COMMENT

ONE STEP FORWARD: COMPASSIONATE RELEASE UNDER THE FIRST STEP ACT

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The federal compassionate release statute allows federal sentencing courts to reduce criminal sentences if "extraordinary and compelling" reasons warrant such reductions. Courts evaluating compassionate release motions must also consider whether the penal goals of punishment would support release of any particular prisoner and whether a sentence reduction would be consistent with the Sentencing Commission's policy statements on compassionate release. Historically, the compassionate release statute vested authority to file compassionate release motions solely with the Director of the Bureau of Prisons.

However, the First Step Act of 2018 modified the language of the compassionate release statute, allowing federal prisoners to file motions on their own behalf. This change to the statute, while subtle, empowers district courts to independently determine whether "extraordinary and compelling" reasons warrant compassionate release. This proposition is supported by the plain text of the statute and the Sentencing Commission's policy statements on compassionate release. Proper consideration of the penal goals of punishment will also support granting sentence reductions in a broad range of cases. Thus, the modified compassionate release statute arguably grants courts a method to begin to tackle the problem of mass incarceration in the United States.

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INTRODUCTION

Incarceration imposes a heavy burden. Among other things, incarceration significantly undermines the individual "interests in freedom of movement and privacy [that] are normally so vital to a good life."[1] Many people are subject to the loss of freedom of movement and privacy that incarceration entails.[2] In 2016, approximately 1.5 million people were incarcerated in the United States.[3] Additionally, "the United States incarcerates more people than any other country in the world. In fact, while only 5 percent of the global population lives in the United States, the nation houses 21 percent of the world's prison population . . . ."[4] The Federal Bureau of Prisons, which the federal government established in 1930,[5] is responsible for managing individuals convicted of federal crimes and subsequently incarcerated.[6] The Bureau of Prisons houses roughly 150,000 prisoners in several federal facilities.[7]

Not only are prisoners harmed as a natural consequence of being imprisoned, but incarceration also carries with it a variety of collateral consequences.[8] Federal prisons are also under a significant amount of

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1. ANDREW VON HIRSCH, CENSURE AND SANCTIONS 35 (1993).

2. *See* ERIN L. MCCOY & JEFF BURLINGAME, INCARCERATION: PUNISHMENT OR REHABILITATION? 6 (2020).

3. *Key Statistic: Prisoners*, BUREAU OF JUST. STAT., https://www.bjs.gov/index.cfm?ty=kfdetail&iid=488#summary [https://perma.cc/MDA6-9DMP] (last visited Oct. 27, 2020).

4. MCCOY & BURLINGAME, *supra* note 2, at 6; *see also* 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'Y, & L. 216, 216 (2018) ("The United States incarcerates more people than any industrialized nation in the world, due in part to truth in sentencing laws, mandatory minimums, habitual inmate or 'three-strikes' laws, and the 'war on drugs.'" (citation omitted)).

5. *About Us*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/ [https://perma.cc/6KPX-DSDD] (last visited Oct. 27, 2020).

6. *About Our Agency*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/agency [https://perma.cc/Y579-7ESA] (last visited Oct. 27, 2020).

7. *Id.*; BUREAU OF JUST. STAT., *supra* note 3.

8. *See, e.g.*, Jason Schnittker & Michael Massoglia, *A Sociocognitive Approach to Studying the Effects of Incarceration*, 2015 WIS. L. REV. 349, 350 (summarizing research on the adverse effects of incarceration); Jillian J. Turanovic, Nancy Rodriguez & Travis C. Pratt, *The Collateral Consequences of Incarceration Revisited: A Qualitative Analysis of the Effects on Caregivers of Children of Incarcerated Parents*, 50 CRIMINOLOGY 913, 943 (2012) (discussing the experiences of people caring for children of incarcerated parents); George Lipsitz, *"In an Avalanche Every Snowflake Pleads Not Guilty": The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. REV. 1746, 1749–50 (2012) (exploring how race and gender discrimination make reentry into society especially difficult for women of color); Michael E. Roettger, Raymond R. Swisher, Danielle C. Kuhl & Jorge Chavez, *Paternal Incarceration and Trajectories of Marijuana and Other Illegal Drug Use from Adolescence into Young Adulthood: Evidence from Longitudinal Panels of Males and Females in the United States*,

strain due to the massive prison population;[9] federal prisons regularly operate over capacity.[10] Incarcerating so many people also costs the United States billions of dollars annually.[11]

While some commentators have challenged the capability or willingness of the federal government to enact comprehensive and progressive criminal justice reform,[12] the recently enacted First Step Act[13] carries with it potential for positive change.[14] One purpose of the First Step Act is "to promote rehabilitation of prisoners and unwind decades of mass incarceration."[15] To effectuate this purpose, the First Step Act included several provisions related to criminal justice reform, one of which modified the language in the federal compassionate release statute.[16] This compassionate release statute allows prisoners to file motions in court for sentence reductions or early release.[17] Federal district courts are empowered to grant sentence reductions if "extraordinary and compelling

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106 ADDICTION 121, 128 (2010) (finding evidence that paternal incarceration increases substance use from adolescence into young adulthood); Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. POVERTY L. & POL'Y 299, 305–20 (2005) (identifies and defines collateral consequences regarding the civil, social, and political rights of ex-offenders); Shytierra Gaston, *The Long-Term Effects of Parental Incarceration: Does Parental Incarceration in Childhood or Adolescence Predict Depressive Symptoms in Adulthood*, 43 CRIM. JUST. & BEHAV. 1056, 1069 (2016) (finding evidence that parental incarceration during childhood or adolescence predicts depressive symptoms in adulthood); Torrey McConnell, Comment, *The War on Women: The Collateral Consequences of Female Incarceration*, 21 LEWIS & CLARK L. REV. 493, 501–13 (2017) (examining the long-term impacts that drug and property sentencing laws have on women).

9. *See* Jalila Jefferson-Bullock, *Are You (Still) My Great and Worthy Opponent?: Compassionate Release of Terminally Ill Offenders*, 83 UMKC L. REV. 521, 551–52 (2015).

10. *See id.* at 551 (noting that federal prison overcrowding was at forty-one percent in 2004); Bryant S. Green, Comment, *As the Pendulum Swings: The Reformation of Compassionate Release to Accommodate Changing Perceptions of Corrections*, 46 U. TOL. L. REV. 123, 123 (2014) ("[F]ederal prisons are currently operating at 39% over capacity . . . ."); *Policy Shifts Reduce Federal Prison Population*, U.S. CTS. (Apr. 25, 2017), https://www.uscourts.gov/news/2017/04/25/policy-shifts-reduce-federal-prison-population [https://perma.cc/M2M5-HJHS] (noting that the federal inmate population was thirteen percent overcapacity in 2017).

11. Green, *supra* note 10, at 123.

12. *See, e.g.*, Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform* 19–28 (Univ. of St. Thomas (Minn.) Legal Studies Research Paper No. 20-07, 2020), https://ssrn.com/abstract=3578123 [https://perma.cc/8ZPT-N7BW].

13. The full title of the FIRST STEP Act is the "Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act." For purposes of convenience, this Comment will refer to this act as the First Step Act as other scholars have done.

14. *See generally* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

15. *See United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa 2019).

16. First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5238–41 (codified at 18 U.S.C. § 3582(c)–(d)).

17. 18 U.S.C. § 3582(c).

reasons warrant such . . . reduction[s]."[18] Before the First Step Act, the Sentencing Commission and the Bureau of Prisons effectively limited which circumstances warranted compassionate release.[19]

This Comment argues that under the newly amended compassionate release statute, district courts are free to independently evaluate whether circumstances rise to the level of "extraordinary and compelling" under the compassionate release statute. Part I provides background to the federal compassionate release statute. Part II argues that federal courts can evaluate compassionate release motions without being bound by the guidance of either the Sentencing Commission or the Bureau of Prisons. Part III considers the penal goals that sentencing courts are required to consider, argues that these goals will often weigh in favor of sentence reductions, and presents specific examples of extraordinary and compelling circumstances.

I. The Historical Development of Compassionate Release

In the early 1900s, the American criminal justice system relied on an "'indeterminate' sentencing system."[20] This system gave significant discretion to judges and parole boards with the hope that those system actors would use their discretion to rehabilitate offenders, release offenders once rehabilitated, and protect the public from unrehabilitated offenders.[21] Judges established maximum terms of imprisonment, and the parole commission determined whether to release rehabilitated prisoners before this maximum term was completed.[22] However, in practice, sentencing judges often applied their personal notions of justice in sentencing individual criminal offenders.[23] In other words, as a result of the broad discretion that sentencing judges had, judges handed out a "wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances."[24]

Starting in the 1970s, many commentators criticized the broad discretion held by judges and parole boards.[25] They argued that such "discretion guaranteed grossly unequal treatment of offenders convicted of the same crime."[26] As a result of this criticism, "[m]any states adopted

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18. *Id.*

19. *See infra* text accompanying notes 48–53.

20. Richard S. Frase, Just Sentencing: Principles and Procedures for a Workable System, at xii (2013).

21. *Id.*

22. S. Rep. No. 98-225, at 38 (1983).

23. *Id.*

24. *Id.*

25. Frase, *supra* note 20, at xii.

26. *Id.*; *see also* S. Rep. No. 98-225, at 38 ("These disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to

or experimented with judicial or parole guidelines or abolition of parole-release discretion."[27] During the 1990s, forty states passed "truth-in-sentencing" laws.[28] Also known as determinate sentencing, the "truth-in-sentencing" criminal justice systems changed the focus from judicial and parole discretion to formal guidelines and mandatory minimum sentences.[29]

To implement determinate sentencing, the federal government enacted the Sentencing Reform Act of 1984.[30] According to legislators, the Sentencing Reform Act was enacted to provide "greater certainty and uniformity in sentencing."[31] In pursuit of these aims, the Sentencing Reform Act effectively abolished federal parole and required sentences to be determinate in length.[32] It also created the Sentencing Commission, which, in turn, was responsible for creating guidelines for judges, outlining the appropriate punishments for people convicted of federal crimes.[33] As part of this legislative package, Congress replaced parole with the compassionate release statute discussed in this Comment.[34] Compassionate release typically allows either elderly prisoners or prisoners suffering from terminal illnesses to be released from confinement before their original sentences would otherwise end.[35] For federal prisoners, 18 U.S.C. § 3582(c)(1)(A)(i) governs compassionate release.[36]

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the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence.").

27. FRASE, *supra* note 20, at xii.

28. MCCOY & BURLINGAME, *supra* note 2, at 31–32.

29. FRASE, *supra* note 20, at xii.

30. Jefferson-Bullock, *supra* note 9, at 528.

31. S. REP. NO. 98-225, at 38.

32. Jefferson-Bullock, *supra* note 9, at 528.

33. *Id.*

34. *Id.* at 528–29.

35. Margaret M. Holland, Stephanie Grace Prost, Heath C. Hoffmann & George E. Dickinson, *U.S. Department of Corrections Compassionate Release Policies: A Content Analysis and Call to Action*, 81 OMEGA–J. DEATH & DYING 607, 608 (2020).

36. 18 U.S.C. § 3582(c)(1)(A)(i) ("The court may not modify a term of imprisonment once it has been imposed except that—in any case—the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."). There is an additional statutory provision which allows courts to grant sentence reductions if "the defendant is at least 70 years of age, has served at least 30 years in prison . . . and a determination has been made by the Director of

Since the abolishment of federal parole, mechanisms currently available to federal prisoners for reductions in their terms of incarceration or early release from prison are remarkably scarce.[37] Sentencing courts can modify sentences that resulted from "arithmetical, technical, or other clear error."[38] Courts may also reduce a sentence if the defendant, after sentencing, provided "substantial assistance" in a criminal investigation or prosecution of another person.[39] Finally, courts can reduce a term of imprisonment "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission."[40] As these statutory mechanisms are fairly limited, compassionate release can be used as a form of relief for the overburdened federal prison system. The compassionate release statute allows federal courts to reduce sentences for prisoners for "extraordinary and compelling reasons."[41]

The Sentencing Commission has statutory authority for determining what reasons constitute extraordinary and compelling reasons warranting a sentence reduction under the compassionate release statute.[42] Pursuant to this authority, the Sentencing Commission published a non-exhaustive list of extraordinary and compelling circumstances.[43] The Sentencing Commission stated that extraordinary and compelling reasons exist under circumstances in which: (1) the prisoner is suffering from a serious health condition;[44] (2) the prisoner is at least 65 years old, is experiencing a

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the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community." § 3582(c)(1)(A)(ii).

37. *See Freeman v. United States*, 564 U.S. 522, 526 (2011) ("Federal courts are forbidden, as a general matter, to 'modify a term of imprisonment once it has been imposed,' . . . subject to few narrow exceptions." (quoting 18 U.S.C. § 3582(c))).

38. FED. R. CRIM. P. 35(a).

39. FED. R. CRIM. P. 35(b).

40. § 3582(c)(2).

41. § 3582(c)(1)(A)(i).

42. 28 U.S.C. § 994(t) ("The Commission . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.").

43. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2018). The Sentencing Commission's list of extraordinary and compelling reasons is non-exhaustive because the most recent version of the Guidelines includes an "Other Reasons" provision which states that "[a]s determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described" in the rest of the policy statement. *Id.* Thus, the Director of the Bureau of Prisons can evaluate whether an individual prisoner has extraordinary and compelling reasons warranting a sentence reduction independent of the Sentencing Commission. *Id.*

44. The actual circumstances set forth by the Sentencing Commission are that the prisoner "is suffering from a terminal illness," "a serious physical or medical condition," "a serious functional or cognitive impairment," or "deteriorating physical or mental health because of the aging process." U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A) (U.S. SENT'G COMM'N 2018). The Sentencing Commission has imposed an

serious deterioration in physical or mental health because of the aging process, and has served at least 10 years or 75% of their term of imprisonment;[45] (3) the prisoner's minor child(ren) has died or has been rendered incapacitated;[46] or, (4) the prisoner's spouse or registered partner has been rendered incapacitated, and the prisoner would be the only available caregiver for their spouse or partner.[47] In addition to these specific circumstances, the Sentencing Commission explicitly stated that the Director of the Bureau of Prisons could determine other extraordinary and compelling reasons.[48]

Before the enactment of the First Step Act, filing compassionate release motions was the exclusive domain of the Director of the Bureau of Prisons.[49] The compassionate release statute provided that courts could only grant sentence reductions if, *upon motion of the Director of the Bureau of Prisons*, "extraordinary and compelling reasons warrant[ed] such a reduction."[50] Furthermore, federal appellate courts consistently held that the Director's decision *not* to file sentence reduction motions was unreviewable by courts.[51] In other words, if the Director of the Bureau of

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additional requirement that these conditions "substantially diminish[] the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover." *Id.*

45. *Id.* § 1B1.13 cmt. n.1(B).

46. *Id.* § 1B1.13 cmt. n.1(C)(i).

47. *Id.* § 1B1.13 cmt. n.1(C)(ii).

48. *Id.* § 1B1.13 cmt. n.1(D).

49. *See* 18 U.S.C. § 3582(c)(1)(A).

50. *Id.*

51. *Fields v. Warden Allenwood USP*, 684 F. App'x 121, 123 (3d Cir. 2017) (holding that Bureau of Prisons' decision not to file motion is not judicially reviewable and that § 3582(c)(1)(A) plainly vests the decision to pursue relief solely with the Bureau of Prisons); *United States v. Dowdell*, 669 F. App'x 662, 662 (4th Cir. 2016) (per curiam) ("Federal law vests the Bureau of Prisons with discretion to seek a sentence reduction pursuant to § 3582(c)(1)(A)."); *Crowe v. United States*, 430 F. App'x 484, 485 (6th Cir. 2011) (per curiam) (holding that Bureau of Prisons' decision not to file motion is not subject to judicial review); *DeLuca v. Lariva*, 586 F. App'x 239, 240–41 (7th Cir. 2014) (mem.) (holding that Bureau of Prisons' decision not to file motion is a judicially unreviewable decision and there are no standards cabining the Bureau of Prisons' exercise of its statutorily-conferred discretion); *United States v. Smartt*, 129 F.3d 539, 540–41 (10th Cir. 1997) (holding that without a motion from the Bureau of Prisons, federal district courts have no authority to reduce a federal inmate's sentence based on special circumstances); *Rodriguez-Aguirre v. Hudgins*, 739 F. App'x 489, 490–91 (10th Cir. 2018) (holding that Section 3582(c)(1)(A) gives the Bureau of Prisons absolute discretion regarding whether to file a motion, and that the Bureau of Prisons' denial of a defendant's compassionate release/reduction in sentence request and declination to file such a motion is not a judicially reviewable decision); *Fernandez v. United States*, 941 F.2d 1488, 1492–93 (11th Cir. 1991) (holding that Congress precluded judicial review of the Bureau of Prisons' inaction by giving the Bureau of Prisons absolute discretion over whether to move for a reduction in a prisoner's sentence). Some appellate courts came to this conclusion because the Supreme Court has held that judicial review is "not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of

Prisons determined that there were no "extraordinary and compelling reasons" warranting a sentence reduction in a particular case, and therefore decided not to file a compassionate release motion on behalf of a prisoner, the prisoner had no recourse to appeal that decision in federal court.[52]

Furthermore, the Bureau of Prisons has historically only filed compassionate release motions in circumstances where the prisoner is suffering from terminal illness.[53] Thus, the Bureau of Prisons and its Director have served as an active gatekeeper to prisoners receiving compassionate release from prison. And, since the Bureau of Prisons' decision to not file a motion was discretionary and unreviewable,[54] those prisoners had no legal recourse.

This all changed when, in December of 2018, Congress passed the First Step Act.[55] The First Step Act modified the language in the compassionate release statute.[56] The amended statute allows federal prisoners to file motions for reduced sentences on their own behalf.[57] While this is a relatively subtle change, it has significant consequences. Unlike the pre-First Step Act version of compassionate release, if the Bureau of Prisons declines to file a motion on a prisoner's behalf, the statute currently allows sentencing judges to review that decision and evaluate the motion for themselves.[58]

Several federal district courts have recognized their newly granted authority under the amended compassionate release statute and have granted sentence reductions even in cases where the Government objected or the Bureau of Prisons declined to file.[59] For instance, courts have

discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Because Section 3582 does not include an independent standard for what reasons count as extraordinary and compelling, appellate courts holding that the Bureau of Prison's decision to not file a Section 3582 motion was judicially unreviewable were likely correct per Supreme Court precedent. *See DeLuca*, 586 F. App'x at 241 ("Section 3582 simply provides, without elaboration, that it is within the power of the Director of the Bureau of Prisons to move for a reduction in sentence on behalf of a prisoner.").

52. *See Crowe*, 430 F. App'x at 485. In fact, the Director of the Bureau of Prisons could arguably decide not to file a sentence reduction motion for any number of reasons because § 3582(c)(1)(A) does not require the Director to file a motion if they do find that extraordinary and compelling circumstances exist in any particular case. *See* 18 U.S.C. § 3582(c)(1)(A).

53. William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 866–68 (2009).

54. *Id.*

55. First Step Act of 2018, Pub. L. No. 115-391, § 603(b)(1), 132 Stat. 5194, 5293.

56. *Id.*; 18 U.S.C. § 3582(c)(1)(A).

57. § 3582(c)(1)(A).

58. *Id.*

59. *See, e.g.*, *United States v. Maumau*, No. 08-cr-00758-TC-11, 2020 U.S. Dist. LEXIS 28392, at *10–18 (D. Utah Feb. 18, 2020); *United States v. Redd*, 444 F. Supp. 3d 717, 723–24 (E.D. Va. 2020).

granted sentence reductions in circumstances where the prisoner is suffering from a severe medical condition,[60] has an incapacitated family member,[61] would have received a lower sentence if sentenced today,[62] and for other extraordinary and compelling reasons.[63] Consistent with this broad application of the statute, many district courts have concluded that "when a defendant brings a motion for a sentence reduction under the amended provision, the [district court] can determine whether any extraordinary and compelling reasons other than those delineated [by the Sentencing Commission] warrant granting relief."[64]

II. INTERPRETING 18 U.S.C. § 3582(C)(1)(A)

District courts generally have broad discretion in deciding whether to grant or deny a motion for a sentence reduction.[65] This broad discretion extends to a district court's authority under the compassionate release statute. Under the current version of the statute, defendants are allowed to file motions on their own behalf in district courts.[66] Because district courts can now evaluate a defendant's compassionate release motion—over the objections of the government—district courts also have the authority to evaluate what reasons amount to "extraordinary and compelling" under the statute.[67] The Sentencing Commission's description of "extraordinary and compelling" circumstances does not constrain the authority that district courts have in independently evaluating compassionate release motions. Three facts support this conclusion. First, the plain language of the statute entails that district courts have broad discretion to grant sentence reductions. Second, the Sentencing Commission's policy

60. *See, e.g.*, *United States v. Gileno*, 448 F. Supp. 3d 183, 187–88 (D. Conn. 2020) (discussing post-First Step Act cases where courts have granted sentence reductions based on defendants' serious medical conditions).

61. *See, e.g.*, *United States v. Bucci*, 409 F. Supp. 3d 1, 2 (D. Mass. 2019).

62. *See, e.g.*, *Redd*, 444 F. Supp. 3d at 723–24; *United States v. Mondaca*, No. 89-CR-0655, 2020 U.S. Dist. LEXIS 37483, at *15–18 (S.D. Cal. Mar. 3, 2020); *Maumau*, 2020 U.S. Dist. LEXIS 28392, at *10–18; *United States v. Urkevich*, No. 03CR37, 2019 U.S. Dist. LEXIS 197408, at *7–8 (D. Neb. Nov. 14, 2019) (granting a reduced sentence because of a change to the statutory sentencing range for a violation of 18 U.S.C. § 924(c)(1)(C)); *United States v. Cantu-Rivera*, Cr. No. H-89-204, 2019 U.S. Dist. LEXIS 105271, at *4 (S.D. Tex. June 24, 2019) (recognizing that the "fundamental change to sentencing policy carried out in the First Step Act's elimination of life imprisonment as a mandatory sentence solely by reason of a defendant's prior convictions" is a factor which contributes to extraordinary and compelling reasons warranting a sentence reduction under § 3582(c)(1)(A)).

63. *See, e.g.*, *United States v. Walker*, No. 11 CR 270, 2019 U.S. Dist. LEXIS 180084, at *7–9 (N.D. Ohio Oct. 17, 2019).

64. *See, e.g.*, *United States v. Cantu*, 423 F. Supp. 3d 345, 352 (S.D. Tex. 2019).

65. *See United States v. Jefferson*, 662 F. App'x 36, 38 (2d Cir. 2016).

66. 18 U.S.C. § 3582(c)(1)(A).

67. *Id.*

statements, neither on their face nor in context, prevent district courts from independently evaluating whether "extraordinary and compelling" reasons warrant compassionate release. Third, Congress intended that district courts utilize their discretion to grant sentence reductions in "extraordinary and compelling" circumstances beyond those initially contemplated either by the Sentencing Commission or the Bureau of Prisons.

A. The Plain Language of § 3582(c)(1)(A)

The compassionate release statute sets out four requirements that a defendant must satisfy to be eligible for a sentence reduction.[68] First, the defendant must have "fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf" or wait "30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier."[69] Second, the defendant must establish that "extraordinary and compelling reasons warrant" a sentence reduction.[70] Third, a sentence reduction must be "consistent with applicable policy statements issued by the Sentencing Commission."[71] Finally, the court must consider the sentencing factors outlined in 18 U.S.C. § 3553(a).[72]

There is no statutory definition of "extraordinary and compelling reasons."[73] For this reason, courts interpreting "extraordinary and compelling reasons" may rely on the plain or ordinary meaning of these terms.[74] In deciphering the plain or ordinary meaning of statutory terms,

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68. *United States v. Stone*, No. 17-cr-0055, 2019 U.S. Dist. LEXIS 182081, at *18–19 (S.D. Iowa Oct. 22, 2019) (Compassionate release motions are "addressed in a 4-step analytical scheme, where each successive step depends upon whether the requirements of the prior step have been satisfied.").

69. § 3582(c)(1)(A). *See also United States v. Weidenhamer*, No. CR-16-01072-001, 2019 U.S. Dist. LEXIS 195620, at *3–11 (D. Ariz. Nov. 8, 2019) (discussing the exhaustion requirement under the compassionate release statute).

70. § 3582(c)(1)(A)(i).

71. § 3582(c)(1)(A).

72. *Id.*

73. *See* § 3582. In a separate statute, Congress did establish a limiting condition on a definition of extraordinary and compelling reasons. Congress explicitly stated that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *See* 28 U.S.C. § 994(t).

74. *See Watt v. Alaska*, 451 U.S. 259, 265 (1981) ("[The] starting point in every case involving construction of a statute is the language itself." (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring))); *see also United States v. Crawford*, No. 07CR317-1, 2019 U.S. Dist. LEXIS 209648, at *10 (M.D.N.C. Dec. 5, 2019) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979))).

courts often utilize dictionary definitions.[75] Merriam-Webster Dictionary defines "extraordinary" as "going beyond what is usual, regular, or customary," or "exceptional to a very marked extent."[76] Similarly, Black's Law Dictionary defines "extraordinary" as "[b]eyond what is usual, customary, regular, or common."[77] A reason is "compelling" if it is forceful, convincing, or demands attention.[78] While these definitions do not set out a clear set of circumstances that may qualify as "extraordinary and compelling" under the compassionate release statute, they are sufficient to entail the proposition that the compassionate release statute potentially extends to a relatively expansive amount of prisoners—certainly more expansive than elderly prisoners or those suffering from debilitating health conditions.[79]

It is also clear from the statutory language that the power to grant compassionate release is vested in the *courts*, not the Sentencing Commission or the Bureau of Prisons.[80] Specifically, the compassionate release statute provides that "*the court* . . . upon motion of the defendant . . . may reduce the term of imprisonment . . . if [*the court*] finds that extraordinary and compelling reasons warrant such a reduction."[81] The statute unambiguously provides that federal sentencing courts have the authority to make a finding as to the existence of extraordinary and compelling reasons.[82] The statute also clearly provides that the court's

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75. *See, e.g.*, *Nix v. Hedden*, 149 U.S. 304, 307 (1893) ("[T]he court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court."); *United States v. Adams*, No. 94CR302, 2019 U.S. Dist. LEXIS 133428, at *8 (M.D.N.C. Aug. 8, 2019) ("Although not dispositive, dictionary definitions are 'valuable tools' for approximating the sense in which a linguistic community uses and understands a word and for confirming that an understanding taken as ordinary is not, in fact, idiosyncratic." (quoting *Struniak v. Lynch*, 159 F. Supp. 3d 643, 653 n.11 (E.D. Va. 2016))). *But see Muscarello v. United States*, 524 U.S. 125, 142–44 (1998) (Ginsburg, J., dissenting) (stating that dictionaries should not be dispositive regarding what the statutory term "carries" means in 18 U.S.C. § 924(c)(1)).

76. *Exceptional*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/exceptional [https://perma.cc/RW6L-5V3A] (last visited Oct. 24, 2020); *see also United States v. Redd*, 444 F. Supp. 3d 717, 722 n.7 (E.D. Va. 2020) (referring to the definition in evaluating a compassionate release motion).

77. *Extraordinary*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Crawford*, 2019 U.S. Dist. LEXIS 209648, at *11–12 (using that definition).

78. *See Compelling*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/compelling [https://perma.cc/N3HQ-WVKN] (last visited Oct. 24, 2020); *see also Redd*, 444 F. Supp. 3d at 724 n.7 (referring to the definition in evaluating a compassionate release motion).

79. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1 (U.S. SENT'G COMM'N 2018).

80. 18 U.S.C. § 3582(c)(1)(A).

81. *Id.* (emphasis added).

82. *Id.*

authority to grant sentence reductions is discretionary.[83] The fact that the term "extraordinary and compelling" has a relatively expansive definition in conjunction with the fact that the statute grants courts the discretionary authority to both find that "extraordinary and compelling reasons" warrant a reduction and grant or deny a prisoner's motion for a reduction suggests that the courts have relatively broad authority and discretion under the statute—authority and discretion that is not constrained by the Sentencing Commission or the Bureau of Prisons.

B. The Sentencing Commission's Policy Statements

The Sentencing Commission has promulgated policy statements regarding compassionate release.[84] Specifically, Congress directed the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction."[85] However, the First Step Act's modification to compassionate release has rightly led district courts around the country to conclude that they now have the authority to evaluate whether prisoners are eligible for compassionate release, independent of the Sentencing Commission's policy statements.

As already stated, any sentence reduction granted by courts must be "consistent with applicable policy statements issued by the Sentencing Commission."[86] Thus, the statute's language raises two additional questions for courts to consider when evaluating motions for sentence reductions. First, which of the policy statements issued by the Sentencing Commission, if any, are *applicable*? Second, what does it mean for a sentence reduction to be *consistent* with these policy statements?

Section 1B1.13 of the United States Sentencing Guidelines incorporates the Sentencing Commission's policy statements on compassionate release.[87] This section of the Sentencing Guidelines repeats the language of the compassionate release statute with notable exceptions.[88] First, the Sentencing Commission has not updated the section to reflect the change to compassionate release allowing prisoners to file motions on their own behalf.[89] Second, it sets forth the requirement that courts can only grant a sentence reduction if they determine that "the defendant is not a danger to the safety of any other person or to the

83. *Id.* ("[T]he court . . . *may* reduce the term of imprisonment.") (emphasis added).

84. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2018).

85. 28 U.S.C. § 994(t).

86. 18 U.S.C. § 3582(c)(1)(A).

87. The title of this section of the Sentencing Guidelines is "Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)." U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2018).

88. *Id.*

89. *Id.*

community."[90] Third, the Commission explicitly stated that "an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment."[91] Fourth, and perhaps most important, the current version of the Sentencing Guidelines describes three specific examples of "extraordinary and compelling" circumstances warranting a sentence reduction.[92] The examples of "extraordinary and compelling" circumstances set out by the Sentencing Commission center around the defendant's medical condition,[93] age,[94] and extenuating family circumstances.[95] The Commission also published a catch-all provision allowing the Director of the Bureau of Prisons to determine "extraordinary and compelling reasons other than, or in combination with" those set out by the Commission.[96]

As a threshold matter, courts need to determine which of the Sentencing Commission's policy statements, if any, apply to compassionate release motions now that Congress has amended the statute.[97] There is currently a dispute amongst federal district courts regarding the applicability of the Sentencing Commission's policy statements. Many district courts have concluded that the Commission lacks an applicable policy statement regarding compassionate release.[98]

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90. *Id.* § 1B1.13(2). This requirement is arguably redundant as courts are already required to consider the defendant's dangerousness as a part of the Section 3553(a) requirement that courts consider the need to protect the public from any future crimes of the defendant. *See United States v. Bradshaw*, No. 15-CR-422, 2019 U.S. Dist. LEXIS 225627, at *6–7 (M.D.N.C. Sept. 12, 2019). Therefore, this Comment relegates any pertinent discussion of this requirement to the section discussing the Section 3553(a) sentencing factors.

91. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.2 (U.S. SENT'G COMM'N 2018). The Commission goes on to state that "the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement." *Id.*

92. *Id.* § 1B1.13 cmt. n.1. The Sentencing Commission's discussion of extraordinary and compelling reasons is found in the commentary to this section of the guidelines. However, the Supreme Court has held that commentary in the guidelines is authoritative as an explanation or description of the guidelines themselves. *See Stinson v. United States*, 508 U.S. 36 (1993).

93. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A) (U.S. SENT'G COMM'N 2018).

94. *Id.* § 1B1.13 cmt. n.1(B).

95. *Id.* § 1B1.13 cmt. n.1(C).

96. *Id.* § 1B1.13 cmt. n.1(D).

97. 18 U.S.C. §§ 3582(c)(1)(A), 3553(a)(5)(A).

98. *United States v. Brown*, 411 F. Supp. 3d 446, 449 (S.D. Iowa 2019); *see also United States v. Gileno*, 448 F. Supp. 3d 183, 185 (D. Conn. 2020) (collecting cases); *United States v. Young*, No. 00-cr-00002-1, 2020 U.S. Dist. LEXIS 37395, at *16–17 (M.D. Tenn. Mar. 4, 2020) (collecting cases); *United States v. Maumau*, No. 08-cr-00758-TC-11, 2020 U.S. Dist. LEXIS 28392, at *4–5 (D. Utah Feb. 18, 2020); *United States v. Rodriguez*, 424 F. Supp. 3d 674, 681 (N.D. Cal. 2019). *But see United States v. Lynn*, No. 89-0072,

This conclusion is largely implied by the fact that the Commission has not updated its policy statements to reflect that prisoners are no longer dependent on the Director of the Bureau of Prisons to file compassionate release motions. Because of this, courts have concluded that the policy statements only apply to motions filed by the Director of the Bureau of Prisons, *not* to motions that prisoners file on their own behalf.[99] In contrast, other courts have held that the Sentencing Commission's policy statements are still applicable and binding on district courts.[100] These courts conclude that judges cannot determine that reasons are "extraordinary and compelling" and warrant compassionate release unless those circumstances are listed explicitly in the Sentencing Commission's policy statements.[101]

The courts that have concluded that there are no applicable policy statements are correct. As several courts have observed, the Commission's policy statement focuses on motions made by the Director of the Bureau of Prisons.[102] The policy statement reads that "[a] reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons."[103] It follows that a compassionate release motion filed by a prisoner, and not the Director, falls squarely outside the plain language of the policy statement. Thus, these policy statements are no longer applicable, and courts are not bound by them. However, even assuming that the policy statements apply to compassionate release motions filed by prisoners, the policy statements do not prevent district courts from concluding that reasons not explicitly set out by the Commission are "extraordinary and compelling" and still warrant compassionate release.

Sentence reductions granted by district courts must be *consistent* with applicable policy statements of the Sentencing Commission. As an initial matter, sentence reductions for defendants whose circumstances match the three "extraordinary and compelling" circumstances explicitly set out by the Sentencing Commission are *consistent* with the Commission's policy

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2019 U.S. Dist. LEXIS 135987, at *10 (S.D. Ala. Oct. 8, 2019) (holding that the Sentencing Commission's most recent policy continues to govern and was not overridden by the modification to the compassionate release statute); *United States v. Brummett*, No. 07-103, 2020 U.S. Dist. LEXIS 53006, at *9 (E.D. Ky. Mar. 27, 2020) (concluding that if a prisoner's grounds for relief do not accord with any of the categories of extraordinary and compelling reasons set out by the Commission, they cannot successfully obtain compassionate release).

99. *See Rodriguez*, 424 F. Supp. 3d at 681.

100. *United States v. Stowe*, 2019 U.S. Dist. LEXIS 166170, at *2–3 (S.D. Tex. Sept. 25, 2019) (citing *Dillon v. United States*, 560 U.S. 817, 827 (2010)).

101. *Brown*, 411 F. Supp. 3d at 451.

102. *See Rodriguez*, 424 F. Supp. 3d at 681.

103. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.4 (U.S. SENT'G COMM'N 2018).

statements.[104] All courts need to do when defendants argue that they are eligible for a sentence reduction under any of these criteria is to analyze whether the facts of the case match up with any of the enumerated categories.[105]

The more interesting and controversial question is whether sentence reductions for defendants who cannot satisfy any of the criteria set out by the Sentencing Commission can nevertheless be *consistent* with applicable policy statements of the Commission. As a reminder, Congress gave the Sentencing Commission the authority to "describe what should be considered extraordinary and compelling reasons for sentence reduction."[106] This statutory grant of authority includes the authority to describe "criteria to be applied and a list of specific examples."[107]

However, Congress never stated that the Sentencing Commission has the *sole* authority for defining what can be considered "extraordinary and compelling reasons for sentence reduction" under the compassionate release statute.[108] The statutory grant of authority simply provides that the Commission should publish policy statements describing what *should* be considered "extraordinary and compelling reasons."[109] The statute does not grant the Commission the authority to describe what *cannot* be considered "extraordinary and compelling reasons," and the statutory grant of authority does not extend to setting out an exhaustive definition of the term.[110] If Congress wanted to give the Commission the *sole* authority for *defining* "extraordinary and compelling reasons," it certainly could have included language indicating that.[111]

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104. *See id.*

105. *See, e.g.*, *United States v. Ebbers*, 432 F. Supp. 3d 421, 428 (S.D.N.Y. 2020) (stating that whether a defendant is experiencing a medical condition warranting compassionate release is a fact-intensive analysis); *United States v. Rivernider*, No. 10-cr-222, 2020 U.S. Dist. LEXIS 21292, at *13–15 (D. Conn. Feb. 7, 2020) (discussing family circumstances); *United States v. Dusenbery*, No. 91-cr-291, 2019 U.S. Dist. LEXIS 199502, at *7 (N.D. Ohio Nov. 18, 2019) (discussing the age and family circumstances of the defendant).

106. 28 U.S.C. § 994(t).

107. *Id.*

108. *See id.*

109. *Id.*

110. *See id.*

111. In other statutes, Congress *has* included this language to indicate that an organization has *sole authority*, supporting the conclusion that it did not intend to grant *sole authority* to the Sentencing Commission in this instance. *See, e.g.*, 28 U.S.C. § 629(a) ("The purpose of the Foundation shall be to have *sole authority* to accept and receive gifts of real and personal property and services made for the purpose of aiding or facilitating the work of the Federal Judicial Center." (emphasis added)); 20 U.S.C. § 80q-3(c) ("[T]he Board of Trustees shall have the *sole authority* to . . . ." (emphasis added)); 7 U.S.C. § 1639r(b) ("[T]he Secretary shall have *sole authority* to promulgate Federal regulations and guidelines that relate to the production of hemp, including Federal regulations and

This position, however, is not universally accepted by the district courts. For instance, some courts have concluded that the Sentencing Commission, not the judiciary, ought to determine what reasons are "extraordinary and compelling" and warrant a sentence reduction.[112] At least one court even went so far as to claim that there is "*express* Congressional intent that the Sentencing Commission, not the judiciary, determine what constitutes an appropriate use of the 'compassionate release' provision."[113] However, the problem with this argument is that there is no *express* congressional intent that it would be inappropriate for the judiciary to independently determine whether circumstances warrant compassionate release. As already stated, Congress did not *expressly* provide that the Sentencing Commission's policy statements foreclose any independent evaluation of "extraordinary and compelling" reasons by judges.[114] It would also be strange for Congress not to include such a limitation on judicial discretion in the very act in which it authorizes compassionate release, particularly given that limiting judicial discretion was one of the primary goals of the act.[115] The position that Congress intended to limit judicial discretion in this way depends on reading such limitations into the statute.

Even if there was reason to think that the Commission *did* have sole authority for defining "extraordinary and compelling reasons," the language in its policy statements indicates that its list of "extraordinary and compelling" circumstances is not meant to be exhaustive. Before the policy statement lists specific "extraordinary and compelling" circumstances, it states that "extraordinary and compelling reasons exist under any of the circumstances set forth."[116] This language is not exclusive. The Commission notably did not state that "extraordinary and compelling reasons" cannot exist under any other circumstances.[117] The Commission also clearly contemplated the existence of additional "extraordinary and compelling" circumstances, as it explicitly allowed the Director of the Bureau of Prisons to determine "extraordinary and

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guidelines that relate to the implementation of sections 1639p and 1639q of this title." (emphasis added)).

112. *See, e.g.*, *United States v. Willingham*, No. CR 113-010, 2019 U.S. Dist. LEXIS 212401, at *4 (S.D. Ga. Dec. 10, 2019) (stating that courts are required to abide by policy statements promulgated by the Sentencing Commission); *United States v. Ebbers*, 432 F. Supp. 3d 421, 427 (S.D.N.Y. 2020) (Congress did not revise that statute's substantive text or alter the Sentencing Commission's authority to define "extraordinary and compelling reasons.").

113. *Willingham*, 2019 U.S. Dist. LEXIS 212401, at *4 (emphasis added).

114. *See* 28 U.S.C. § 994(t).

115. *See* 18 U.S.C. § 3582(c) (imposing limitations on the court's discretionary ability to modify sentencing).

116. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1 (U.S. SENT'G COMM'N 2018).

117. *See id.*

compelling" reasons "other than" the ones outlined in its policy statement.[118] The only limitation the Commission put on "extraordinary and compelling reasons" is one that Congress already put in force. Namely, that "rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason."[119] As with the congressional grant of authority, if the Commission wanted to limit courts in their ability to independently evaluate whether "extraordinary and compelling reasons" exist in any particular case, it could have included such language in its policy statements.[120]

Finally, as the next section illustrates, Congress intended to increase the use of compassionate release for federal prisoners.[121] The Sentencing Commission is unable to take notice of Congress's intent and amend the guidelines, as it currently lacks a quorum to do so.[122] The Commission needs four voting commissioners in order to amend the Guidelines (including the policy statements regarding compassionate release). However, it only has two as of the time of writing this Comment.[123] Courts should not let the inability of the Sentencing Commission to update its policy statement prevent them from doing as Congress intended—increase the use of compassionate release.

C. Congressional Intent[124]

Congress modified the language to the compassionate release statute because it intended federal courts to grant sentence reductions in

118. *Id.* § 1B1.13 cmt. n.1(D).

119. *Id.* § 1B1.13 cmt. n.3.

120. In the past versions of the Sentencing Guidelines, the Commission used language limiting factors that federal courts can consider in various contexts. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 5K2.0(d) (U.S. SENT'G COMM'N 2018) ("[T]he court may not depart from the applicable guideline range based on any of the following circumstances . . . ."). If the Commission wanted to limit the court's discretion in this instance, it could have included language to the effect that courts may not consider circumstances not listed in the policy statement in granting compassionate release. The fact that it did not include such language illustrates that it did not wish to limit the court's discretion in this way. *But see United States v. Rodriguez*, 424 F. Supp. 3d 674, 681 (N.D. Cal. 2019) (stating that the Sentencing Commission limited extraordinary and compelling reasons to the four scenarios it set out in its policy statement).

121. *See United States v. Brown*, 411 F. Supp. 3d 446, 449 (S.D. Iowa 2019) ("Congress unequivocally said it wishes to '[i]ncreas[e] the [u]se . . . of [c]ompassionate [r]elease' by allowing district courts to grant petitions 'consistent with *applicable* policy statements' from the Sentencing Commission." (citing 18 U.S.C. § 3582(c)(1)(A))).

122. *See Brown*, 411 F. Supp. 3d at 449 ("[T]he Commission—unable to take any official action—has not made the policy statement for the old regime applicable to the new one.").

123. *Id.* at 449 n.1.

124. Portions of this argument regarding the congressional intent underlying the compassionate release statute are adapted from a sample compassionate release brief

circumstances beyond those initially contemplated by the Bureau of Prisons and the Sentencing Commission. The title of the act evidences this intent.[125] The full title of the FIRST STEP Act is the "Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act."[126] From that title, Congress intended for provisions of the Act to govern the *release* of incarcerated individuals. Furthermore, the subtitle of the amendment to compassionate release is "*Increasing* the Use and Transparency of Compassionate Release."[127] District courts can most effectively increase the use of compassionate release if previous determinations of the Sentencing Commission and the Bureau of Prisons do not constrain their decision-making.[128]

The legislative history of the compassionate release statute also implies that federal courts have relatively broad authority under that statute. Congress first enacted the compassionate release provision in 18 U.S.C. § 3582 as part of the Sentencing Reform Act of 1984.[129] In passing the Sentencing Reform Act, Congress set out to create a restructured sentencing system for federal courts.[130] However, Congress did not intend to completely remove judicial discretion in sentencing decisions.[131] Instead, the Sentencing Guidelines were meant to "guide" judges in making decisions on the appropriate sentences.[132] Judges were allowed to deviate from the guidelines in "appropriate" cases.[133]

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drafted by Shon Hopwood. For a sample brief, see Shon Hopwood, *Sample Brief for Compassionate Release Under 18 U.S.C. 3582(c)(1)(A)*, FEDERAL DEFENDERS OF NEW YORK (June 27, 2020), https://federaldefendersny.org/pdfs/2020.05.11%20CLE/Clausen%20CR.pdf [https://perma.cc/QR3R-8BJ4].

125. *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 462 (1892) ("Among other things which may be considered in determining the intent of the legislature is the title of the act."); *see also Brown*, 411 F. Supp. 3d at 450 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998)) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.").

126. First Step Act of 2018, Pub. L. No. 115-391.

127. *Id.* (emphasis added); *see also Brown*, 411 F. Supp. 3d at 450–51 (discussing how the title can be "especially valuable" in evaluating Congress's intent in light of the Bureau of Prison's long and criticized history of rarely granting compassionate release petitions); *United States v. Ebbers*, 432 F. Supp. 3d 421, 430 (S.D.N.Y. 2020) ("Congress has made the legislative judgment to increase the use of compassionate release. The section's title, as already noted, unambiguously states as much.").

128. *See Brown*, 411 F. Supp. 3d at 450–51 ("Therefore, the only way direct motions to district courts would increase the use of compassionate release is to allow district judges to consider the vast variety of circumstances that may constitute 'extraordinary and compelling.'").

129. Sentencing Reform Act of 1984, 18 U.S.C. § 3582.

130. S. Rep No. 98-225, at 52–53 (1983).

131. *Id.* at 51.

132. *Id.*

133. *Id.* at 51–52.

At several points, the Senate Committee on the Judiciary stressed the fact that sentencing decisions should be the sole province of judges.[134] With the abolishment of parole, Congress decided that compassionate release would enable *courts* to decide if there was a justification for granting reduced sentences on a case-by-case basis.[135] The Senate Committee explicitly stated that "there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances."[136] Furthermore, the Committee stated that these "unusual cases" would include "cases of severe illness" and "cases in which *other* extraordinary and compelling circumstances justify a reduction of an unusually long sentence."[137] The Senate Committee evidently contemplated additional extraordinary and compelling circumstances warranting sentence reductions beyond illness. Thus, even before the First Step Act modified the compassionate release statute, Congress intended for *judges* to make key sentencing decisions, not the Sentencing Commission, which was merely established to guide judicial discretion. Congress also intended for judges to exercise their discretion in granting compassionate release even in cases where the prisoner is not suffering from terminal illness.[138]

The circumstances surrounding the application of compassionate release leading up to the First Step Act further clarify Congress's intent in amending the compassionate release statute. As outlined above, the Sentencing Commission, pursuant to a congressional directive, set out several examples of "extraordinary and compelling" circumstances.[139] However, the discretionary decision to file motions for compassionate release was vested with the Bureau of Prisons.[140] In 2013, the Department of Justice issued a report criticizing how the Bureau of Prisons managed its discretionary authority under the compassionate release statute.[141] The Office of the Inspector General concluded that the "compassionate release program has been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided."[142] The Sentencing Commission then amended its policy statement, encouraging

134. *See, e.g.*, *id.* at 54 ("[S]entencing should be within the province of the judiciary.").

135. *Id.* at 56.

136. *Id.* at 55.

137. *Id.* (emphasis added).

138. *Id.* at 55–56.

139. *See supra* notes 89–91 and accompanying text.

140. *See supra* note 92 and accompanying text.

141. U.S. DEP'T OF JUST. OFF. OF THE INSPECTOR GEN. EVALUATION & INSPECTIONS DIV., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM (2013).

142. *Id.* at i.

the Director of the Bureau of Prisons to file sentence reduction motions for prisoners who met the Commission's enumerated criteria.[143]

Congress apparently wished to correct the inability of eligible prisoners to receive compassionate release and allowed such prisoners to bypass the Bureau of Prisons and file motions directly with courts. Courts assume that, when Congress legislates, it does so with the full knowledge of how agencies have interpreted and implemented earlier versions of a statute.[144] Instead of implicitly approving of the approach to compassionate release taken by the Bureau of Prisons and the Sentencing Commission, Congress enacted a statute allowing prisoners to make their case for compassionate release directly to courts.[145] Congress clearly intended its modification of the statute's language to result in more sentence reductions under the compassionate release statute. Following this clear indication of congressional intent, courts now have the judicial authority and discretion to grant sentence reductions for "extraordinary and compelling reasons" beyond those originally contemplated by the Sentencing Commission and the Bureau of Prisons, and such courts are not bound by guidance published by these agencies.

III. THE GOALS OF PUNISHMENT

Even if a court finds that "extraordinary and compelling" reasons warrant a sentence reduction in a particular case, it is not required to grant such a reduction.[146] Additional requirements for compassionate release are that the individual "is not a danger to the safety of any other person or the community"[147] and that the sentencing factors in 18 U.S.C. § 3553(a) support a reduction.[148]

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143. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.4 (U.S. SENT'G COMM'N 2018).

144. *See United States v. Brown*, 411 F. Supp. 3d 446, 450 (S.D. Iowa 2019) (citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000)).

145. *Id.* at 451. The court noted that, specifically, Congress sought to overturn the Bureau of Prisons' decision in three ways. First, the amended statute now requires the Bureau of Prisons to notify terminally ill prisoners of their ability to petition the Bureau of Prisons. Second, the statute requires the Bureau of Prisons to report to Congress the frequency and reasoning of its compassionate release decisions. Third, the statute allows prisoners to motion district courts directly for compassionate release even after the Bureau of Prisons Director denies their petition. *Id.*

146. 18 U.S.C. § 3582(c)(1)(A) ("[T]he court . . . *may* reduce the term of imprisonment." (emphasis added)).

147. *See* § 3582(c)(1)(A)(ii); *see also* U.S. SENT'G GUIDELINES MANUAL § 1B1.13(2) (U.S. SENT'G COMM'N 2018).

148. *See* § 3582(c)(1)(A). The statute provides that a federal court can grant a sentence reduction "after considering the factors set forth in section 3553(a) to the extent that they are applicable." *Id.* While the statute does not explicitly provide that consideration

Consideration of the sentencing factors in Section 3553(a) will often weigh in favor of granting sentence reductions. Section 3553(a) provides that sentencing courts shall impose a sentence "not greater than necessary" to comply with the purposes of punishment set forth by Congress.[149] Because of this requirement, courts considering compassionate release have good reason to reduce sentences when there is reason to believe that a lengthier sentence would not promote any penal goals. The argument in this section proceeds in two steps. First, there are compelling reasons to be skeptical that lengthier sentences, in general, further the consequentialist penal goals codified in Section 3553(a), particularly deterrence. Second, I attempt to elucidate what may be meant when the statute indicates that courts must consider the need for the sentence imposed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense . . . ."[150] Finally, with that discussion as background, I provide examples of circumstances in which district courts may find that "extraordinary and compelling" reasons warrant compassionate release. I argue that the Section 3553(a) sentencing factors will generally support sentence reductions for individuals in those circumstances.

A. Deterring from Crime & Protecting the Community

In both imposing an initial sentence and considering a prisoner's compassionate release motion, federal courts are required to consider the need for the imposed sentence to "afford adequate deterrence to criminal conduct"[151] and "protect the public from further crimes of the defendant."[152] Intuitively, deterrence is attractive as a justification for punishment because it relies on common-sense observations of human behavior.[153] For instance, one assumption underlying the value of deterrence as a sentencing factor is that a criminal justice system can effectively reduce crime by intimidating potential offenders through imposing relatively lengthy terms of incarceration.[154] Even the *existence* of a criminal justice system likely deters people from committing

of the factors in Section 3553(a) must *support* a sentence reduction, I assume that a court will not grant a sentence reduction unless the factors do, in fact, support one.

149. 18 U.S.C. § 3553(a).

150. § 3553(a)(2)(A).

151. § 3553(a)(2)(B).

152. § 3553(a)(2)(C).

153. JAMES Q. WILSON, THINKING ABOUT CRIME 109 (Basic Books 2013) (1975) ("To assert that 'deterrence doesn't work' is tantamount to either denying the plainest facts of everyday life or claiming that would-be criminal are utterly different from the rest of us.").

154. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 7 (1985).

crimes.[155] However, while the *existence* of criminal laws and the *possibility* of punishment may deter would-be criminal offenders, it is unclear whether matching specific punishments to crimes does serve as an effective deterrent.[156]

1. DETERRENCE SKEPTICISM

There is a distinction between specific or special deterrence, which seeks to discourage criminal offenders from committing future crimes by instilling fear of receiving additional penalties, and general deterrence, which seeks to discourage would-be criminal offenders by instilling a fear of receiving similar penalties that were given to others.[157] District courts have routinely denied compassionate release motions after concluding that a reduced sentence would undermine the need for the sentence to deter people from crime.[158] However, there are compelling reasons why courts, in particular, should be skeptical that they can effectively evaluate whether specific terms of incarceration are likely to serve any deterrence value.

One fact justifying such skepticism is that not much is known about the general deterrent effects of attaching specific penalties to criminal

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155. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 951 (2003).

156. *Id.* at 976 ("While deterrence may be a good reason for having a criminal justice system that punishes violators, it is at best ineffective as a guide for distributing liability and punishment within that system."); *see also* Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 CRIME & JUST. 279, 286 (2008) (noting that a sizable literature demonstrates that ordinary citizens are largely uninformed about the operation of the criminal justice system, the content of the criminal law, and the severity of punishments).

157. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70–71 (2005); *see also* Robinson & Darley, *supra* note 155, at 955 ("'Special deterrence' is the degree to which a punishment, once experienced, reduces the likelihood of the person who experienced the punishment risking a similar punishment by offending again in the future.").

158. *See, e.g.*, *United States v. Israel*, No. 05 CR 1039, 2019 U.S. Dist. LEXIS 211974, at *29–30 (S.D.N.Y. Dec. 4, 2019) ("The Government argues that reducing Israel's sentence would also undermine the goal of general deterrence, which it views as especially important in white collar cases. While this Court has on occasion expressed the view that general deterrence does not rank as high in my sentencing priorities as do other 3553(a) factors, the Government's argument is not, in this particular instance, wrong—again, given the magnitude of Israel's crime and the hundreds of millions of dollars in losses that he caused. If someone can obtain almost a half a billion dollars under false pretenses, leave his victims bereft of over $300 million, and get out of prison after just 11 years, any impact that the sentence might have on others who might be inclined to commit crimes would likely be ameliorated."). *But see United States v. Romero*, No. EP-13-CR-01649-4, 2020 U.S. Dist. LEXIS 9847, at *3–5 (W.D. Tex. Jan. 21, 2020) (finding that a defendant's past criminal history and financial status did not justify believing that the defendant was likely to commit crimes in the future).

conduct.[159] In order to adequately test whether relatively long terms of imprisonment are effective as general deterrents, we must be able to measure the extent to which crime rates are affected by changes in penalties.[160] In other words, we would have to be able to measure whether increasing the criminal sanction for particular crimes would reduce instances of those crimes. To do this effectively, researchers would have to isolate threats of imprisonment as a cause of individuals restraining from criminal behavior. However, crime rates are affected not only by the threat of criminal penalties but also by various other socioeconomic and demographic factors.[161] Furthermore, it is difficult, if not impossible, to know the true extent of crime and how many people would have committed crimes had there been no threat of punishment.[162] When research *is* done on the general deterrent effect of criminal penalties, it seems that would-be offenders are more likely to be deterred by the *probability* of punishment than its *severity*.[163]

Research on the specific deterrent value of criminal penalties seems to be equally inconclusive. Few studies have demonstrably shown that increasing the length of criminal sentences consistently deters criminal offenders from committing future crimes.[164] Some studies have even demonstrated that more prolonged terms of incarceration do not reliably deter offenders from subsequent involvement in criminal conduct and in fact may even *increase* recidivism rates.[165]

Deterrence theories also assume that would-be criminal offenders behave as rational actors.[166] Three conditions must be satisfied in order for specific terms of imprisonment to successfully deter would-be offenders.[167] First, the potential offender must know what sentences attach

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159. VON HIRSCH, *supra* note 154, at 13.

160. *Id.* at 32.

161. *Id.* at 13; *see also* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 39 (1976).

162. Johs Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 176, 180 (1952–53).

163. Frase, *supra* note 157, at 72.

164. *See* WILSON, *supra* note 153, at 121.

165. *See* Ellen A. C. Raaijmakers, Thomas A. Loughran, Jan W. de Keijser, Paul Nieuwbeerta & Anja J. E. Dirkzwager, *Exploring the Relationship Between Subjectively Experienced Severity of Imprisonment and Recidivism: A Neglected Element in Testing Deterrence Theory*, 54 J. RSCH. CRIME & DELINQ. 3, 18–19 (2017); Jalila Jefferson-Bullock, *Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders*, 79 OHIO STATE L.J. 937, 945–46 (2018). *But see* WILSON, *supra* note 153, at 135 ("In general, there is no evidence that the prison experience makes offenders as a whole more criminal, and there is some evidence that certain kinds of offenders (especially certain younger ones) may be deterred by a prison experience."); WILSON, *supra* note 153, at 111 ("The best studies of deterrence . . . provide evidence that deterrence works.").

166. *See* Robinson & Darley, *supra* note 155, at 950.

167. *Id.* at 953.

to criminal offenses.[168] Second, the potential offender must "perceive the cost of violation as greater than the perceived benefit."[169] Third, the potential offender "must be able and willing to bring such knowledge to bear on his conduct decision at the time of the offense."[170] However, the circumstances of individuals receiving such sanctions for criminal behavior are largely "characterized by delay, uncertainty, and ignorance," characteristics that all undermine the ability for these conditions to be met.[171]

First, potential offenders commonly do not know the specific penalties which attach to specific criminal offenses.[172] This is especially likely to be true in the federal criminal justice system, which plays host to many intractable legal rules governing sentencing decisions.[173] An illuminating example of how convoluted some federal criminal law rules can be with regard to applicable criminal penalties is the recent upsurge in rules governing recidivism statutes. The Armed Career Criminal Act of 1984 (ACCA) is such a statute.[174] Defendants convicted of being a felon in possession of a firearm under the ACCA face more severe punishment if they have three or more previous convictions for a "violent felony" or "serious drug offense."[175] Several times, the Supreme Court has evaluated whether criminal convictions under state laws count as violent felonies under the ACCA.[176] And on one of those occasions, the Supreme Court held that part of the definition of "violent felony" was so vague that it was unconstitutional.[177] These same species of arguments occur in the context of deciphering whether state drug offenses qualify as "serious drug offenses" under federal law.[178] The complex, and arguably nonsensical,

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168. *Id.*
169. *Id.*
170. *Id.*
171. WILSON, *supra* note 153, at 106.
172. Robinson & Darley, *supra* note 155, at 953.
173. *See infra* notes 176–178.
174. 18 U.S.C. § 924(e).
175. § 924(e)(1).
176. *See, e.g.*, *James v. United States*, 550 U.S. 192 (2007) (holding that Florida's offense of attempted burglary is a "violent felony"); *Begay v. United States*, 553 U.S. 137 (2008) (holding that New Mexico's offense of driving under the influence is not a "violent felony"); *Chambers v. United States*, 555 U.S. 122 (2009) (holding that Illinois's offense of failure to report to a penal institution is not a "violent felony"); *Sykes v. United States*, 564 U.S. 1 (2011) (holding that Indiana's offense of vehicular flight from a law-enforcement officer is a crime of violence).
177. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).
178. *See, e.g.*, *Caffie v. Krueger*, No. 17-cv-00487, 2019 U.S. Dist. LEXIS 30153 (S.D. Ind. Feb. 26, 2019). *Caffie* is one of the most confusing examples. In this case, Caffie argued that his prior cocaine offenses in Illinois were not "serious drug offenses" because Illinois's definition of "cocaine" is broader than the federal definition of "cocaine" as the Illinois definition included positional isomers. *Id.* at *3. Caffie cited to a case in the Ninth Circuit in which the court held that "the California definition of methamphetamine was

rules entangled with federal recidivism statutes constitute just one example supporting the proposition that criminal offenders are unlikely to know most, if any, of the legal rules which govern the sanctions that attach to criminal conduct.[179]

In part due to this lack of knowledge, potential offenders also "do not perceive an expected cost for a violation that outweighs the expected gain" or "make rational self-interest choices."[180] This disconnect between the consequences of committing crimes and the ability of criminal offenders to let those consequences guide their behavior significantly undermines any deterrent value that lengthy prison sentences may have.[181] Also, the longer a prison term goes, the more acclimated to prison life a prisoner is likely to become.[182] Because people often become more comfortable in otherwise adverse situations with time, if an individual is unlikely to be deterred by a relatively short term of imprisonment, incrementally increasing their prison sentence is unlikely to cause so much more harm to the prisoner that it would motivate them to commit fewer crimes in the future.[183]

None of the preceding discussion is meant to imply that courts should not consider the value that imposed sentences would have in either deterring criminal offenders or the general public. This Comment does not take a position on whether deterrence should be removed as a sentencing factor in Section 3553(a). There are likely some factors that predict the likelihood of recidivism and the deterrence value of criminal sanctions

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overly broad compared to the federal definition because California law includes 'optical and geometrical isomers,' whereas the Controlled Substances Act includes only optical isomers." *Id.* (citing *Lorenzo v. Sessions*, 902 F.3d 930, 934–35 (9th Cir. 2018)). If any readers are confused about all of this talk of positional, optical, and geometrical isomers, consider for a moment whether it is reasonable to believe that the average drug offender would be aware of what these terms mean. Furthermore, because an understanding of these terms appears to be relevant in ascertaining the likely criminal penalties of federal crimes with recidivism provisions, we have good reason to believe that likely criminal offenders have a minimal understanding of what the likely penalties are of their criminal conduct in this context.

179. Robinson & Darley, *supra* note 155, at 954 ("Potential offenders typically do not read law books and their ability to learn the law, even indirectly through hearing or reading of particular cases, is limited by the fact that the legal rule is just one of hundreds of variables that influence a case disposition. To divine the operative liability rule, hidden as it is under the effects of all the other variables, would require both a higher number of reported cases than those to which potential offenders are exposed and a mind for complex calculation beyond that which is reasonable to expect.").

180. *Id.* at 953; *see also* WILSON, *supra* note 153, at 106 (stating that "some scholars contend that a large fraction of crime is committed by persons who are so impulsive, irrational, or abnormal that even if there were no delay, uncertainty, or ignorance attached to the consequences of criminality, we would still have a lot of crime.").

181. Robinson & Darley, *supra* note 155, at 955.

182. *Id.*

183. *Id.*

more successfully than others.[184] If a court believes that factors in a particular case strongly indicate that a prisoner is likely to re-offend if released, it should certainly consider those factors when evaluating whether compassionate release is appropriate.

However, there are cases in which deterrence does not seem to support maintaining the original sentence, even if we assume that we can accurately track the consequences of imposing or upholding criminal sanctions. The Sentencing Commission has identified the age of the defendant as a potentially "extraordinary and compelling" circumstance but never treats age alone as a factor justifying compassionate release.[185] However, courts should be particularly aware of the prisoner's age when evaluating compassionate release, particularly in a determination of whether a reduced sentence would support the goal of deterring people from crime.[186] Courts should, furthermore, take judicial notice of the fact that criminal offenders seem to "age out" of committing crimes as they get older.[187] This is particularly true for the elderly population, as relatively few people over the age of fifty ever commit a subsequent crime.[188]

This is not to suggest that courts should automatically grant compassionate release to prisoners the moment they turn 50 years of age. However, the aging prisoner population is relatively large and continues to grow.[189] Furthermore, aging prisoners are more susceptible to chronic

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184. *See, e.g.*, MCCOY & BURLINGAME, *supra* note 2, at 29 (claiming that some studies have found that inmates who enroll in college courses during their time in prison have a relatively low reincarceration rate). Some scholars have criticized using recidivism rates as a stand-alone metric. *See, e.g.*, Cecilia Klingele, *Measuring Change: From Rates of Recidivism to Markers of Desistance*, 109 J. CRIM. L. & CRIMINOLOGY 769 (2019). Klingele proposes that the criminal justice system should use the more-nuanced metric of desistance, which is "the process by which individuals move from a life that is crime-involved to one that is not." *Id.* at 769. Desistance "is evidenced not just by whether a person re-offends but also by whether there are increasing intervals between offenses and patterns of de-escalating behavior." *Id.*

185. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1 (An extraordinary and compelling reason exists if "[t]he defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment.").

186. *See* Holland, Prost, Hoffmann & Dickinson, *supra* note 35, at 619.

187. WILSON, *supra* note 153, at 129 (discussing a "well-known tendency" of people to "mature out of crime" in their thirties).

188. MCCOY & BURLINGAME, *supra* note 2, at 97 ("In fact, the recidivism rate of such people in Ohio was zero, and in Pennsylvania it was only about 1.5 percent. This compares to an overall five-year recidivism rate of roughly 76 percent."); *see also* Holland, Prost, Hoffmann & Dickinson, *supra* note 35, at 610 ("[R]ecidivism rates among older adult persons (50 years or older) hover near 10%, compared with persons released under the age of 21 years old at 35.5%.").

189. Between 1999 and 2016, the amount of older prisoners aged 55 or older increased by nearly 280%. Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, PEW (Feb. 20, 2018), https://www.pewtrusts.org/en/research-and-

medical conditions, leading to an increased financial cost for their care.[190] The cost of incarcerating prisoners 55 or older with chronic or terminal medical conditions is two to three times the cost of incarcerating other prisoners.[191] In the federal system, the costs of incarcerating aging prisoners are approximately 8% higher than for younger adults and account for roughly 19% of the Bureau of Prisons budget.[192] Once an elderly prisoner no longer poses a threat of committing future crimes, specific deterrence considerations no longer support keeping them imprisoned, particularly when we take the financial costs of housing such prisoners into consideration.[193] Thus, for those elderly prisoners that have satisfied the mandatory minimum sentence attached to their crime, courts should seriously consider granting a reduced sentence under the compassionate release provision.[194]

2. IMPRISONMENT AND EXTENDED SUPERVISION: PROTECTING THE COMMUNITY

District courts are also required to consider the need for the imposed sentence "to protect the public from further crimes of the defendant."[195] Imprisonment successfully protects the public because it deprives

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analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs [https://perma.cc/4LUK-A2P5].

190. *Id.*

191. *Id.*

192. Holland, Prost, Hoffmann & Dickinson, *supra* note 35, at 609 ("Average costs of incarcerating aging inmates within federal prisons are 8% higher than costs for younger adults (U.S. Department of Justice, 2016). These costs were estimated as roughly 19% of the entire Federal Bureau of Prisons (BOP) budget in 2013."); *see also* Wylie, Knutson & Greene, *supra* note 4, at 217 ("Because of the additional costs and resources required to care for older and infirmed inmates, it is estimated that each inmate costs approximately 8% to 13% more per year than a younger inmate.").

193. *See* Jefferson-Bullock, *supra* note 165, at 977. Jefferson-Bullock also argues that "[o]nce an offender no longer poses a threat to society, *general* deterrence considerations can no longer be justified." *Id.* (emphasis added).

194. One possible counterargument to releasing members of the elderly population is that older former prisoners are vulnerable to severe and costly social and medical challenges. These challenges include housing instability, poor employability, and multiple chronic health conditions. Brie A. Williams, James S. Goodwin, Jacques Baillargeon, Cyrus Ahalt & Louise C. Walter, *Addressing the Aging Crisis in U.S. Criminal Justice Health Care*, 60 J. AM. GERIATRICS SOC'Y 1150, 1150 (2012). This concern does not support categorically excluding members of the elderly population from the possibility of receiving compassionate release. Whether a prisoner would be able to take care of himself once released is just one factor that a court may consider when evaluating compassionate release. If a court determines that a prisoner would likely not be able to take care of himself when released, this may justify keeping him imprisoned for the duration of his original sentence.

195. 18 U.S.C. § 3553(a)(2)(C).

criminals of the ability to commit offenses against citizens or the public.[196] However, imprisonment only works to protect the public and reduce the overall crime rate if three conditions are met: "some offenders must be repeaters, offenders taken off the streets must not be immediately and completely replaced by new recruits, and prison must not increase the post-release criminal activity of those who have been incarcerated sufficiently to offset the crimes prevented by their stay in prison."[197]

Unlike deterrence, the observable value of which depends on isolating criminal sanctions as a motivation for behavior,[198] there is evidence that imprisoning individuals does successfully protect the public from crime.[199] With that said, "longer sentences [should] be given primarily to those who, when free, commit the most crimes."[200] Judges should make this determination on a case-by-case basis. If a prisoner can establish that they have "extraordinary or compelling" reasons which warrant compassionate release, courts can evaluate the particular case and whether the prisoner is likely to commit future crimes or be a danger to society.[201] The compassionate release statute also empowers district courts to impose a term of supervised release with conditions that can be used to

196. WILSON, *supra* note 153, at 133.

197. *Id.* at 133–34.

198. *See infra* notes 160–64 and accompanying text.

199. Because many criminal offenders do re-offend, separating those offenders from the general public will likely protect members of the public from a certain amount of criminal activity. *See* WILSON, *supra* note 153, at 134 (stating that "a significant fraction" of ex-convicts "are rearrested for new offenses within a relatively brief period" of their release from prison).

200. *Id.* at 141–42.

201. James Q. Wilson notes seven factors which, "taken together, [are] highly predictive of a convicted person being a high-rate offender: he (1) was convicted of a crime while a juvenile (that is, before age sixteen), (2) used illegal drugs as a juvenile, (3) used illegal drugs during the previous two years, (4) was employed less than 50 percent of the time during the previous two years, (5) served time in a juvenile facility, (6) was incarcerated in prison more than 50 percent of the previous two years, and (7) was previously convicted for the present offense." *Id.* at 142–43. However, Wilson also notes that while certain factors may enable us to identify a group of offenders who are especially likely to re-offend, they may lead to substantial errors if used to identify any particular individual as a likely re-offender. *Id.* at 143. The ability to predict criminal behavior is not without its critics. John Monahan identifies three common criticisms of predicting violent behavior: "(1) that it is empirically impossible to predict violent behavior; (2) that, even if such activity could be forecast and averted, it would . . . violate the civil liberties of those being predicted; and (3) that even if accurate prediction [was] possible without violating civil liberties, psychiatrists and psychologists should decline to do it, since it is a social control activity at variance with their professional helping role." JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 27 (SAGE Libr. Soc. Rsch., Volume No. 114, 1981).

protect the public from possible future criminal activity on the part of the defendant.[202]

B. Proportionality, Justice, and Respect for the Law

Courts evaluating compassionate release motions must also consider "the nature and circumstances of the offense,"[203] "the history and characteristics of the defendant,"[204] and the need for the sentence imposed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."[205] That courts consider the need for the imposed sentence to reflect the seriousness of the crime and provide just punishment for the offense reflects the importance of the principle of proportionality.[206] The fundamental intuition underlying the principle of proportionality is that sentences imposed ought to be *proportional* to the crime committed.[207]

The concept of proportionality can be divided into two further concepts. Quantitative proportionality "concerns the temporal length of the sentence imposed."[208] Qualitative proportionality, on the other hand, "concerns the methods used to punish the individual and the conditions under which the punishment is imposed."[209] In the incarceration context, qualitative proportionality "pertains to the conditions of imprisonment, and contemplates circumstances, such as inadequate medical care, overcrowding, shortage of educational opportunities, and the absence of rehabilitative services."[210] In other words, courts adhere to the principle of proportionality in determining an appropriate term of imprisonment when they consider both the length of the sentence and how harsh imprisonment is likely to be for the individual being punished.

As a fundamental matter, Congress sets mandatory minimums for many criminal offenses.[211] These mandatory minimums can be seen as an expression by Congress on the minimum amount of prison time necessary

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202. *See* 18 U.S.C. § 3582(c)(1)(A) (indicating that "the court . . . may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment.").

203. 18 U.S.C. § 3553(a)(1).

204. *Id.*

205. § 3553(a)(2)(A).

206. VON HIRSCH, *supra* note 1, at 2.

207. *Id.*

208. John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO STATE L.J. 71, 71 (2010).

209. *Id.*

210. Jefferson-Bullock, *supra* note 165, at 979.

211. CHARLES DOYLE, CONG. RSCH. SERV., R45074, MANDATORY MINIMUM SENTENCING OF FEDERAL DRUG OFFENSES 2–3 (2018).

to express opprobrium to people convicted of specific crimes.[212] The Sentencing Commission also sets guidelines for courts to consider regarding what sentences are proportional given a variety of factors.[213] However, compassionate release allows judges to re-evaluate whether a term of imprisonment in a particular case remains proportional to the offense.[214]

The principle of proportionality supports granting sentence reductions to aging prisoners.[215] As prisoners age, their quality of life *as* prisoners changes dramatically. Prisoners often require assistance doing daily tasks, such as dressing, eating, moving around the facility, and using the bathroom.[216] It also may be difficult for older prisoners to do once easy tasks such as "hearing orders, climbing onto top bunks, and standing for count."[217] Thus, invoking the concept of qualitative proportionality, the *quality* of the punishment has changed since the sentence was imposed even if the duration of the sentence remained static. In other words, imprisonment is harsher for some members of the aging population than it is for young prisoners.[218] In extraordinary cases, this may result in courts concluding that the sentence is so disproportionate as to warrant granting a reduced sentence.

Courts are also required to consider the need for the imposed sentence "to promote respect for the law."[219] If people have respect for the law, they give appropriate consideration to the law in deliberating about how they ought to behave.[220] For the criminal offender, this means reacting appropriately to criminal sanctions. A criminal sanction can be seen as a type of censure.[221] This censure addresses the offender, conveys a message concerning his wrongful conduct, and conveys disapproval of him for committing the wrongful act.[222] A moral response is then expected on the part of the offender, either "an expression of concern, an

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212. Letter from Hon. Robert Holmes Bell, Chair, Comm. on Crim. L. Jud. Conf. U.S., to Hon. Patrick J. Leahy, Chairman, Comm. on Judiciary, U.S. Senate (Sept. 17, 2013).

213. U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A (U.S. SENT'G COMM'N 2018).

214. Jefferson-Bullock, *supra* note 165, at 978.

215. *Id.* at 977.

216. Wylie, Knutson & Greene, *supra* note 4, at 217 (noting that "[p]risons typically lack elevators and ramps necessary for safe movement by less mobile inmates, and often have uneven terrain and narrow pathways that affect ease of mobility.").

217. *Id.*

218. *United States v. Karr*, No. 17-CR-25, 2020 U.S. Dist. LEXIS 27149, at *14, *25 (E.D. Ky. Feb. 18, 2020) ("Each day lasts 24 hours, but each day's toll is not the same.").

219. 18 U.S.C. § 3553(a)(2)(A).

220. *See* Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36, 38 (1977).

221. *See* VON HIRSCH, *supra* note 1, at 10.

222. *Id.*

acknowledgement of wrongdoing, or an effort at better self-restraint."[223] A reaction of indifference would be grounds for criticizing the offender and would also illustrate that the censure did not have the desired effect in promoting respect for the law on the part of the offender.[224]

One reason why we may rely on imprisonment in censuring criminal offenders is that we, as a society, have made the judgment that censure for serious criminal offenses must be accomplished through more serious means than a finding of guilt by a judge or jury.[225] For relatively serious offenses, censure takes the form of terms of incarceration. As people are moral agents, criminal offenders are "capable of taking seriously the message conveyed through the sanction, that the conduct is reprehensible."[226] However, altering the terms of imprisonment imposed "will alter the degree of censure conveyed."[227] One concern, then, is that granting compassionate release will alter the degree of censure conveyed so much that it would undermine respect of the law.

Promoting respect for the law on the part of the general public is crucial as the criminal justice system depends upon the public obeying laws.[228] However, respect for the law is undermined if many people believe that the courts exercise their authority unfairly.[229] Several factors can lead people to think that courts are behaving unfairly.[230] Among them are perceptions of biased decision-making and that authorities are not treating people with dignity and respect.[231]

The concern with promoting respect for the law supports granting sentence reductions in cases where a prisoner would have received a significantly lower sentence if sentenced today.[232] Several district courts have already recognized this fact and have granted compassionate releases in cases where changes to a sentencing range were not made retroactively applicable.[233] Sentencing courts are already required to consider "the need

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223. *Id.*

224. *See id.*

225. *Id.* at 12 (Some argue "that censure (at least in certain social contexts) cannot be expressed adequately in purely verbal or symbolic terms; that hard treatment is needed to show that the disapprobation is meant seriously."). von Hirsch also makes the point that a criminal sanction "is preferred to the purely symbolic response because of its supplementary role as a disincentive." *Id.* at 14.

226. *See id.* at 13.

227. *Id.* at 14.

228. *See* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003).

229. *See id.*

230. *Id.* at 298–99.

231. *Id.* at 298.

232. *E.g.*, *United States v. Redd*, 444 F. Supp. 3d 717, 722–23, 727–28 (E.D. Va. 2020).

233. *See, e.g.*, *id.*; *United States v. Mondaca*, No. 89-CR-0655, 2020 U.S. Dist. LEXIS 37483, at *15–18 (S.D. Cal. Mar. 3, 2020); *United States v. Maumau*, No. 08-cr-

to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[234] However, courts should also be aware that Congress, in changing the sentences attaching to criminal conduct without making those changes retroactive, has the possibility of sending mixed messages by causing people to think that the criminal justice system is treating similarly situated people unfairly.[235] Since punishment is a form of censure, "[b]y punishing one kind of conduct more severely than another, the punisher conveys the message that it is worse—which is appropriate only if the conduct is indeed worse."[236] However, if Congress reduced the sentence available for, say, a drug offense but did not make that change retroactive, then persons sentenced today for the same crime receive a less harsh form of punishment/censure than offenders did before the change. Expressing different levels of censure for the same conduct not only has the potential of causing offenders to believe that the authority doing the censuring does not have moral authority (and so will undermine their respect for the law) but may also undermine the public's perception of fairness in the criminal justice system itself.

CONCLUSION

This Comment argued that district courts have broad authority and discretion in determining whether "extraordinary and compelling" reasons warrant compassionate release. This discretion is not constrained by the Sentencing Commission's policy statements, even though the Sentencing Commission has the authority to describe "extraordinary and compelling" circumstances. Neither Congress nor the Sentencing Commission expressly or implicitly foreclosed courts from determining whether a prisoner's circumstances are "extraordinary and compelling" in a particular instance. Also, Congress clearly intended to increase the use of compassionate release by amending the statute to allow prisoners to file motions on their own behalf in federal court. The most efficient way for

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00758-TC-11, 2020 U.S. Dist. LEXIS 28392, at *17–20 (D. Utah Feb. 18, 2020); *United States v. Urkevich*, No. 03CR37, 2019 U.S. Dist. LEXIS 197408, at *2, *7–8 (D. Neb. Nov. 14, 2019) (granting a reduced sentence because of a change to the statutory sentencing range for a violation of 18 U.S.C. § 924(c)(1)(C)); *United States v. Cantu-Rivera*, Cr. No. H-89-204, 2019 U.S. Dist. LEXIS 105271, at *4 (S.D. Tex. June 24, 2019) (recognizing that the "fundamental change to sentencing policy carried out in the First Step Act's elimination of life imprisonment as a mandatory sentence solely by reason of a defendant's prior convictions" is a factor which contributes to extraordinary and compelling reasons warranting a sentence reduction under § 3582(c)(1)(A)).

234. 18 U.S.C. § 3553(a)(6).

235. *See* VON HIRSCH, *supra* note 1, at 15–16; *see also* Nathaniel W. Reisinger, *Redrawing the Line: Retroactive Sentence Reductions, Mass Incarceration, and the Battle Between Justice and Finality*, 54 HARV. C.R.-C.L. L. REV. 299 (2018).

236. VON HIRSCH, *supra* note 1, at 15–16.

courts to effectuate Congress's intent is to evaluate the entirety of a prisoner's compassionate release motion for themselves, which would include independently determining whether "extraordinary and compelling" reasons exist.

Furthermore, the penal goals of punishment would also support granting reduced sentences in particular instances. While this Comment has not endeavored to explore all of the circumstances which may rise to the level of "extraordinary and compelling" reasons warranting compassionate release, district courts will hopefully continue to recognize their new authority under the compassionate release statute. In turn, district courts analyzing particular cases and opining on them will no doubt inform the jurisprudence of compassionate release going forward.