN. REGS. § 45-700-2(b)(1) (2002).

²²⁶ § 45-700-2(b)(1)(B).

administrative rights, or the time frame requirements had not yet been met.²²⁷

Another argument frequently made by prosecutors is that an inmate's illnesses should not cut their sentence short. For example, in Miami, an elderly inmate with numerous health conditions sentenced to life in prison recently sought compassionate release.²²⁸ The prosecutor argued that any health problems would not contribute to extraordinary and compelling circumstances needed to grant compassionate release because a life sentence meant the inmate would die in prison regardless.²²⁹ In Texas, a prosecutor told an incarcerated former judge that because "his age and medical conditions did not get in the way of him committing his crimes, [then] he should not be able to hide behind them now to avoid the consequences of his actions."²³⁰ Prosecutors may always strongly oppose compassionate release. It is a prosecutor's job to incarcerate people for the crimes they allegedly commit and to ensure that inmates see their sentence through, despite whatever unfortunate circumstances have fallen upon them. However, the legislature can counter this problem by changing the compassionate release statutes.

VI. CONCLUSION

The FIRST STEP Act provided relief for inmates in federal prisons, but there has been little relief for Kansas state inmates. Sections 22-3728 and 3729 of the Kansas Statutes Annotated leave a lot of problems unresolved because of the broad language, vague requirements, and high level of PRB discretion. Kansas must change the language of its compassionate release statutes. The most vulnerable people, elderly and sick inmates, deserve the opportunity to seek the relief they need outside of prison. Solutions to the problems in Kansas can be found in other states' compassionate release provisions and the FIRST STEP Act. The suggestions made in this article are to aid the Kansas State Legislature in finding the best solution to help vulnerable inmates incarcerated in Kansas correctional facilities.

²²⁷ See Neena Satija, 'Come On, We're Human Beings': Judges Question Response to Coronavirus Pandemic in Federal Prisons, WASH. POST (May 13, 2020), https://www.washingtonpost.com/investigations/come-on-were-human-beings-judges-question-response-to-coronavirus-pandemic-in-federal-prisons/2020/05/12/925e5d32-912a-11ea-a9c0-73b93422d691_story.html [https://perma.cc/93K9-28TT]; see Walter Pavlo, *Federal Prosecutors Across The Country Oppose Many Common Sense Motions For Compassionate Release*, FORBES (Apr. 15, 2020), <https://www.forbes.com/sites/walterpavlo/2020/04/15/federal-prosecutors-across-the-country-oppose-many-common-sense-motions-for-compassionate-release/?sh=6d12e3da75a0> [https://perma.cc/CK8L-SB2G].

²²⁸ C.J. Ciaramella, *Federal Prosecutors Argue COVID-19 is Just 'One More Way to Perish in Prison'*, REASON FOUND. (Sept. 25, 2020), <https://reason.com/2020/09/25/federal-prosecutors-argue-covid-19-is-just-one-more-way-to-perish-in-prison/> [https://perma.cc/X537-LMW8].

²²⁹ *Id.*

²³⁰ Angela Morris, *Prosecutors: His Age Never Interrupted His Crimes, So This Ex-Texas Judge Shouldn't Get Compassionate Release*, TEX. LAW. (May 18, 2020), <https://www.law.com/texaslawyer/2020/05/18/prosecutors-his-age-never-interrupted-his-crimes-so-this-ex-texas-judge-shouldnt-get-compassionate-release/> [https://perma.cc/CN9A-QPA].