RELEASING COMPASSION IN THE STATES

Julie B. Cramer

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The First Step Act expanded federal "compassionate release," allowing, for the first time, incarcerated individuals to go directly to the district court to seek release. Since the passage of the First Step Act in 2018, incarcerated individuals no longer must wait for the Bureau of Prisons to recommend their release, a wait that was virtually hopeless considering the Bureau of Prisons recommended release of roughly twenty-one incarcerated people per year, around 0.01% of the federal prison population. Instead, judges have the power to determine sentencing again.

In April 2023, the United States Sentencing Commission, the administrative agency charged with writing policy and guidelines in federal sentencing, released Proposed Amendments—which became effective on November 1, 2023—to its pre-First Step Act Guidelines. These Amendments recognize the judicial response to the First Step Act, which saw the release of thousands of federally incarcerated people over the last four years, a far cry from the infinitesimal amount in the decade before. Importantly, the Amendments instruct that the law is focused on second chances and alternatives to incarceration. The Amendments expand the Sentencing Guidelines for compassionate release by adding categories to "extraordinary and compelling" reasons for release, which are no longer rooted in the narrow view that compassionate release is only available to those close to death or with dire health conditions.

Yet, state compassionate release policies have not seen the same movement even though state prisons are where the vast majority of people are incarcerated and most people in the United States support some form of second-chance policy in criminal sentencing. Of the 1.2 million people incarcerated in the United States, almost 90% of these individuals are incarcerated in the states. Current compassionate release in the states resembles pre-First Step Act federal compassionate release; it is rarely used, it is limited to situations of impending death and dire health, and it remains so complex and nontransparent that even prison management does not know how to use it. There is room in state compassionate release policy to follow what federal sentencing policy has already accomplished. Releasing compassion in the states is imperative as our prison population ages and gets sicker.

This Article argues that states can expand their already-existing compassionate release statutes to evaluate whether a given sentence is still consistent with the goals of sentencing. This Article argues that this can be accomplished in three important ways: (1) shifting sentencing back into the hands of judges; (2) expanding the view of what constitutes compassionate release; and (3) ending limitations on who is eligible for compassionate release.

* Julie B. Cramer is the First Assistant Attorney General in Civil Rights in Colorado where she oversees the Attorney General's investigation and enforcement power in pattern and practice, worker protection and housing protection. Prior to this role, Ms. Cramer was a Visiting Professor of Law at the University of Denver Sturm College of Law where she directed and taught the Criminal Defense Clinic along with Lasch Clinical Teaching Fellow Colleen Cullen. Prior to joining the faculty of DU, Ms. Cramer spent thirteen years as a professor at the UCLA School of Law, where she also taught in the clinical program, co-directing the Criminal Defense Clinic. Ms. Cramer's work focused on indigent criminal defense in both state and federal court as well as post-conviction relief. Ms. Cramer has helped her clients earn gubernatorial pardons and presidential grants of clemency. Ms. Cramer would like to thank her wonderful clinic student and research assistant Teresa Cropper for her invaluable contributions to this Article, as well as her supportive colleagues who read and commented on drafts, Rebecca Aviel, Bernard Chao, Allen Chen, Colleen Cullen, Ingrid Eagly, Meredith Esser, Sam Kamin, Tammy Kuennen, Viva Moffat, Nancy Leong, Laura Rovner, and Laurent Sacharoff.

INTRODUCTION

The First Step Act of 2018 brought awareness across the country that common-sense sentencing reform was long overdue. While federal sentencing reform is an important step towards decarceration, most of the incarcerated people in the United States are locked in state, not federal, prisons. In fact, of the 1.2 million people incarcerated in the United States, almost 90% of these individuals are incarcerated in the states.[1] Fifteen percent of the prison population is fifty-five or older and predominately Black or Latine.[2] Even though most incarcerated people are in state prisons, states struggle to find meaningful avenues to advance criminal-justice reform to decarcerate prison populations. The recent reforms of the First Step Act and the subsequent Amendments to the United States Sentencing Guidelines (the Amendments) promulgated in 2023 by the United States Sentencing Commission (the Commission)[3] offer a viable path whereby states could use their already-existing "compassionate release"[4] schemes to help lend second chances to their prison populations.

In the Amendments to the Sentencing Guidelines,[5] the Commission recognized the need to reevaluate the harsh sentencing scheme of the 1970s, 1980s, and 1990s when the United States saw an explosion in the size of its prison population.[6] In issuing the Amendments, the Commission made the following statement: "Today, we are listening to Congress and the public by increasing first steps toward ***second chances*** . . . . The policies issued today are common-sense ideas that will increase public safety while strengthening our communities."[7]

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1. E. ANN CARSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., PRISONERS IN 2021- STATISTICAL TABLES 6 tbl.1 (Eric Hendrixson ed., 2022) https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf [https://perma.cc/XDX3-K5PM].

2. *Id.* at 15 tbl.7.

3. The current Sentencing Commission was appointed by President Biden in 2022. *See* Nate Raymond, *U.S. Senate Committee Advances Nominees to Restock Sentencing Panel*, REUTERS (July 21, 2022, 3:31 PM), https://www.reuters.com/legal/government/us-senate-committee-advances-nominees-restock-sentencing-panel-2022-07-21/ [https://perma.cc/BB36-D3Z4]. Prior to this appointment, the Sentencing Commission was unable to update sentencing guidelines for nearly four years because they did not have a quorum. *Id.*

4. For a definition and explanation of the term, see *infra* note 84.

5. The Sentencing Commission recently promulgated new amendments in April 2024, which will become effective in November 2024. Press Release, U.S. Sent'g Comm'n, Commission Votes Unanimously to Pass Package of Reforms Including Limit on Use of Acquitted Conduct in Sentencing Guidelines (Apr. 17, 2024), https://www.ussc.gov/about/news/press-releases/april-17-2024 [https://perma.cc/EKK3-3H5J]. These amendments, while important, are not the subject of this Article, as they do not affect compassionate release. *See id.*

6. *See* ASHLEY NELLIS, THE SENT'G PROJECT, MASS INCARCERATION TRENDS 2 fig.1 (2024), https://www.sentencingproject.org/app/uploads/2024/05/Mass-Incarceration-Trends.pdf [https://perma.cc/DU22-FW7X].

7. Press Release, U.S. Sent'g Comm'n, "Back in Business" U.S. Sentencing Commission Acts to Make Communities Safer & Stronger (Apr. 5, 2023) (emphasis added), https://www.ussc.gov/about/news/press-releases/april-5-2023 [https://perma.cc/JT2C-2BNT].

The Commission's position is in line with popular opinion in the United States, and its ideas could be applied to state compassionate release schemes.[8] The majority of people in the United States believe in criminal-justice reform, including second-look sentencing,[9] compassionate release, and prison oversight.[10] In the Amendments, the Commission expanded the definition of "extraordinary and compelling" reasons for release from prison under what has become known as compassionate release.[11] While the Amendments expand criteria we associate with compassionate release, like the failing health and impending death of incarcerated individuals, the Amendments go well beyond health reasons for release.[12] The Commission[13] instead focused on ***second chances***, moving the power from the Bureau of Prisons (BOP) to the judiciary to determine those worthy of release.[14]

In 2021, I joined a group of defense attorneys, public-interest groups, and clinicians across the country working on First Step Act Compassionate Release motions to secure the release of incarcerated people who were sentenced to life in federal prison. The opportunity to work on these cases was only made possible by the passage of the First Step Act, which for the first time took compassionate release out of the hands of the BOP and allowed incarcerated

8. *See infra* Part IV.

9. "Second[-]look sentencing laws grant an individual serving an extreme sentence the opportunity to have their sentence reviewed and potentially be released if the person has successfully rehabilitated themselves after a defined period (e.g., 10 or 15 years)." *Second Look Sentencing Explained*, FAMS. AGAINST MANDATORY MINIMUMS (July 2, 2019), https://famm.org/wp-content/uploads/2019/07/Second-Look-Infographic.pdf [https://perma.cc/R4X4-8MM3]. The desire for second-look sentencing is reflected by the recent enactment of second-look sentencing laws in several states. Washington was the first state to do so in 2014, and its law allows people convicted before their eighteenth birthday to petition the indeterminate-sentence review board for release after twenty years, or twenty-five years if the offense was aggravated first-degree murder. *See* WASH. REV. CODE § 9.94A.730 (2014). Several other states have enacted second-look sentencing laws, including California, Colorado, Connecticut, D.C., Illinois, Louisiana, New Mexico, and Oregon. *See* CAL. PENAL CODE § 1170(d) (West, Westlaw through Ch. 498 of 2024 Reg. Sess.); COLO. REV. STAT. § 18-1.3-801(6) (2023); CONN. GEN. STAT. § 54-125a (g)(1) (2015); D.C. CODE § 24-403.03 (2023); 725 ILL. COMP. STAT. 5/122-9 (2022); LA. STAT. ANN. § 15:574.4(A)(5)(a) (2021); LA. CODE CRIM. PROC. ANN. art. 930.10 (2021), *declared unconstitutional by* State v. Lee, 370 So. 3d 408 (La. 2023); N.M. STAT. ANN. § 31-21-10.2 (2021); OR. REV. STAT. § 137.218 (2021).

10. Press Release, Am. Civ. Liberty Union, 91 Percent of Americans Support Criminal Justice Reform ACLU Polling Finds (Nov. 16, 2017), https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds [https://perma.cc/7BVY-PZU7]; Press Release, Fams. Against Mandatory Minimums, 82% of Americans Support Prison Oversight, According to First-Ever National Poll (Aug. 3, 2022), https://famm.org/82-of-americans-support-prison-oversight-according-to-first-ever-national-poll/ [https://perma.cc/5AYQ-DHL3].

11. *See infra* Part III.

12. *See infra* Part III.

13. When the original Sentencing Commission was created in 1984 through the Sentencing Reform Act, overall crime in the United States was reaching an all-time high. Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 HOFSTRA L. REV. 1167, 1182 (2017). Recidivism was also perceived to be higher than before. *Id.* Between 38%–51% of federal offenders were rearrested within three years of their release from federal prison. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., RESEARCH REVIEW: RECIDIVISM AMONG FEDERAL OFFENDERS 1 (1986), https://www.ojp.gov/pdffiles1/Digitization/102224NCJRS.pdf [https://perma.cc/JL8X-2KYQ].

14. *See infra* Part III.

people to go directly to the courts themselves and ask for mercy.[15] Backed by the words of senators, congressmembers, and the President of the United States, lawyers like me filed motions that did not rely on failing health as a reason for release. As Senator Cory Booker stated when the First Step Act was passed and presented to the President of the United States:

> Our country's criminal justice system is broken – and it has been broken for decades. You cannot deny justice to any American without it affecting all Americans. That's why the passage of the First Step Act tonight is so meaningful – it begins to right past wrongs that continue to deny justice to millions of Americans. This bill is a step forward for our criminal justice system. By no means can it be the only step – it must be the beginning of a long effort to restore justice to our justice system. But for the first time in a long time, with the passage of this bill into law, our country will make a meaningful break from the decades of failed policies that led to mass incarceration, which has cost taxpayers billions of dollars, drained our economy, compromised public safety, hurt our children, and disproportionately harmed communities of color while devaluing the very idea of justice in America.[16]

I met Mr. Jennings[17] through a series of letters and emails on the prison electronic-mail system.[18] In 2004, Mr. Jennings had been charged in a nine-count indictment. Because Mr. Jennings was an indigent person, the federal judge presiding over his case appointed Criminal Justice Act (CJA)[19] counsel to his case under his Sixth Amendment right to counsel. Mr. Jennings's appointed CJA counsel had never taken a case to trial, had no prior experience representing someone who was facing a possible life sentence, and was under the psychiatric care of her doctors, who advised her to cease work on large or

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15. *See infra* Part III.

16. Press Release, U.S. Senate Comm. on the Judiciary, Senate Passes Landmark Criminal Justice Reform (Dec. 18, 2018), https://www.judiciary.senate.gov/press/rep/releases/senate-passes-landmark-criminal-justice-reform [https://perma.cc/PC58-UREA].

17. Although the cases were filed publicly, I use fictitious names here to protect the personal information of my client, who has now reentered society.

18. The First Step Act cases that I worked were co-counseled by the dedicated lawyers at the Federal Defenders Office in Central District of California. I am especially thankful to Brianna Mircheff, Lisa LaBarre, and Brittany Klein for partnering with the UCLA School of Law Clinic. I am also thankful to my colleague, Professor Ingrid Eagly, who worked on these cases and co-directed the UCLA Criminal Defense Clinic with me.

19. In the Central District of California, when the Federal Defenders Office is conflicted out of handling a case, the court will appoint a lawyer using the Criminal Justice Act (CJA) attorney panel. *See* CJA COMM., PROCEDURES FOR THE CJA TRIAL ATTORNEY PANEL FOR THE CENTRAL DISTRICT OF CALIFORNIA 1–2 (2019), https://www.cacd.uscourts.gov/sites/default/files/documents/Procedures%20for%20the%20CJA%20Trial%20Attorney%20Panel%20Revised%202019.pdf [https://perma.cc/33HU-5FRW]. According to the current application, members of the CJA Trial Panel are "highly skilled criminal defense attorneys," who are in good standing with the California Bar and the associated federal courts, have: "1. practiced primarily criminal law in federal court for five years; 2. been employed for the last three years in the criminal division of the USAO or FPDO; or 3. had primary responsibility as counsel of record in at least [forty] criminal cases (state or federal)," and "have chaired or second-chaired at least four sentencing hearings where the [Sentencing Guidelines] applied." *Id.*

extended cases.[20] During her representation, she never visited Mr. Jennings in prison to discuss case discovery or the possibility of pleading guilty.[21] Instead, CJA counsel wrote Mr. Jennings letters filled with falsehoods about the status of his case, including that his case would be dismissed.[22] While counsel told Mr. Jennings these lies, defendant after defendant in the same case accepted plea agreements from the government, receiving downward departures for acceptance of responsibility.[23] Mr. Jennings's codefendants ultimately received sentences from four to 240 months for the exact same charge Mr. Jennings faced.[24] In 2005, after a ten-day trial, Mr. Jennings was found guilty of a single count of conspiracy to manufacture and possess PCP.[25] At the time, the Sentencing Guidelines were mandatory, and the judge had no choice but to sentence Mr. Jennings to life in prison.[26]

In 2021, that same judge released Mr. Jennings under the First Step Act's compassionate release provision.[27] Mr. Jennings did not have any health problems nor was he so old that he was near death.[28] In fact, he was quite strong, maintaining steady employment in the prison for the seventeen years he was imprisoned.[29] He contracted COVID-19 and recovered well.[30] Before 2018, there would have been no available avenue for Mr. Jennings to request compassionate release, as it was limited to situations of dire health needs and had to be brought by the BOP itself.[31] Our team, however, was able to argue for his release based on "extraordinary and compelling" circumstances, focusing not on his health but other criteria allowed by the recently passed First Step Act.[32]

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20. To keep his identity private, all citations that might identify his case have been removed. Please reach out to the author with questions.

21. Correspondence from Mr. Jennings to author (2004) (on file with author).

22. *Id.*

23. To keep his identity private, all citations that might identify his case have been removed. Please reach out to the author with questions.

24. To keep his identity private, all citations that might identify his case have been removed. Please reach out to the author with questions.

25. *See* 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iv), 846.

26. At the time of Mr. Jennings's sentencing in 2005, there was no federal parole. A life sentence, like Mr. Jennings's, was a sentence to die in prison. Congress abolished federal parole under the Sentencing Reform Act of 1984. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a), 98 Stat. 1987, 2008 (codified at 18 U.S.C § 3624). The abolishment of federal parole was in response to the arbitrary granting of parole which was "'confusing' to the public and did not bestow confidence in the federal criminal justice system." Newton & Sidhu, *supra* note 13, at 1174.

27. To keep his identity private, all citations that might identify his case have been removed. Please reach out to the author with questions.

28. Correspondence from Mr. Jennings to author (2021) (on file with author).

29. *Id.*

30. *Id.*

31. *See infra* Parts I & III.

32. Congress stated that rehabilitation alone is not enough for "extraordinary and compelling" circumstances for release but left open what "extraordinary and compelling" meant. *See* 28 U.S.C. § 994(t).

Let's imagine that Mr. Jennings was not in federal prison and was not subject to the recent changes the First Step Act legislation brought to compassionate release but, instead, was convicted of a state crime in California that resulted in a life sentence. In California's restrictive compassionate release scheme, incarcerated people are not eligible for compassionate release unless they have a serious and advanced illness with an end-of-life trajectory or are permanently medically incapacitated with a medical condition that did not exist when they were originally sentenced.[33] Compassionate release is also not available to anyone who was sentenced to life without parole.[34] Instead of working, taking care of his family, and contributing to society, as Mr. Jennings is now doing three years after his release, he would still be wasting away in a California jail cell.

This example demonstrates that, while federal laws have expanded the view of compassionate release and most of the United States population believes in second-chance legislation, state compassionate release laws have remained largely untouched. Compassionate release in the states is stuck in a pre-First Step Act world where it is rarely used and limited to situations of impending death and dire health.[35] It remains so complex and nontransparent that even prison management does not know how to use it.[36] Recent legislation in California proves that modifications to state compassionate release schemes more in line with the First Step Act and the Amendments are possible. Just last year, California passed Assembly Bill 960, which expanded the transparency and use of compassionate release.[37] While California's law is still focused on health conditions, it recognizes that power should be given to judges, as opposed to

33. *See* CAL. PENAL CODE § 1172.2(b)(2) (West, Westlaw through Ch. 1002 of 2024 Reg. Sess.). These limited factors for release are actually a recent expansion in California's compassionate release under Assembly Bill 960 which went into effect on January 1, 2023. *See* Piper French, *California Passes Bill to Expand Prison Releases for Terminally Ill People*, BOLTS (Sept. 2, 2022), https://boltsmag.org/california-legislature-passes-bill-to-expand-prison-releases-for-terminally-ill-people/ [https://perma.cc/9XYL-KC9N]. Previously, California's compassionate release law was even more limited, only applying to people who were "'terminally ill with an incurable condition caused by an illness or disease that is expected to cause death within 12 months' OR 'permanently medically incapacitated' with a condition that makes them 'permanently unable to perform activities of basic daily living' and 'requiring 24-hour care.'" PRISON L. OFF., COMPASSIONATE RELEASE AND MEDICAL PAROLE FOR PEOPLE IN CDCR PRISONS 2 & n.4 (2024), https://prisonlaw.com/wp-content/uploads/2024/01/Compassionate-Release-and-Medical-Parole-January-2024.pdf [https://perma.cc/ULE2-GF5X]. Assembly Bill 960's improvement to the law also requires release if an incarcerated person meets either condition, whereas the old compassionate release statute left release discretionary, even if an incarcerated person met the strict conditions. *Id.* While AB 960 marks an improvement in California's compassionate release scheme, conditions for release are still quite limited.

34. *See* PENAL § 1172.2(o) (Westlaw).

35. *See* MARY PRICE, FAMS. AGAINST MANDATORY MINIMUMS, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES 12 (2018) [hereinafter EVERYWHERE AND NOWHERE], https://famm.org/wp-content/uploads/2023/12/Exec-Summary-Report.pdf [https://perma.cc/R8E3-2RL9] (noting that every state, except for Iowa, plus D.C. has some kind of compassionate release scheme revolving around medical and health issues).

36. *See id.* at 7–8.

37. French, *supra* note 33.

the Department of Corrections, to reevaluate sentencing.[38] Additionally, California's law recognizes that incarcerated people have a right to an attorney to help them in this process.[39]

Existing scholarship tends to focus on the *federal* criminal legal system even though it accounts for just over 10% of the prison population.[40] This Article uses the federal criminal sentencing system to demonstrate how recent modifications in the Commission's guidelines could serve as a model for states to do the same, thereby creating more avenues for reevaluation of overly lengthy sentencing. Part I of this Article looks at the development of the Commission through the 1984 Sentencing Reform Act and the early composition of the Commission and its policies. It also explains the history behind the Commission and the First Step Act and how that led to the creation of the current Amendments. Part II of this Article focuses on state compassionate release schemes, which have been meticulously cataloged by Mary Price and her team at Families Against Mandatory Minimums. Part III of this Article discusses the Commission's Amendments, specifically the new, more expansive definition of "extraordinary and compelling." Finally, Part IV of this Article argues that states could follow the Commission's guidance on compassionate release, addressing the failures of their own compassionate release schemes and thereby making more people eligible for release especially as our state prison population ages and is made up of predominately people of color.[41]

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38. *See* PENAL § 1172(c) (Westlaw).

39. *Id.* § 1172.2(k).

40. *See* Renagh O'Leary, *Compassionate Release and Decarceration in the States*, 107 IOWA L. REV. 621, 625 n.22 (2022).

41. Many scholars have drawn attention to compassionate release on the federal level, especially in the wake of the First Step Act and the various court decisions that followed. *See, e.g.*, Nathaniel Berry, Comment, *Droughts of Compassion: The Enduring Problem with Compassionate Release and How the Sentencing Commission Can Address It*, 90 U. CHI. L. REV. 1719 (2023) (arguing for the further improvement of federal compassionate release with Sentencing Commission oversight of judicial discretion to prevent disparities in who is granted release); Michael T. Hamilton, *Opening the Safety Valve: A Second Look at Compassionate Release Under the First Step Act*, 90 FORDHAM L. REV. 1743 (2022) (discussing the historical development of compassionate release and proposing how the judiciary might still have discretion while also applying compassionate release evenhandedly and consistently); Christopher J. Merken & Barnett J. Harris, *Damn the Torpedoes! An Unprincipled, Incorrect, and Lonely Approach to Compassionate Release*, 44 CARDOZO L. REV. 477 (2022) (examining compassionate release's history, critiquing the Eleventh Circuit's opinion in United States v. Bryant, 996 F.3d 1243 (11th Cir. 2021), and proposing three ways to return discretion to sentencing judges); John F. Ferraro, Note, *Compelling Compassion: Navigating Federal Compassionate Release After the First Step Act*, 62 B.C. L. REV. 2463 (2021) (surveying the patchwork of district court rationales for granting or denying motions for compassionate release). Despite the recent, broad changes at the federal level, there has been very little scholarly attention aimed at the improvement of state compassionate release laws. Such scholarly attention was primarily focused on what states were doing during COVID-19. *See, e.g.*, Abby Higgins, *Compassionate Release During a Pandemic: Clearer Routes for Direct Advocacy of Prisoners to Avoid Harmful Delays to Medically Vulnerable Population*, 30 ANNALS HEALTH L. ADVANCE DIRECTIVE 199 (2020), https://www.luc.edu/media/lucedu/law/students/publications/ahl/pdfs/AD%20Vol%2030%20Fall%202020.pdf [https://perma.cc/4E7N-F5WC] (discussing the varying state compassionate laws across the country during COVID-19 and how such laws could better respond to a public health emergency); Eda Katharine Tinto & Jenny Roberts, *Expanding Compassion Beyond the Covid-19 Pandemic*, 18 OHIO ST. J. CRIM. L. 575 (2021) (discussing state prison policy

I. THE LONG PATH TO THE MODERN-DAY FEDERAL COMPASSIONATE RELEASE STATUTE

This Part takes a targeted historical look at federal sentencing before and after the Sentencing Reform Act to give context to compassionate release. It also details Congress's intention with the passage of the First Step Act and the absence of the Sentencing Commission at the time of the Act's passage. This Part provides the necessary information to understand how important the Amendments are and why they could be used as a model to expand compassionate release in the states.

A. Federal Sentencing Before 1984

In 1984, many people in the United States believed that rehabilitation did not work and that the rise of crime and recidivism was to be blamed on ineffective sentencing regimes.[42] At the time the Sentencing Reform Act was enacted (discussed in Section I.B), federal sentencing looked very different than it does today.[43] Federal defendants were sentenced to disparate sentences largely due to the fact that there were few legal constraints on judges outside of broad statutory penalty ranges,[44] and "there was virtually no appellate review" of the sentences that judges ultimately imposed.[45] Moreover, federal prosecutors had wide discretion to bring criminal charges and offer plea bargains that did not always match the level of seriousness of the underlying offense.[46] Sentencing hearings were inconsistent: judges allowed different kinds of evidence to be presented, and the judges were not required to give any reasons for the

during the pandemic and calling for improvements to compassionate release beyond just in emergency health situations). My work advances the legal scholarship in this area because it is the first to call on state legislatures to expand their state compassionate release laws, modeled after the ideas in the First Step Act. My proposals build off of a 2018 report from Families Against Mandatory Minimums. *See* EVERYWHERE AND NOWHERE, *supra* note 35 (comprehensively surveying compassionate release statutes in every state). *Compassionate Release and Decarceration in the States* is most similar to my work, though Professor O'Leary focuses primarily (and importantly) on how states can reform and expand their compassionate release statutes to reach people incarcerated for violent convictions, whereas I suggest how to expand compassionate release more generally. *See* O'Leary, *supra* note 40 (explaining how existing state compassionate release does not apply to people with violent convictions and making great suggestions for how to remedy this).

42. Newton & Sidhu, *supra* note 13, at 1182–83.

43. *See id.* at 1169–71.

44. *See id.* at 1169; *see also* Peter B. Hoffman & Barbara Stone-Meierhoefer, *Application of Guidelines to Sentencing*, 3 L. & PSYCH. REV. 53, 55–56 (1977) ("[A]t the sentencing stage a federal judge is left to act without any standards to guide the exercise of his discretion other than the attitudes and values he brings with him or develops on the bench. Whether factors relating the circumstances of the present offense, the defendant's prior record, social background, attitude or remorse, or type of plea are given primary weight, some weight, or no weight at all is left totally to the discretion of the individual sentencing judge.").

45. Newton & Sidhu, *supra* note 13, at 1169.

46. *Id.*

sentences they ultimately imposed.[47] The result was a system that many argued was ad hoc and riddled with discrepancies.[48]

The discretion of the prosecutor and the sentencing court were not the only factors that made sentencing inconsistent across the United States. Sentencing was also largely controlled by two executive-branch agencies: the United States Parole Commission (the Parole Commission) and the BOP.[49] The Parole Commission, which was an arm of the Department of Justice, often released incarcerated people early on parole, which caused sentencing courts to impose more severe sentences on the front end to account for the likelihood the defendant would be released ahead of schedule on the back end.[50] But early release was not always granted, so front-end sentences were artificially inflated.[51] Supreme Court Justice Stephen Breyer, who was a member of the Commission before he became one of the nine Justices,[52] described the dilemma in this way:

> [T]he judge says twelve years [in one case] . . . [b]ut the parole commission [later] says . . . [f]our years [in paroling the offender . . .]. Well [in a future case] the judge knowing [the next defendant is] going to really only get four [years when the judge wants] to give twelve [years] gives him thirty six [years]. But this time the parole commission . . . [gives the offender] thirty [years] . . . . [T]his goes back and forth . . . and benefits nobody.[53]

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47. *Id.* at 1170 & nn.14–15.

48. *See* United States v. Waters, 437 F.2d 722, 723 (D.C. Cir. 1970) ("What happens to an offender after conviction is the least understood, the most fraught with irrational discrepancies, and the most in need of improvement of any phase in our criminal justice system."); *see also* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 4 (1972) ("The scope of what we call 'discretion' permits imprisonment for anything from a day to one, five, 10, 20, or more years."). Judge Frankel, who was a federal district court judge in New York City, was one of the most outspoken and influential critics of federal sentencing. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228 (1993). In his book, *Criminal Sentences: Law Without Order*, he proposed a solution to the sentencing disparities: a national scheme that would develop sentencing criteria that each federal judge could use at sentencing. *Id.* Many of Judge Frankel's original prescriptions were adopted in the Sentencing Reform Act. *Id.* Senator Kennedy called Judge Frankel the "father of sentencing reform." *Id.*; *see also* Albert W. Alschuler, *Be Careful What You Wish for* 14 (Univ. Chi. L. Sch. Pub. L. Working Paper No. 844, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4470201 ("[Judge] Frankel . . . would have been distressed to discover that his work played even a small part in creating America's record-level imprisonment.").

49. Newton & Sidhu, *supra* note 13, at 1170.

50. *Id.* at 1173–74.

51. *Id.* at 1174.

52. Justice Breyer served as one of the original members on the Commission from 1985 to 1989 while he was concurrently a judge on the U.S. Court of Appeals for the First Circuit. *See* Linda Greenhouse, *Guidelines on Sentencing Are Flawed, Justice Says*, N.Y. TIMES (Nov. 21, 1998), https://www.nytimes.com/1998/11/21/us/guidelines-on-sentencing-are-flawed-justice-says.html [https://perma.cc/NT9X-XC7V]. Prior to that, he was chief counsel of the Senate Judiciary Committee and helped move a bill through Congress that eventually became the Sentencing Reform Act of 1984. *Id.*; *Stephen Breyer*, HARV. L. SCH., https://hls.harvard.edu/faculty/stephen-breyer/ [https://perma.cc/SDB8-A95G].

53. Newton & Sidhu, *supra* note 13, at 1174 (certain alterations in original) (citing Judge Stephen G. Breyer, U.S. Ct. of Appeals, Address at Federalist Society for Law & Public Policy Studies (Sept. 10, 1988), *in U.S. Sentencing Commission Plan*, C-SPAN, https://www.c-span.org/video/?5692-1/us-sentencing-commi

The result of this game was that the sentencing court understood its role to be to impose the maximum possible sentence on the defendant instead of the definite amount of time a defendant would serve.[54]

The Parole Commission and its boards also increased the level of inconsistency already seen in the federal courts' sentencing styles.[55] Not only did defendants convicted of the same crime often receive different sentences but incarcerated people of similar situations often received different parole decisions.[56] This disparate treatment in sentencing and release caused incarcerated people to view parole as a gamble, meaning it was unclear what effect, if any, rehabilitation had on a decision for release.[57]

Because of these disparities in sentencing and the misaligned incentives with rehabilitation, Congress spent the 1970s and the early 1980s trying to reform the parole system.[58] Congress passed legislation in 1976 that created parole-eligibility guidelines that measured the severity of the offense against a "salient factor score," a number that estimated recidivism.[59] However, these reforms did little to create judicial guidance to better ensure consistency and equity across the federal criminal system.[60]

The BOP also added to the inconsistent sentencing problem by allowing federally incarcerated people to earn "good time" credit,[61] which significantly reduced the length of time served relative to the term sentenced in the district court.[62] A federally incarcerated person could receive two types of good time:

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ssion-plan); *see also* United States v. Addonizio, 442 U.S. 178, 188–90 (1979) (recognizing the sentencing uncertainty caused by ad hoc decisions of sentencing courts and the Parole Commission).

54. *See* Ferraro, *supra* note 41, at 2470.

55. *Id.*

56. *Id.* This was largely because parole boards had unchecked discretion in making these determinations. *Id.*

57. *Id.* at 2470–71.

58. *See id.* at 2472–73.

59. *Id.* at 2472. Congress attempted reform in the 1970s, when it passed the Parole Commission and Reorganization Act of 1976. *See* Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, § 2, 90 Stat. 219, 219–33 (1976) (codified at 18 U.S.C. §§ 4201–18, *repealed by* Joint Resolution of Oct. 12, 1984, Pub. L. 98-473, § 218(a)(5), 98 Stat. 1837, 2027). The Act rebranded the Board of Parole as the Parole Commission and authorized the Commission to create parole-eligibility guidelines. *Id.* at 219–20. These guidelines measured the severity of a defendant's offense against a "salient factor score," a number that estimated an inmate's risk of parole violation and recidivism. Ferraro, *supra* note 36, at 2470; *see also* Parole, Release, Supervision and Recommitment of Prisoners, Youth Offenders and Juvenile Delinquents, 42 Fed. Reg. 39808, 39809–22 (Aug. 5, 1977) (repealed 1984). Several variables determined a salient factor score, such as the seriousness of the offense and the offender's criminal history. *Id.* at 39813.

60. Ferraro, *supra* note 41, at 2472 & n.63; *see also* Stith & Koh, *supra* note 48, at 229 ("For many sentencing reform advocates, the transformation of parole from an indeterminate, rehabilitative model to a more uniform, nondiscretionary model was not enough; rather, they sought the complete elimination of parole. Moreover, parole was not the only, or even the most pernicious, source of disparity, in the view of reformers." (footnote omitted)).

61. Stith & Koh, *supra* note 48, at 226 n.10. Good time credits were established federally in 1875 and existed before the creation of parole. *Id.*

62. *See* Newton & Sidhu, *supra* note 13, at 1170–71; *see also* James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 218 (1982) (explaining that good time credits could reduce a sentence by "one-third to one-half and sometimes more"); Pamela J. Franks, *The New Federal Sentencing Guidelines*, ARIZ.

statutory good time and industrial good time.[63] Statutory good time credit was calculated through an allowance of days per month for good behavior.[64] Statutory good time also depended on the amount of time a particular defendant received: defendants earned "up to five days per month" of credit on sentences of "less than one year and up to ten days per month . . . for sentences of ten years or more."[65] Therefore, defendants serving harsher sentences were able to earn more good time credit.

The second type of good time, industrial good time, was rewarded for "exceptionally meritorious service" by working in a prison industry or camp.[66] In 1983, ahead of the passage of the Sentencing Reform Act of 1984, the Senate Judiciary Committee released a report that reflected over a decade of hearings in both the House of Representatives and the Senate.[67] Congress found that good time credits resulted in unpredictable and disparate sentences, something it tried to correct in the budding legislation.[68]

B. The Sentencing Reform Act and Compassionate Release

Compassionate release is not a novel concept. It has been a part of the federal sentencing statute for nearly forty years.[69] In 1984, Congress passed and President Ronald Reagan signed into law the Sentencing Reform Act, which was a part of a larger piece of legislation called the Comprehensive Crime

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ATT'Y, Sept. 1988, at 27, 28 ("[A] defendant serving a ten year sentence would be mandatorily released after serving five years and ten months if he earned all possible statutory and industrial good time credits.").

63. Jacobs, *supra* note 62, at 221.

64. *See* 18 U.S.C. § 4161 (repealed 1984); *see also* Newton & Sidhu, *supra* note 13, at 1170.

65. Newton & Sidhu, *supra* note 13, at 1170.

66. *See* 18 U.S.C. § 4162 (repealed 1984); *see also* Newton & Sidhu, *supra* note 13, at 1170.

67. *See generally* S. REP. NO. 98-225 (1983), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/deconstructing_the_guidelines/legislative-history-of-the-comprehensive-crime-control-act-of-1983.pdf [https://perma.cc/3BEU-GLBL]; Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 425 & n.43 (1992).

68. Newton & Sidhu, *supra* note 13, at 1171 n.21 ("Even in those cases where the [Parole] Commission can adjust court-imposed sentences in order to bring the actual prison terms in line with those for similarly situated offenders across the country, the actual terms to be served are subject continually to the 'good time' adjustments by the BOP and to counter-adjustments by the Parole Commission. Thus, [incarcerated people] often do not really know how long they will spend in prison until the . . . day they are released." (quoting S. REP. NO. 98-225, at 49 (1983)). For an additional critique of the good time laws prior to the Sentencing Reform Act of 1984, see Jacobs, *supra* note 62, at 221 ("Although good time . . . has played an important role in mitigating sentence severity, this goal can and should be achieved through more open practices beyond the control of prison authorities. Similarly . . . other options exist which are more effective and less prone to abuse. . . . [But] [a]bolishing good time would require substantial shortening of nominal sentences if they were to be served in full.").

69. *See* 18 U.S.C. § 3582(c)(1) (providing the statutory basis for compassionate release sentence modification); Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987, 1987–99 (codified as amended in 18 U.S.C. §§ 3551–86) (creating the federal early-release system which would eventually become known as compassionate release).

Control Act.[70] Against a backdrop of ineffective sentencing and correctional regimes, as illustrated by rising crime rates and recidivism in the United States, the Sentencing Reform Act meant to correct sentencing disparities.[71] Through the Sentencing Reform Act, Congress created the Sentencing Commission, which was to be "an independent commission in the judicial branch of the United States."[72] The Commission was given the power to promulgate sentencing guidelines for federal offenses,[73] to issue "policy statements" about the Guidelines' application,[74] and to establish policies necessary to implement the Guidelines.[75] The Sentencing Reform Act and the Sentencing Commission Guidelines that followed created a "sophisticated grid" where judges would derive sentencing by using criminal-history points and gravity-of-the-offense points along with enhancing factors to derive sentence lengths, many of which became mandatory sentences.[76] The idea was that judges across the United States would sentence consistently for the same kind of crime and the same kind of defendant.[77]

While this might have been appealing in nature, the result was a system whereby judges had little to no discretion in sentencing, even though it was squarely in their role as members of the judiciary to determine.[78] The discretion of judges became even more limited in the decades that followed leading up to the 2003 Feeney Amendment to the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act).[79] This

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70. Stith & Koh, *supra* note 48, at 223. The bill passed both houses of Congress by overwhelming majorities. *Id.*

71. Newton & Sidhu, *supra* note 13, at 1183.

72. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 991, 98 Stat. 1987, 2017 (codified as amended at 28 U.S.C. § 991). The Act required the Commission to have seven members; each member was to be appointed by the President, with the Senate's advice and consent. Ann Marie Tracey & Paul Fiorelli, *Throwing the Book[er] at Congress: The Constitutionality and Prognosis of the Federal Sentencing Guidelines and Congressional Control in Light of* United States v. Booker, 2005 MICH. ST. L. REV. 1199, 1203 n.20 (2005). The commission was to be bipartisan, with no more than four of any political party and, at most, three federal judges. *Id.*

73. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 994(a)(1), 98 Stat. 1987, 2019 (codified as amended at 28 U.S.C. § 994); Tracey & Fiorelli, *supra* note 72, at 1202.

74. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 994(a)(2), 98 Stat. 1987, 2019 (codified as amended at 28 U.S.C. § 994); Tracey & Fiorelli, *supra* note 72, at 1203 (explaining that the Commission would also have "to report its findings to Congress annually").

75. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 994(a)(3), 98 Stat. 1987, 2019 (codified as amended at 28 U.S.C. § 994); Tracey & Fiorelli, *supra* note 72, at 1203.

76. Tracey & Fiorelli, *supra* note 72, at 1202; *see also* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 1987, amended 2016).

77. Tracey & Fiorelli, *supra* note 72, at 1202.

78. *See id.* at 1201–02 ("The Sentencing Guidelines have been misnamed since their inception. They act as mandates on sentencing courts, vastly restricting discretion." (quoting Kathryn Keneally, *Corporate Compliance Programs: From the Sentencing Guidelines to the Thompson Memorandum and Back Again*, 28 CHAMPION 42, 46 (2004))).

79. *See id.* at 1203. Shortly after the Feeney Amendment was passed, the Supreme Court decided *United States v. Booker* and effectively returned decision-making power back to judges. *See* 543 U.S. 220 (2005). *Booker* held that the mandatory nature of the sentencing guidelines was unconstitutional and eliminated the new

came after "Congress became concerned that some judges were varying their sentences from this range, without adequate justification."[80] The Feeney Amendment essentially made the Guidelines mandatory. Judges had to report to the Commission their rationale for departing from the Guidelines.[81] And instead of using a clearly erroneous standard of review as had been done in the past, federal appellate judges were required to conduct a de novo review of a federal trial court judge's decision.[82]

The Sentencing Reform Act also abolished federal parole in an effort to correct the perceived wrongs of the Parole Commission and the BOP's good time credit calculations.[83] In its place, Congress created "compassionate release," a path by which a federal judge could "release [a criminal defendant] before they [completed] their entire sentence[] in 'extraordinary and compelling' circumstances."[84] Congress intended compassionate release to be a "safety valve" for the early release of eligible incarcerated people because they were at the same time abolishing federal parole.[85] But in reality, compassionate release was rarely used after the passage of the Sentencing Reform Act.[86] This is largely because "the original compassionate-release statute gave the BOP *exclusive* control over" who could receive compassionate release.[87] The federally incarcerated person had no way to seek compassionate release for themselves; any motion for compassionate release had to be made by the director of the BOP.[88] Unsurprisingly, the director of the BOP did not rush to recommend

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Feeney Amendment's de novo review standard for sentences. *Id.* at 265–67. Accordingly, *Booker* "makes the Guidelines effectively advisory, requiring a sentencing court to consider Guidelines ranges, but permitting it to tailor the sentence in light of other statutory concerns." *Id.* at 222 (citation omitted).

80. Tracey & Fiorelli, *supra* note 72, at 1203.

81. *Id.*

82. *Id.* at 1204 ("Not only was this an insult to federal judges, it made reversals more likely. Moreover, appellate judges would be required to conduct such a review even though they did not have the same information with respect to credibility or sincerity as the trial judge had possessed" (footnote omitted)); *see also* Joy Anne Boyd, *Power, Policy, and Practice: The Department of Justice's Plea Bargain Policy as Applied to the Federal Prosecutor's Power Under the United States Sentencing Guidelines*, 56 ALA. L. REV. 591, 602 (2004).

83. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a), 98 Stat. 1987, 2008–09 (codified as amended at 18 U.S.C. § 3624); *see also* Newton & Sidhu, *supra* note 13, at 1174–75.

84. Merken & Harris, *supra* note 41, at 481; 18 U.S.C. § 3582(c)(1)(A)(i). "This section's title and statutory text speak in terms of 'reduction' to a sentence, and not 'compassionate release.'" Ferraro, *supra* note 41, at 2476 n.86 (quoting 18 U.S.C. § 3582(c)(1)(A)). "'It bears remembering that compassionate release is a misnomer. 18 U.S.C. § 3582(c)(1)(A) in fact speaks of *sentence reductions*.' . . . Nevertheless, the term 'compassionate release' stuck, and to this day remains in regular usage in the federal criminal justice system." *Id.* (quoting United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020)).

85. Merken & Harris, *supra* note 41, at 482–83; Ferraro, *supra* note 41, at 2476.

86. *See* Merken & Harris, *supra* note 41, at 484 n.33.

87. *Id.* at 483; *see* 18 U.S.C. § 3582(c)(1)(A).

88. *See* Merken & Harris, *supra* note 41, at 483; *see also* 18 U.S.C. § 3582(c)(1)(A)(ii) (providing for the release of a federally incarcerated person, on BOP motion, if the incarcerated person is at least seventy years old, served at least thirty years of a life sentence, and is determined not to be a danger to the safety of any other person or the community).

compassionate release even in the most dire of circumstances.[89] In a 2013 report from the Office of the Inspector General, "approximately 13 percent (28 of 208) of the [incarcerated people] whose release requests had been approved by a Warden and Regional Director died before their requests were decided by the BOP Director."[90]

The BOP's exclusive control over compassionate release created a compassionate release scheme that was not a path to release at all. For example, "[b]etween 1990 to 2000, on average, only twenty-one [incarcerated people] were released on BOP motions annually," which amounted to ".01% of the federal prison population."[91] The Commission, which is discussed more completely in Section I.B, was created to provide guidance on the new Sentencing Reform Act.[92] Its guidance served to double down on the BOP's power over compassionate release.[93] Due to the BOP's exclusive control, despite rising numbers of aging and ill incarcerated defendants, up until 2018 when the First Step Act was passed, the compassionate release provision was rarely used to consider incarcerated people for release or to ultimately release incarcerated people.[94]

Even after the substantial hurdle of getting the BOP to move for compassionate release, to actually earn release, three additional obstacles were in the way of a defendant's path to freedom. The first, and toughest part of the labyrinth, was establishing "extraordinary and compelling reasons" for release

89. *See, e.g.*, Opening Brief of Appellant at 19, Crowe v. United States, 430 F. App'x 484 (6th Cir. 2011) (No. 09-6508). Take, for example, Mr. Clayton Crowe. Mr. Crowe suffered from heart disease and diabetes. *Id.* Under the care of the BOP he was not receiving proper medical care. *Id.* at 23. Though the prison never got him tested, his kidneys were likely failing as he suffered from elevated heart pressure and persistent leg and foot swelling. *Id.* Additionally, Mr. Crowe likely suffered from neuropathy (nerve disease) as he suffered from numbness, tingling, burning, and occasional pain in his feet and hands. *Id.* But again, he did not receive a diagnosis due to being under the BOP's care. *See id.* Mr. Crowe's health conditions were also getting worse as he aged. *See id.* at 22–25. Mr. Crowe asked the BOP director to file a motion in federal court for compassionate release. *Id.* at 19–20. The BOP director refused, and Mr. Crowe remained incarcerated. Crowe v. United States, 430 F. App'x 484, 484 (6th Cir. 2011). In these circumstances, incarcerated people had no avenues to get out of prison because courts uniformly held that the future of an incarcerated person's life and health was purely up to the discretion of the BOP. *See id.* at 485 ("[T]he BOP's decision regarding whether or not to file a motion for compassionate release is judicially unreviewable.").

90. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 11 (2013), https://oig.justice.gov/reports/2013/e1306.pdf [https://perma.cc/D3Y9-QYHZ].

91. Merken & Harris, *supra* note 41, at 484 n.33 (citing Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 FED. SENT'G REP. 188, 191 (2001)).

92. *See* 28 U.S.C. § 994(t); *see also* Ferraro, *supra* note 41, at 2473–74.

93. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmts. nn. 1–2 (U.S. SENT'G COMM'N 2007); *see also* Merken & Harris, *supra* note 41, at 484 n.33 ("[T]he BOP retained discretion to determine when other circumstances may be 'extraordinary and compelling.'").

94. Between 2006 and 2011, only 0.01% of the federal prison population was released. Merken & Harris, *supra* note 41, at 484 n.33. From "2013 [to] 2017, the BOP approved 6% of the applications it received." *Id.* In 2018, the numbers dropped again, as the BOP only released .01% of the federal prison population. *Id.* (compiling sources describing the BOP's grant rate for compassionate release applications).

under § 3582(c)(1)(A)(i).[95] With no definition of this phrase until 2007, it was nearly impossible for an incarcerated person to establish it.[96] Second, the incarcerated person had to establish that the sentence reduction was "consistent with applicable policy statements issued by the . . . Commission."[97] Once these hurdles were met, the third and final step was the requirement that the district court had to do a complete § 3553(a) analysis to determine whether the incarcerated person "was a danger."[98] Section 3553(a) is the provision of the statute which outlines seven factors judges should consider in determining whether the sentence is consistent with the purpose of sentencing.[99]

The lack of a definition for "extraordinary and compelling" still haunts compassionate release even after the passage of the First Step Act. At the time of the Sentencing Reform Act, Congress never defined the phrase nor provided examples.[100] Instead, it gave the newly created Sentencing Commission the power to promulgate policy statements which would provide guidance as to the term's weight.[101] The only factor that Congress specifically precluded was "[r]ehabilitation of the defendant," stating that this factor could not be the *only* basis for release; it could be something the court considers in its menagerie of other considerations.[102] Prior to 2006, the Commission failed to issue a policy statement about what constituted an "extraordinary and compelling reason[]," allowing the BOP exclusive control over what "extraordinary and compelling"

95. Merken & Harris, *supra* note 41, at 483 (quoting 18 U.S.C. § 3582(c)(1)(A)(i)).

96. *See id.* at 484. When Congress passed the Sentencing Reform Act, it did not define "extraordinary and compelling." *Id.*

97. *Id.* at 483 (quoting 18 U.S.C. § 3582 (c)(1)(A)(ii)).

98. *Id.*

99. *See* 18 U.S.C. § 3553(a)(1)–(7) (outlining "(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range . . . as set forth in the [sentencing] guidelines . . . (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . [and] in effect on the date the defendant is sentenced[;] (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense"). Many courts had not done a § 3553(a) analysis in their original sentencing decisions because until *Booker* in 2005, the Sentencing Guidelines were mandatory. *See* United States v. Booker, 543 U.S. 220, 234–45 (2005).

100. Merken & Harris, *supra* note 41, at 484.

101. "The Commission, in promulgating general policy statements regarding the sentencing modification provisions in [§] 3582(c)(1)(A) of title 18, 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." Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 2023 (codified as amended at 28 U.S.C. § 994(t)).

102. 28 U.S.C. § 994(t) ("Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.").

meant.[103] As a result, the BOP only considered compassionate release for those who were terminally ill.[104]

In 2007, the Commission expanded the definition of "extraordinary and compelling" to include a few additional specific reasons to modify a sentence.[105] These included: terminal illness, serious physical or medical condition, deteriorating health because of the aging process, death or incapacitation of the caregiver of a defendant's only family member capable of caring for the defendant's minor child, and a catch-all provision for "extraordinary and compelling" reasons other than the reasons listed.[106] This expanded definition did not include further guidance on what "extraordinary and compelling" meant.

C. The First Step Act and the Sentencing Commission at Odds with Each Other

At the time of the passage of the First Step Act in 2018, the relevant Commission guidelines were from 2016.[107] In 2016, the Sentencing Commission responded to criticisms of the compassionate release system by providing broader guidance of "extraordinary and compelling" circumstances and by reorganizing the definitions.[108]

The 2016 Guidelines remained largely the same as those promulgated in 2007 with a few exceptions. In the category of "Medical Condition of the Defendant," the Commission included terminal illness (which had been included from the original guidance)[109] and added conditions that would reduce the defendant's ability to operate in a prison setting—including cognitive impairment, a serious medical condition, or deteriorating mental or physical health from aging.[110] The advanced age of the incarcerated person became a

103. *See* Merken & Harris, *supra* note 41, at 484.

104. *See* Ferraro, *supra* note 41, at 2477 (explaining that the BOP believed these incarcerated people "were the only group that did not present a recidivism or public safety risk").

105. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)(i)–(iv) (U.S. SENT'G COMM'N 2007).

106. *Id.* "[O]ther extraordinary and compelling reasons" served as a catch-all to allow the BOP to provide compassionate release in other circumstances. Price, *supra* note 91, at 189. However, "[t]he BOP does not provide any affirmative guidance in its Program Statement on what circumstances qualify under this 'catch all' provision." Ferraro, *supra* note 41, at 2479 n.100 (referring to FED. BUREAU OF PRISONS, DEP'T OF JUST., PROGRAM STATEMENT 5050.50, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 and 4205(G), at 12 (2019)).

107. *See* U.S. SENT'G GUIDELINES MANUAL app. C, supp., amend. 799, at 132 (U.S. SENT'G COMM'N 2016).

108. Hamilton, *supra* note 41, at 1753.

109. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)(i) (U.S. SENT'G COMM'N 2007). The 2016 additions to the Guidelines added specific examples of terminal illnesses which "[e]xamples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia." U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)(i) (U.S. SENT'G COMM'N 2016).

110. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)(ii) (U.S. SENT'G COMM'N 2016).

new category for the BOP to consider for release as well.[111] The family-circumstances category, which was previously limited to situations where the inmate would be the only caregiver for their children,[112] was expanded to include situations where the defendant was the only caregiver for a spouse.[113] The catch-all provision remained the same and provided, "As determined by the director of the Bureau of Prisons, there exists in the [incarcerated person's] case an extraordinary and compelling reason other than, or in combination with, the [aforementioned] reasons . . . ."[114]

Under these updated Guidelines, but before the First Step Act, the process still left in the hands of the BOP the power to bring compassionate release motions. Only the director of the BOP could make a motion for compassionate release on the inmate's behalf, and the BOP continued to rarely grant compassionate release motions.[115] The process had several steps but was relatively straightforward: first, the incarcerated person would apply for release with the warden where they were incarcerated; second, the warden would review the application and make an initial determination of whether "extraordinary or compelling" reasons for release were present; and third, the warden would refer any approved applications to the director of the BOP, who could decline to bring the motion to the sentencing court despite the warden's recommendation otherwise.[116] If the motion ever made it to a judge, the judge would simply either grant or deny the motion.[117] Courts could not do any independent analysis of whether "extraordinary and compelling" reasons existed; instead, the sentencing court had to rely solely on the BOP's motion.[118] Judges also considered § 3553(a) factors to determine whether the modification of the sentence was in line with the purposes of sentencing in the first place.[119]

111. *Id.* § 1B1.13 cmt. n.1(B) ("The 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, whichever is less.").

112. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)(iii) (U.S. SENT'G COMM'N 2007).

113. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(C)(ii) (U.S. SENT'G COMM'N 2016) ("The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.").

114. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(D) (U.S. SENT'G COMM'N 2016). After the First Step Act, when incarcerated people could bring their own motions for compassionate release, circuit courts broadened the power of district courts by deciding that whenever an incarcerated person filed a motion for their release, the district court, rather than the BOP, could consider whether reasons were "extraordinary and compelling." *See* United States v. Brooker, 976 F.3d 228, 236 (2d Cir. 2020); *see also* Hamilton, *supra* note 41, at 1756; Ferraro, *supra* note 41, at 2494–98.

115. Hamilton, *supra* note 41, at 1753.

116. *See* 28 C.F.R. §§ 571.61–.64 (2013) (providing the procedure by which an inmate submits a compassionate release request to a warden, who reviews the request and refers it to senior staff at the BOP and eventually to the BOP director).

117. *See* Engle v. United States, 26 F. App'x 394, 397 (6th Cir. 2001) (explaining that district courts have no authority to grant compassionate release and can only do so upon a motion from the BOP).

118. *See id.*

119. *See* 18 U.S.C. § 3553(a)(1)–(7).

However, in 2018, with the passage of the First Step Act, everything changed. The First Step Act took away the BOP's power by amending § 3582(c) to allow incarcerated people to file their *own* compassionate release motions directly into district court.[120] While defendants no longer had to wait for the BOP to take action, the other hurdles remained the same: (1) the defendant had to establish "extraordinary and compelling" reasons; (2) the reasons had to be consistent with the Sentencing Commission's applicable policy statements; and (3) release had to be consistent with § 3553(a) factors.[121]

While procedural in nature, this change quickly resulted in significant, substantive consequences. In 2018, prior to the passage of the First Step Act, "only [thirty-four] people received compassionate release sentence reductions."[122] "After the First Step Act became law in December 2018, the BOP report[ed] that over [one thousand] motions for compassionate release or sentence reduction ha[d] been granted."[123] That number grew more significantly through the second quarter of 2023—almost thirty thousand compassionate release motions have been filed and over 4,700 have been granted (roughly 16%).[124]

A classic problem of statutory interpretation arose in many jurisdictions. In passing the First Step Act, Congress created a new statute with the clear purpose of addressing mass incarceration by adding new teeth to the compassionate release provisions of the Sentencing Reform Act. In fact, Congress titled the new compassionate release statute, "Increasing the Use and Transparency of Compassionate Release."[125] However, the only relevant Commission guidance was from earlier in 2018,[126] *before* the passage of the First Step Act and arguably no longer in line with Congress's intent. The Commission needed to redefine "extraordinary and compelling," but there was no active Commission in place

120. *See* First Step Act of 2018, Pub. L. No. 115-391, § 603(b)(1), 132 Stat. 5194, 5239 (amending 18 U.S.C. § 3582(c)).

121. *See* 18 U.S.C. § 3553(a)–(b).

122. United States v. Brooker, 976 F.3d 228, 233 (2d Cir. 2020) (citing Press Release, Off. of Pub. Aff., U.S. Dep't of Just., Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk and Needs Assessment System (July 19, 2019), https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and [https://perma.cc/NE3G-XLGP]).

123. *Id.* at 233 (citing *First Step Act*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/ [https://perma.cc/52ZF-2ALX]).

124. U.S. SENT'G COMM'N, COMPASSIONATE RELEASE DATA REPORT, at tbl.1 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/202305-Compassionate-Release.pdf [https://perma.cc/GE3P-E84M].

125. *See* First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194, 5239 (amending 18 U.S.C. § 3582(c)).

126. The 2016 guidelines were republished in 2018 with minor changes. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 app. C (U.S. SENT'G COMM'N 2018). Section 1B1.13 was amended to add a missing word. *See id.* Substantively, however, Section 1B1.13 from the 2018 manual was the same as the Commission Manual from 2016. *See id.*

at the time the First Step Act was signed into law.[127] A tale as old as time—new legislation, old guidance. Eventually, by 2022, all except two circuit courts found that the courts had discretion to determine what circumstances justify compassionate release for motions filed by incarcerated people.[128] This discretion, however, with no updated guidance from the Commission, created a disparity in who could receive compassionate release dependent upon what jurisdiction they were in.[129] For example, the grant rate in the First Circuit was 47.5%, whereas in the Fifth Circuit, the grant rate was 13.7%.[130]

II. COMPASSIONATE RELEASE IN THE STATES

Of the over 1.2 million people incarcerated in the United States, over one million of those people are locked in the state prison system.[131] Almost 16% of these incarcerated people in state prisons are fifty-five years or older.[132] Currently, forty-nine states and the District of Columbia provide some means for incarcerated people to obtain an early release from prison when they are facing imminent death or significant illness.[133] However, studies have shown that very few incarcerated people receive compassionate release from the state programs that exist.[134] Moreover, these programs are limited in nature, and many have significant obstacles to compassionate release including "[s]trict or

127. *Brooker*, 976 F.3d at 233–34 ("For, despite the material changes Congress made to compassionate release procedures in the First Step Act, the Sentencing Commission has not updated its policy statement on compassionate release. Thus, Section 1B1.13 still refers in multiple places to BOP having the exclusive authority to bring a compassionate release motion before the court. And no update to that Guideline appears forthcoming because, as the Government notes here, the Commission currently lacks a quorum of voting members." (citation omitted)).

128. *See* United States v. Ruvalcaba, 26 F.4th 14, 28 (1st Cir. 2022); *Brooker*, 976 F.3d at 235 (2d Cir. 2020); United States v. Andrews, 12 F.4th 255, 259 (3d Cir. 2021); United States v. McCoy, 981 F.3d 271, 275, 282 (4th Cir. 2020); United States v. Shkambi, 993 F.3d 388, 392–93 (5th Cir. 2021); United States v. Jones, 980 F.3d 1098, 1107–11 (6th Cir. 2020); United States v. Gunn, 980 F.3d 1178, 1180–81 (7th Cir. 2020); United States v. Aruda, 993 F.3d 797, 802 (9th Cir. 2021) (per curiam); United States v. McGee, 992 F.3d 1035, 1050 (10th Cir. 2021); United States v. Long, 997 F.3d 342, 355 (D.C. Cir. 2021). *But see* United States v. Bryant, 996 F.3d 1243, 1247, 1262 (11th Cir. 2021); United States v. Marcussen, 15 F.4th 855, 859 (8th Cir. 2021).

129. *See* U.S. SENT'G COMM'N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 4 (2022) [hereinafter FIRST STEP ACT AND COVID-19 PANDEMIC], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf [https://perma.cc/3MUG-LEJN] ("The likelihood that an offender would receive compassionate release substantially varied by circuit, from a grant-rate high of 47.5 percent in the First Circuit to a low of 13.7 percent in the Fifth Circuit."); *see generally* Berry, *supra* note 41.

130. FIRST STEP ACT AND COVID-19 PANDEMIC, *supra* note 129.

131. CARSON, *supra* note 1.

132. *Id.* at 23 tbl.11. As of December 2021, 6.9% of the state prison population were ages fifty-five to fifty-nine, 4.5% of the state prison population were ages 60–64, and 4.2% of the state prison population was 65 years or older. *Id.*

133. EVERYWHERE AND NOWHERE, *supra* note 35, at 8.

134. *Id.* at 13. For example, Kansas "has detailed eligibility criteria and process rules." *Id.* Yet, only "seven individuals received compassionate release between 2009 and 2016." *Id.* In New Jersey, medical parole has only been granted two times per year since 2010. *Id.*

vague eligibility requirements[;] [c]ategorical exclusions[;] [m]issing or contradictory guidance[;] [c]omplex and time-consuming review processes[;] and [u]nrealistic time frames."[135] And incarcerated people and their families are not informed about the availability of compassionate release, causing another barrier to decarceration in the states.[136]

One of the stated reasons behind punishment is incapacitation. The idea of incapacitation is that if we remove the dangerous person from society and put them behind bars, then we in turn create a safer community.[137] It is no surprise, therefore, that many state compassionate release schemes center the release around recidivism and the individual's release posing a danger to society.[138] Many states dictate that compassionate release is available only if the incarcerated person is "diagnosed with a medical condition that results in debilitation or incapacitation severe enough to prevent him or her from committing a crime or posing a danger to the community."[139] California has restrictive eligibility criteria stating that incarcerated people cannot get compassionate release unless they have "a serious and advanced illness with an end-of-life trajectory" or are "permanently medically incapacitated with a medical condition . . . that renders them permanently unable to complete basic activities of daily living, including . . . bathing [or] eating."[140] Other states, like Georgia, limit compassionate release to those who are expected to die within twelve months.[141] Other state schemes are confusingly silent on the criteria for medical release, leaving it up to broad interpretation not typically in favor of the incarcerated person.[142]

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135. *Id.*

136. *Id.*

137. *See* Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1 (2017) (recognizing this but arguing that incapacitation is flawed on both theoretical and empirical grounds).

138. *See* EVERYWHERE AND NOWHERE, *supra* note 35, at 13.

139. *Id.*

140. CAL. PENAL CODE § 1172.2(b)(1)–(2) (West, Westlaw through Ch. 1002 of 2024 Reg. Sess.). California recently changed its compassionate release process by vesting more power in the courts and less in the California Department of Corrections. *See* OFF. OF THE STATE PUB. DEF., CHANGES TO CDCR COMPASSIONATE RELEASE PROCEDURE AB 960, https://www.ospd.ca.gov/wp-content/uploads/2023/06/AB-960-Changes-to-CDCR-compassionate-release-procedure_Accessible.pdf [https://perma.cc/25MW-44XE].

141. EVERYWHERE AND NOWHERE, *supra* note 35, at 13 (citing GA. CODE ANN. § 42-9-43(b)(1)(A), (b)(2) (West, Westlaw through 2024 Reg. Sess.)).

142. *See, e.g.*, *id.* at 13–14. For example, Montana requires that to be eligible for medical parole, a non-terminal prisoner must need "extensive medical attention," but "extensive" has not been defined. *See* MONT. CODE ANN. § 46-23-210(1)(c)(i) (2023). In New Hampshire, medical parole will only be considered if the cost of medical care is "excessive." EVERYWHERE AND NOWHERE, *supra* note 35, at 13–14. Excessive is not defined. *Id.*; N.H. REV. STAT. ANN. § 651-A:10-a(I)(b) (West, Westlaw through Chapter 378 of the 2024 Reg. Sess.). In Missouri, an incarcerated person can only be granted medical parole if confinement "will necessarily greatly endanger or shorten the offender's life." MO. REV. STAT. § 217.250 (2021). In Rhode Island, medical parole may be granted to severely ill incarcerated people with no chance of recovery *only if* the state will incur exorbitant expenses for their care. *See* 13 R.I. GEN. LAWS §§ 13-8.1-2 to 13-8.1-3 (2021). But exorbitant is not defined. *Id.*

Another purpose behind sentencing is retribution. Society has decided that some crimes are more punishable than others, and compassionate release schemes have taken shape around this idea. For example, there are many states, like Alaska, that categorically exclude those convicted of sexual assault or abuse from eligibility for compassionate release.[143] Other states follow South Carolina's lead, which does not consider for compassionate release anyone sentenced to life without parole or death.[144] Some other states categorically exclude those who have served only a short portion of their sentence, even if they are terminally ill.[145]

The state systems are limited on the one hand by their missing or contradictory guidance on how to apply for and receive compassionate release and on the other hand by overly complex systems making it hard for individuals to access it. Ohio is a perfect example of an overly complex system that renders compassionate release all but nonexistent. The state has two early-release mechanisms: (1) judicial release and (2) administrative release.[146] Both of these systems are for those who are facing imminent death—the judicial release is for individuals with a twelve-month life expectancy, while the administrative process is for individuals with a six-month life expectancy.[147] The major hurdle, however, is the fact that the incarcerated person must exhaust the judicial process before the administrative process.[148]

Another barrier to entry is the lack of representation. There is no constitutional right to post-conviction representation, so most individuals who apply for compassionate release are not advised of the process.[149] Similarly, incarcerated people do not have access to those who could assist in creating a release plan.[150] A release plan is an important tool to establish to the ultimate decision-maker, either a judge or a court administrator, that the incarcerated person has a plan of how they will successfully reenter society.[151] Because the

143. EVERYWHERE AND NOWHERE, *supra* note 35, at 14 (citing ALASKA STAT. § 33.16.085(a)(1) (2023)).

144. *Id.* (citing Letter from Brendan McDonald, Assistant Att'y Gen., to Kela E. Thomas, Dir., Dep't of Prob., Parole & Pardon Servs. (Aug. 24, 2015)).

145. *Id.* (providing Indiana as an example, which will not release incarcerated people for "terminal illness unless they are within seven and a half years of their release date").

146. *Id.* at 15 (citing OHIO REV. CODE ANN. § 2967.05 (LexisNexis through File 56 of the 135th Gen. Assemb. (2023-2024))).

147. *Id.*

148. *Id.* (citing OHIO DEP'T OF REHAB. and CORR., NO. 66-ILL-01). This is the opposite of the First Step Act procedure where the incarcerated person must first ask BOP before seeking the court's assistance. *See* 18 U.S.C. § 3582(c)(1)(A).

149. *See* Pennsylvania. v. Finley, 481 U.S. 551, 555 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further."); *see also* Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring) ("[T]here is nothing in the Constitution or the precedents of this Court that requires that a State provide counsel in postconviction proceedings. A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment.").

150. *See* EVERYWHERE AND NOWHERE, *supra* note 35, at 18–19.

151. *Id.*

basis for compassionate release in most jurisdiction is extreme illness nearing death, people who have been released from incarceration need to show they can access public benefits like Medicaid and Medicare—which can be a lengthy and confusing application process.[152]

State compassionate release systems, therefore, are extremely limited and still exclusively focus on the health of the person. At the same time, the prison population is aging, which requires more funding to treat the prisoners' failing health.[153] A majority of the public agrees that overly long sentences should be reevaluated, yet states struggle to pass second-look legislation.[154] As we wait for second-look legislation to work its way through state legislatures, states could use the First Step Act and the Amendments to help decarcerate by expanding their already-existing compassionate release regimes.

III. NEW SENTENCING GUIDELINES

> "The Sentencing Commission is back in business . . . . Today, we are listening to Congress and the public by increasing first steps toward **second chances**, taking targeted action on gun trafficking and fentanyl, and **expanding alternatives to incarceration**."[155] - Chair Carlton W. Reeves

In 2022, President Biden appointed a new Sentencing Commission, ending the void in the previous administration which existed at the time of the passage of the First Step Act.[156] In January 2023, the new Commission promulgated proposed amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary, calling for public comment over a sixty-day period

152. EVERYWHERE AND NOWHERE, *supra* note 35, at 18. North Carolina is an example of a state that provides a social worker to help with release planning within forty-five days of an incarcerated person's medical-release request. N.C. DEP'T OF PUB. SAFETY, POL'Y & PROC., MEDICAL RELEASE OF ILL AND DISABLED OFFENDERS ch. C, § .2104(i)–(j) (2018). California's recent changes to its compassionate release provisions also afford individuals who are deemed indigent a lawyer to represent them in court. CAL. PENAL CODE § 1172.2(b), (k) (West, Westlaw through Ch. 1002 of 2024 Reg. Sess.).

153. "From 1991 to 2021, the percentage of the state and federal prison population nationwide aged 55 or older swelled from 3% to a whopping 15%." Emily Widra, *The Aging Prison Population: Causes, Costs, and Consequences*, PRISON POL'Y INITIATIVE (Aug. 2, 2023), https://www.prisonpolicy.org/blog/2023/08/02/aging/ [https://perma.cc/7CDP-TR6A]. A 2016 report from the Office of the Inspector General found that aging incarcerated folks are more costly than younger incarcerated people—costing 8% more on average. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS 2 (2016), https://oig.justice.gov/reports/2015/e1505.pdf [https://perma.cc/27AL-967D]. Furthermore, in fiscal year 2013, the BOP institutions with the highest percentage of older inmates were paying *five times* more for medical care and *fourteen times* more on medication per person than BOP institutions with the lowest percentages of older inmates. *Id.* at 3.

154. Kellie R. Hannan et al., *Public Support for Second Look Sentencing: Is There a Shawshank Redemption Effect?*, 22 CRIMINOLOGY & PUB. POL'Y 263, 267 tbl.5 (2023) (finding that in two studies respectively, 75.9% and 53.4% of Americans supported second-look sentencing); *see* sources cited *supra* note 9.

155. U.S. Sent'g Comm'n, *supra* note 7 (emphasis added).

156. Press Release, The White House, President Biden Nominates Bipartisan Slate for the United States Sentencing Commission (May 11, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/11/president-biden-nominates-bipartisan-slate-for-the-united-states-sentencing-commission/ [https://perma.cc/9VCB-UFC5].

following the publication of the proposed amendments.[157] Even prior to announcing the proposed amendments, the Commission identified its priorities in October 2022—which generated more than eight thousand letters of public comment.[158] The Commission's first priority was to address sentence reduction under the compassionate release provision of the First Step Act by defining what should be considered "extraordinary and compelling" reasons for reductions under 18 U.S.C. § 3582(c)(1)(A).[159] After the sixty-day comment period and two public hearings, the Commission published its final proposed amendments in April 2023.[160] These proposed amendments went into effect on November 1, 2023.[161]

A. Public Comment

During the public-comment period, the Commission received public comments from stakeholders including but not limited to, former and current federal judges, professors, non-profit organizations, private law firms, the Department of Justice, federal defenders offices, reentry programs, and members of the public.[162] A letter signed by twenty-five former federal judges—most of whom sentenced individuals pre- and post-*Booker* and have had broad experience with the consequences of the Sentencing Reform Act of 1984—stated:

> Judges have an absolute duty to follow applicable law at sentencing. We also understand and respect the principles of finality and consistency that are the hallmarks of the federal sentencing system. But we also understand that a prison term imposed at sentencing may not always stand the test of time because of changed circumstances that might provide extraordinary and compelling reasons to revisit it. We believe the Commission's thoughtful approach – expressed in the proposed amendments to § 1B1.13 of the Sentencing Guidelines – to providing judges with reasonable guidance and authority to reduce prison terms for truly extraordinary and compelling

157. Press Release, U.S. Sent'g Comm'n, U.S. Sentencing Commission Seeks Comment on Proposed Revisions to Compassionate Release Increase in Firearms Penalties (Jan. 12, 2023), https://www.ussc.gov/about/news/press-releases/january-12-2023 [https://perma.cc/U23E-JX6K].

158. *Id.*

159. Proposed Priorities for Amendment Cycle, 87 Fed. Reg. 60438, 60439 (Oct. 5, 2022).

160. *See* Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254 (May 3, 2023).

161. *Id.*

162. *See* U.S. SENT'G COMM'N, PROPOSED AMENDMENTS/ PUBLIC COMMENT 88 FR 7180 (2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf [https://perma.cc/RC95-N4U2]. The Sentencing Commission collected information from a representative sample of the public, which was used by the Commissioners during their deliberations and carefully curated them for future reference and official recordkeeping purposes. *Id.*

> reasons fully comports with the framework for sentencing modification set forth by Congress in 18 U.S.C. § 3852(c)(1).[163]

The federal public defenders also submitted a letter in support of the Commission's position on compassionate release (the Defender Comment).[164] The Defender Comment took the position that the Commission does have the "authority to describe what should be considered 'extraordinary and compelling.'"[165] Congress specifically instructed the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[166] In other words, by the very terms of § 3582(c)(1)(A), Congress never intended to limit early release for federally incarcerated people to medical conditions or near-death situations.[167] In fact, when the Sentencing Reform Act was enacted, Judge Tyler presented testimony to Congress explaining that § 3582(c)(1)(A) would serve the purpose of parole in the new sentencing scheme in circumstances where an offender receives a sentence which turns out to be manifestly unfair or wrong.[168] Finally, the Defender Comment appropriately noted that "[d]ecades of inaction by the BOP did not alter" Congress's intention when it passed the Sentencing Reform Act in 1984.[169] Even though Congress gave broad authority to the Commission to define "extraordinary and compelling" from the start, the BOP's policy for the last forty years has been to file motions for compassionate release only in the most dire of medical cases.[170] Congress's intent, therefore, was never to limit compassionate release to medical cases, and the First Step Act makes that intention clear.[171] When it passed the Sentencing Reform Act in 1984, Congress legislated that courts, not parole boards, would review sentences.[172] The proposed Sentencing Guidelines give more power to the judicial branch to do so.[173]

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163. Wayne Andersen et al., Comment Letter in Support of Compassionate Release Guideline Amendments (Mar. 14, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf [https://perma.cc/K5NY-4QJD].

164. *See* Fed. Defender Sent'g Guidelines Comm., Federal Public and Community Defenders Comment on Proposal to Amend USSG § 1B1.13 (Proposal 1) (Mar. 14, 2023) [hereinafter Defender Comment], https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf [https://perma.cc/9HAR-2DPR].

165. *Id.* at 2.

166. *Id.* (citing 28 U.S.C. § 994(t)).

167. *Id.* at 3 n.3 (contrasting the statutory language of 18 U.S.C. § 3582(c)(1)(A) with that of state statutes limiting compassionate release to medical parole, serious medical conditions, or advanced age). This Article recognizes that the statutory language of state statutes is a hurdle and this would have to be overcome if applying broader compassionate release at the state level. *See id.*

168. *See* S. REP. NO. 98-225, at 53–56 (1983).

169. Defender Comment, *supra* note 164, at 4.

170. *See* United States v. Brooker, 976 F.3d 228, 231 (2d Cir. 2020).

171. Defender Comment, *supra* note 164, at 3.

172. *See* 18 U.S.C. § 3582(c)(1)(A).

173. *See* Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 521 (2010). Professor Klingele states several

The United States Department of Justice was on the other side of the discussion and has historically asked the Commission to leave the construction of policy to the BOP itself[174] even though the BOP's track record of filing compassionate release motions is abysmal.[175] The Department of Justice also submitted a letter during the public-comment period.[176] In its letter, the Department supported the Commission's decision to prioritize compassionate release for review but asked that the Commission "clearly articulate in the Guidelines the circumstances where compassionate release is appropriate."[177] The Department agreed with some proposals;[178] however, the Department affirmatively disagreed that § 3582(c) authorized courts to reduce sentences based on a nonretroactive developments in sentencing law and argued that the Commission should reject the proposed "[c]hanges in [l]aw" provision of the new Guidelines.[179]

The Department's position was that § 3582(c)(1)(A)(i) did not authorize sentence reductions based on nonretroactive changes in sentencing law.[180] The Department's letter listed examples of where the Department has taken this

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reasons that judicial sentence reduction has advantages over a reduction system reliant on a parole board. *Id.* First, the judicial process is more transparent, as proceedings occur on the record where both parties and a victim can present arguments. *Id.* at 515. Second, the judicial process of sentence reduction promotes accountability as proceedings "invite[] the offender to revisit in a concrete way [their] offense and the community in which [they] committed it." *Id.* at 517. Lastly, Professor Klingele argues that courts should be the "arbiters of justice with respect to the outer limits, at least, of the quantum of punishment merited in any given case." *Id.* at 534.

174. Dep't of Just. of the U.S., Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines, at 4, 6–8 (Feb. 12, 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/DOJ.pdf [https://perma.cc/6263-UXSX]; *see also* Defender Comment, *supra* note 164, at 8.

175. *See generally* Christie Thompson, *Old, Sick and Dying in Shackles*, THE MARSHALL PROJECT (Mar. 7, 2018, 5:00 AM), https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles [https://perma.cc/3CDG-TCUV] (explaining that the BOP only approved 6% of its applications between 2013 and 2017).

176. *See* U.S. Dep't of Just., Comment Letter on Proposed Amendments to the Policy Statement for § 1B1.13 (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ1.pdf [https://perma.cc/3ND5-3D3N].

177. *Id.* at 2.

178. Specifically, the DOJ agreed with expanding the definition of "extraordinary and compelling" reasons to address: (1) "[R]isk of serious medical complications in connection with public health emergencies" but only for "disease that is similar in severity to the COVID-19 pandemic, rather than routine seasonal outbreaks, such as the annual cold and flu season, or an outbreak of a less serious disease such as chickenpox"; (2) additional family circumstances that warrant release, but only for "immediate family member[s]" (suggesting that "grandparents, aunts/uncles, nieces/nephews, and cousins" are not immediate family members); and, (3) an individual's suffering of "sexual assault, or physical abuse resulting in serious bodily injury, committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody," but only after such "misconduct has been independently substantiated—such as after there has been a criminal conviction, an administrative finding of misconduct, or a finding or admission of liability in a civil case." *Id.* at 4–6.

179. *Id.* at 6.

180. *Id.*

position in court as well as five appellate courts that agreed with the Department's position:[181]

> [T]he Department has concerns about using compassionate release as the mechanism to address these concerns for several reasons. First, this proposal risks undermining the principles of finality and consistency that are the hallmarks of the Sentencing Reform Act. . . . Second, and relatedly, a compassionate-release mechanism without further guardrails or procedural protections would seriously affect the victims of crime . . . . Third, the burden on the judicial system would be immense. . . . Fourth, the proposal will lead to widespread sentencing disparities . . . .[182]

The Department identified that § 3582(c)(1)(A) "permits courts to reduce a sentence in light of a Guidelines amendment, so long as the reduction is consistent with Commission policy statements."[183] The Department objected to the "changes in law" proposal because it would "essentially eliminate the restrictions that § 3582 and [that the policy statement in Section] 1B1.10 place on sentence reductions predicated upon on a Guideline amendment."[184] The proposed amendments would "permit courts to reduce a sentence regardless of whether it was based upon a retroactive Guidelines amendment; to consider changes other than those set forth in the amendment; and to impose a sentence below the newly applicable Guidelines range."[185]

B. The Amendments

> Judges are in the best position to decide if someone deserves to have the length of their sentence revisited. . . . This policy trusts courts to continue doing what is right.[186] – Judge Reeves, Sentencing Commission Chair

When the new Commission was appointed, it took the position that the First Step Act directed the Commission "to increase the use and transparency of [compassionate release], . . . ensure judges can continue to take first steps toward second chances for those who deserve them, and reunite families through appropriate reentry."[187] The Commission noted that "[d]uring the pandemic, federal judges saved lives using their authority in 18 U.S.C. § 3582(c)(1)(A) to reduce sentences for incarcerated people facing 'extraordinary and compelling' circumstances."[188]

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181. *Id.* at 7 nn.5–8.

182. *Id.* at 7–8. Many of these criticisms of the proposed amendments would also be criticisms of expanding state compassionate release, which I will address in Part IV.

183. *Id.*

184. *Id.*

185. *Id.* at 8 (first citing 18 U.S.C. § 3582(c)(2); and then citing U.S. SENT'G GUIDELINES MANUAL §§ 1B1.10, 13 (U.S. SENT'G COMM'N 2018)).

186. U.S. Sent'g Comm'n, *supra* note 7.

187. *Id.*

188. *Id.*

In the preamble to the 2023 proposed amendments, the Commission explained its attempt to be thoughtful in addressing the public comments and the data it received.[189] It recognized that, at the time the First Step Act was passed, the First Step Act's changes and the absence of a Commission made it impossible for the Commission to amend Section 1B1.13 to allow defendants to file their own compassionate release motions without the BOP as a gatekeeper.[190] "During those [four] years, courts have found extraordinary and compelling reasons warranting sentence reductions based on all of the factors the Commission identified in 2007," but they also found many other non-listed "extraordinary and compelling" reasons for release.[191]

"The amendment expands the list of specified extraordinary and compelling reasons . . . to better account for and reflect the plain language of § 3582(c)(1)(A), its legislative history, and decisions by courts made in the absence of a binding policy statement."[192] With regards to the "other reasons" category, the amendment "makes clear that extraordinary and compelling reasons exist if the defendant presents *any other* circumstance or combination of circumstances that, considered [with or without any of the reasons in the medical, family or sexual-abuse categories], are similar in gravity to [those categories]."[193] The Commission "specifically rejected" the limitation that the Department sought that "'other reasons' be similar in nature and consequence to the specified [medical, family or sexual-abuse] reasons."[194] The Commission rejected this proposal because after it reviewed the hundreds of district court decisions around the country that based sentence reductions on dozens of other reasons, the Commission determined that judges are "in a unique position to determine whether the circumstances warrant a reduction."[195] Further guidance on what those factors are is best provided by the district courts themselves who

189. U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 2 (2023) [hereinafter PROPOSED AMENDMENTS], https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf [https://perma.cc/UCX5-5SL6].

190. *Id.* ("The amendment revises § 1B1.13(a) to reflect that a defendant is now authorized to file a motion under 18 U.S.C. § 3582(c)(1)(A), making the policy statement applicable to both defendant-filed and BOP-filed motions.").

191. *Id.* at 1–2; *see* U.S. SENT'G COMM'N, COMPASSIONATE RELEASE DATA REPORT FISCAL YEARS 2020 TO 2022, at tbls.10, 12, 14. (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf [https://perma.cc/9ZAU-M2YU].

192. PROPOSED AMENDMENTS, *supra* note 189, at 3. The Amendments make new subcategories under "Medical Circumstances of the Defendant" which "incorporates several factors courts considered during the COVID-19 pandemic." *Id.* The Amendments also expand the "Family Circumstances" ground and adds a new ground for "Victim[s] of Abuse" that "applies if a defendant has suffered sexual or physical abuse that was committed by or at the direction of a correctional officer, an employee or contractor of the BOP, or any other individual having custody or control over the defendant." *Id.* at 3–4. The Amendments do adopt the Department's argument that the sexual abuse must be established in some kind of criminal, civil or administrative proceeding. *Id.* at 4.

193. *Id.* at 4 (emphasis added).

194. *Id.* at 4–5.

195. *Id.* at 5.

are looking at the facts of each case rather than "an effort by the Commission to predict and specify in advance all of the grounds on which relief may be appropriate."[196]

Another expansion of the "extraordinary and compelling" category appears in subsection (b)(6) called "Unusually Long Sentence" and allows nonretroactive changes in law (other than nonretroactive amendments to the Guidelines) to be considered "extraordinary and compelling circumstances warranting a sentence reduction[,]" but only in narrow circumstances: (1) the defendant has an unusually long sentence; (2) the defendant has served ten years[197] of it; and (3) "an intervening change in the law has produced a gross disparity between the sentence being served and the sentence" that would likely be imposed now.[198] Subsection (b)(6) applies to defendants who seek to have a nonretroactive change in law itself be considered an "extraordinary and compelling" reason warranting a reduction in sentence.[199] The Commission

196. *Id.*

197. "Commission data show[ed] that between fiscal year 2013 and fiscal year 2022, fewer than [12%] (11.5%) of all offenders were sentenced to a term of imprisonment of ten years or longer." *Id.* at 3, 6.

198. *Id.* at 5. This change also seeks to remedy a circuit split about whether nonretroactive changes in law may be considered "extraordinary and compelling" reasons. *Id.* ("*Compare United States v. Ruvalcaba,* 26 F.4th 14, 16, 26–28 (1st Cir. 2022) (holding that nonretroactive changes in sentencing law may be considered in light of a defendant's particular circumstances), *United States v. McCoy*, 981 F.3d 271, 286–88 (4th Cir. 2020) (same), *United States v. Chen*, 48 F.4th 1092, 1098 (9th Cir. 2022) (same), *and United States v. McGee*, 992 F.3d 1035, 1047–48 (10th Cir. 2021) (same), *with United States v. Andrews*, 12 F.4th 255, 260–62 (3d Cir. 2021), *cert. denied,* 142 S. Ct. 1446 (2022) (holding that nonretroactive changes in law are not permissible considerations), *United States v. McMaryion*, 64 F.4th 257, 259–60 (5th Cir. 2023) (same), [*and*] *United States v. McCall*, 56 F.4th 1048, 1061 (6th Cir. 2022) (en banc) (same) . . . ."). The Commission ultimately decided it needed to resolve the circuit split because it was rooted in its own Guidelines, and the Department successfully prevented Supreme Court review by arguing that the Commission was the governing body to address it. *See id.* at 6.

199. *Id.* at 6. Since the Amendments became effective in November 2023, there has been a lot of litigation around subsection (b)(6). The decisions have been a mixed bag, some applying Section 1B1.13(b)(6) to reduce a defendant's sentence and other decisions siding with the government that Section 1B1.13(b)(6) is unconstitutional as Congress specifically said the First Step Act was not retroactive. *See, e.g.*, United States v. McCain, No. 3:12-cr-34-MCR, 2024 U.S. Dist. LEXIS 80070, at *1 (M.D. Fla. May 2, 2024) (granting the motion under Section 1B1.13(b)(6) and reducing the sentence, which was largely based on stacked 924(c)s, from 385 to 198 months); United States v. Staake, No. 17-30063, 2024 WL 1906432, at *2 (C.D. Ill. May 1, 2024) (determining that the Seventh Circuit's pre-Amendments opinion regarding legal changes, United States v. Thacker, 4 F.4th 569 (7th Cir. 2021), does not preclude relief under Section 1B1.13(b)(6) and reducing the sentence for a nonviolent drug offense); United States v. Parson, No. 9:95-cr-08089-CMA, 2024 WL 4296222, at *4–8 (S.D. Fla. Apr. 19, 2024) (rejecting the government's validity argument); United States v. Byam, No. 12-CR-586-01, 2024 WL 1556741, at *1–2, *6–9 (E.D.N.Y. Apr. 10, 2024) (reducing a thirty-two-year sentence that was based on stacked 924(c) charges to sixteen years, under Section 1B1.13(b)(6)); United States v. Cousins, No. 1:92-CR-250, 2024 WL 1516121, at *5–7 (N.D. Ga. Apr. 4, 2024) (rejecting the government's validity argument and reducing a long sentence to time served, noting other cases in the jurisdiction doing the same). The government's arguments, for the most part, rest on pre-2023-amendment cases like United States v. Andrews, 12 F.4th 255, 261 (3rd Cir. 2021), which held that Congress specifically said that nonretroactive sentencing changes by themselves could not be the basis for compassionate release. But, in a recent opinion from June 25, 2024, the Eastern District of Pennsylvania did a thoughtful analysis of congressional intent, giving deference to the Sentencing Commission's 2023 Amendments and found that Section 1B1.13(b)(6) does not contravene the Third Circuit's decision in *Andrews* and that nonretroactive sentencing changes can be considered in narrow circumstances. *See* United States v. Ali, No. 07-0042-2, 2024 WL 3161749, at *6–11 (E.D. Penn. June 25, 2024) (reducing the defendant's sentence to twenty-one years—what he would have served if sentenced today—and finding that the defendant established extraordinary and

added a new subsection (c) to the guidance which "governs the use of changes in the law in cases where a defendant 'otherwise establishes that extraordinary and compelling reasons warrant a sentence reduction.' In those circumstances, *all* changes in law, including nonretroactive amendments to the Guidelines Manual, may properly be considered . . . ."[200]

As Chairman Judge Reeves stated during the Sentencing Commission's public meeting, the purpose of these amendments is to meet congressional intent in passing the First Step Act, recognize congressional efforts to decarcerate, find alternatives to prison, and to give back to the judges the power to determine appropriate sentences based on all of the facts presented to them at sentencing.[201] The judges, not parole boards nor administrative agencies, are in the best position to make those determinations.[202]

IV. HOW THE IDEAS IN THE NEW SENTENCING GUIDELINES COULD BE APPLIED IN THE STATES

While the federal government expanded the use of compassionate release, moving well beyond the notions of death and dire health conditions being its only purpose, the states are stuck in the rut of the past while the prison population ages and gets sicker.[203] States are making progress with second-look legislation; however, it is slow and imperfect.[204] States could simultaneously

compelling reasons as his sentence was unusually long, served longer than the ten years required, and the change in law caused a gross disparity in sentencing).

200. PROPOSED AMENDMENTS, *supra* note 189, at 7.

201. *See generally* Transcript of Public Meeting at 12–17, U.S. Sent'g Comm'n (2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230405/20230405_transcript.pdf [https://perma.cc/6PPK-UWHT].

202. *See* U.S. Sent'g Comm'n, *supra* note 7.

203. *See generally* EVERYWHERE AND NOWHERE, *supra* note 35.

204. Even states like California that have passed second-look legislation realize its limitations. On January 1, 2024, California's newest second-look legislation went into effect, which allows judges to reevaluate old sentences that seem unfair in light of changes in the law or new circumstances. *See* CAL. PENAL CODE § 1172.1 (West, Westlaw through Ch. 1002 of 2024 Reg. Sess.). On its face, this sounds exactly like what we hope to achieve in second-look legislation. But while this new law should be celebrated, it has limitations. For example, it leaves the resentencing decision in the hands of trial court judges. *See id.* § 1172.1(a)(1). There is no requirement that judges hear a resentencing, change a sentence in any case, or explain their reasoning for why they denied the resentencing. *See id.* § 1172.1(a)–(d). Furthermore, the law only applies to people serving a sentence under a law that has changed since the original sentence was given. *See id.* § 1172.1(a)(1). Most troubling, California's new law does not provide for a right to counsel for individuals seeking resentencing. *See id.* § 1172.1(a)–(d). But in other states, like Colorado, second-look legislation is complicated by constitutional and separation-of-powers concerns. A Colorado Supreme Court case, People v. Herrera, 516 P.2d 626 (Colo. 1973) (en banc), makes meaningful second-look legislation difficult. In *Herrera*, eight separate defendants sought a reduction of sentence under Section 40-1-501(f), which allowed for post-conviction review by the courts if there had been a significant change in the law that warranted a retroactive application of the changed legal standard in the interest of justice. *Id.* at 159. The court recognized that in passing this legislation, the legislature sought to "confer upon the courts the express power to review sentences after conviction and exhaustion of appellate remedies." *Id.* at 161. However, the court determined that the Colorado Constitution did not vest the power of commutation of sentence in the courts and affirmed previous decisions that held that only the governor has the power to grant reprieves, commutations, and

expand their existing compassionate release regimes to include other kinds of compassion recognized in the Commission's Amendments.[205] States should not allow their departments of corrections and other administrative bodies to serve as the gatekeepers of compassionate release. Instead, states should use compassionate release as an avenue for second chances, as the federal Sentencing Commission believes it should be.

There are three critical tenants of the Amendments that states could employ to expand compassionate release under existing state legislative frameworks:

1. Create a mechanism to allow incarcerated people to initiate compassionate release and seek release through the judicial system, taking the decisions about compassionate release out of the hands of their departments of corrections and parole boards;

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pardons after conviction. *Id.* at 162. The court held that "[a]ny attempt, therefore, to exercise such power by the judicial department, even though legislatively sanctioned, would be a violation of the doctrine of separation of powers under Article III of the Colorado Constitution." *Id.* The court denied the defendants' motions to review their sentences. *See id.* at 163. *Herrera* makes it nearly impossible for Colorado to pass a law like that of California allowing courts to reevaluate sentences.

205. Many states have attempted to change their compassionate release programs in the last several years, including New Mexico, Pennsylvania, and North Carolina in 2023. In New Mexico, Governor Michelle Grisham signed Senate Bill 29 into law to lower the age of those seeking compassionate release from sixty-five to fifty-five. *See* N.M. STAT. ANN. § 31-21-5(G)(2) (West, Westlaw through 2024 Second Reg. Sess.). In Pennsylvania, a 2020–2021 budget report from the Pennsylvania Department of Corrections reported an increase in their aging prison population since 2000 with 23% of those incarcerated over the age of fifty. *See* John E. WETZEL, PENN. DEP'T OF CORR., FY 2021-21 BUDGET: BUDGET TESTIMONY 12 (2021), https://www.pa.gov/content/dam/copapwp-pagov/en/cor/documents/resources/statistics/budget-documents/Budget%20Testimony%202020-21.pdf [https://perma.cc/EX56-KV5X]. Annual medication costs per inmate for those over fifty were $3600. *Id.* at 13. In October 2023, Pennsylvania House Bill 587 was passed by the Pennsylvania House Judiciary Committee in response to the fact that despite this aging population, only thirty-one individuals have been released in thirteen years under the state's current policy. *See* H.B. 587, 2023 Leg., Reg. Sess. (Pa. 2023); Danielle Ohl, *Pennsylvania's Broken 'Compassionate Release' Law, by the Numbers*, SPOTLIGHT PA (Apr. 5, 2022), https://www.spotlightpa.org/news/2022/04/pa-compassionate-release-by-the-numbers/ [https://perma.cc/QGB2-E9P4]. The new policy aims to lower the age of eligible incarcerated individuals to fifty-five and make those who have served twenty-five years or half of their sentence, whichever is lesser, eligible for release. *See* Pa. H.B. 587. In North Carolina, House Bill 259 seeks to reduce the age criteria for medical release from sixty-five to fifty-five or older if they suffer from chronic illness and pose "no risk or low risk to public safety." H.R. 259, 2023 Leg., Reg. Sess. (N.C. 2023). Formerly, an individual had to be sixty-five or older and "not pose a safety risk." *See id.* The bill would allow compassionate release if death were likely within nine months, which would replace the current six-month requirement. *See id.* The cost of healthcare in North Carolina prisons only increases as the prison population ages; nearly 9% of inmates are over sixty and almost 2% are over seventy. Kelan Lyons, *Monday Numbers: Health Care in NC Prisons Cost $357 Million Last Year and Is Expected to Increase*, NC NEWSLINE (Feb. 20, 2023, 6:00 AM), https://ncnewsline.com/2023/02/20/monday-numbers-health-care-in-nc-prisons-cost-357-million-last-year-and-is-expected-to-increase/ [https://perma.cc/5EJZ-CXN5]. In 2023, similar bills in Alabama, Arizona, Connecticut, Kansas, and Montana were introduced, but each stalled in various stages of the process. *See* H.B. 228, 2023 Reg. Sess. (Ala. 2023); H.B. 2524, 56th Leg., 1st Reg Sess. (Ariz. 2023); H.B. 6738, 2023 Leg., Jan. Sess. (Conn. 2023); H.B. 2071, 2023 Leg., Reg. Sess. (Kan. 2023); H.B. 357, 2023 Leg., Reg. Sess. (Mo. 2023); S.B. 581, 2023 Leg., Reg. Sess. (Mo. 2023). The beginning of 2024 saw a renewed effort for compassionate release programs, with bills in Washington, Maryland, Michigan, Missouri, New York, Pennsylvania, and Virginia. *See, e.g.*, S.B. 128, 446th Gen. Assemb., Reg. Sess. (Md. 2024); S.B. 6037, 68th Leg., Reg. Sess. (Wash. 2024).

2. Expand the definition of compassionate release to mean more than cases where the inmate is near death or in dire health; and

3. Stop limiting who is eligible for compassionate release based on the kind of conviction. Many states disqualify people sentenced under certain laws, such as habitual offenders and those with life sentences.[206] This limitation also has the effect of disproportionately affecting Black people who are far more likely to receive "habitual offender" designations and longer sentences, which make them ineligible for compassionate release.[207]

A. Provide a Direct Avenue for the Incarcerated Person to Initiate a Request for Compassionate Release and a Pathway to the Courts

One of the most important components of the First Step Act and the Amendments is removing the BOP as the gatekeeper for compassionate release. Prior to the First Step Act, only the BOP could bring a compassionate release motion on behalf of an inmate, and it rarely did.[208] The First Step Act and the Amendments give incarcerated people the right to go directly to the court with their claim for release, which made compassionate release more accessible.[209] Under the new scheme, the BOP has been completely cut out of the decision-making process.[210]

206. *See, e.g.*, WIS. STAT § 302.113 (2024); NEB. REV. STAT. § 83-1, 110.02 (2018).

207. THE SENT'G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/ [https://perma.cc/GS6X-T472]; *see also* Charles Crawford et al., *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 CRIMINOLOGY 481, 496 (2006). Forty-eight percent of the approximately 206,000 individuals "serving life and 'virtual life' prison sentences are African American and another 15% are Latino." THE SENT'G PROJECT, *supra*. According to the United States Sentencing Commission, Black male defendants "were 21.2[%] less likely than White male offenders to receive a non-government sponsored downward departure or variance" between 2012 and 2016. U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf [https://perma.cc/35AQ-QMG3]. Among individuals who received sentences within the applicable sentencing guidelines range, Black male defendants' sentences were 7.9% longer than those received by White male defendants. *Id.* And these disparities were not a result of different histories of violence—even accounting for violence in a defendant's past, "Black male [defendants] received sentences on average 20.4[%] longer than similarly situated White male [defendants]." *Id.*

208. *See supra* Part I. For over thirty years, BOP very rarely filed compassionate release motions and only about two dozen inmates per year saw relief. PROPOSED AMENDMENTS, *supra* note 189, at 1 (citing U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM, I-2013-006 1 & n.9 (2013)). Additionally, the BOP's motions were limited to those who were about to die "or profoundly and irredeemably incapacitated." *Id.*

209. *See supra* Part III. In 2020, for example, 96% of the applicants who were granted relief filed their own motions. FIRST STEP ACT AND COVID-19 PANDEMIC, *supra* note 129, at 3.

210. *See generally* FIRST STEP ACT AND COVID-19 PANDEMIC, *supra* note 129, at 7.

Currently, in only six states and D.C. is the final decision-maker for compassionate release a court or judge.[211] That means forty-three states leave such decisions to their parole boards, departments of corrections, or other administrative entities.[212] In many of those jurisdictions, there is also no direct pathway for the defendant to initiate the motion.[213]

Florida is a good example of a state who delegates all compassionate release decision-making power to the Florida Department of Corrections. In Florida, there are two types of compassionate release: (1) conditional medical release[214] and (2) medical furlough.[215] In both categories, neither incarcerated people nor their loved ones nor advocates can initiate the compassionate release process.[216] Staff of the Florida Department of Corrections are the only people who can identify an eligible inmate, and they have no affirmative duty to begin that process.[217] The Florida Board of Pardons and Paroles and/or the Commissioner of the Department of Corrections are the final decision-makers.[218] Florida does not publish data on how many incarcerated people are able to utilize either program.[219] Given that Florida releases so few prisoners, this data is likely negligible.[220]

California's recent compassionate release legislation moved in the opposite direction. In September 2022, Governor Gavin Newsom signed Assembly Bill 960 into law, which expanded California's compassionate release eligibility criteria and *removed* the Secretary of the California Department of Corrections

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211. The six states are California, Delaware, New Jersey, Ohio, Pennsylvania, and Wisconsin. *See* FAMS. AGAINST MANDATORY MINIMUMS, COMPASSIONATE RELEASE STATE BY STATE 2–9 (2022), https://famm.org/wp-content/uploads/CCR-State-Chart-2022indd-03-18-22.pdf [https://perma.cc/74PB-5A3T]; *see also* CAL. PENAL CODE § 1172.2 (West, Westlaw through Ch. 1002 of 2024 Reg. Sess.); DEL. CODE ANN. tit. 11, § 4217(e) (2010); N.J. STAT. ANN. § 30:4-123.51e (West through L.2024, c. 62 and J.R. No. 1); OHIO REV. CODE ANN. § 2929.20 (LexisNexis through File 56 of the 135th Gen. Assemb. (2023-2024)); 42 PA. CONS. STAT. § 9776 (2023); WIS. STAT. § 302.113 (2024). In 2024, several states introduced compassionate release legislation that would allow the defendant to petition the courts for compassionate release, including Indiana, Maryland, New Jersey, and Washington. *See* H.B. 1354, 123d Gen. Assemb., 2d Reg. Sess. (Ind. 2024); S.B. 0291, 123d Gen. Assemb., 2d Reg. Sess. (Ind. 2024); S.B. 389, 446th Gen. Assemb., Reg. Sess. (Md. 2024); S.B. 2338, 221st Leg., Reg. Sess., (N.J. 2024); S.B. 6037, 69th Leg., Reg. Sess. (Wash. 2024).

212. *See* FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 211, at 4. Iowa does not have a compassionate release scheme at all, so it was not included in this count. *See id.*

213. *See id.* at 2–8.

214. *See* FLA. STAT. § 947.149 (1997).

215. *See* FLA. ADMIN. CODE ANN. r. 33-601.603(7)(b) (1997).

216. *See* FLA. STAT. § 947.149(3) (1997); FLA. ADMIN. CODE ANN. r. 23-24.020(2) (1994); FLA. ADMIN. CODE ANN. r. 33-601.603(7)(b)(2) (1997).

217. *See* FLA. STAT. § 947.149(3) (1997); FLA. ADMIN. CODE ANN. r. 23-24.020(2) (1994); FLA. ADMIN. CODE ANN. r. 33-601.603(7)(b)(2) (1997).

218. FLA. STAT. § 947.149(3) (1997); FLA. ADMIN. CODE ANN. r. 23-24.020(2) (1994); FLA. ADMIN. CODE ANN. r. 33-601.603(7)(b)(2) (1997).

219. *See* FAMS. AGAINST MANDATORY MINIMUMS, COMPASSIONATE RELEASE REPORT CARD 3 (2022), https://famm.org/wp-content/uploads/2022/10/fl-report-card-final.pdf [https://perma.cc/8CEG-CSHN].

220. *See id.* In its state scorecard, Families Against Mandatory Minimums gives Florida's compassionate release policies an "F." *Id.* at 1.

and Rehabilitation from compassionate release decision-making altogether.[221] Incarcerated people may seek relief directly from the courts, just as the First Step Act provides.[222] With this legislation, California recognized that the previous system did not work; in fact, "[b]etween January 2015 and April 2021, [ninety-one] people died while awaiting compassionate release, while only [fifty-three] people were released."[223]

To start the compassionate release process under AB 960, a California Department of Corrections doctor[224] must determine that the incarcerated person has a medical prognosis that meets the medical criteria.[225] Once this is determined, the doctor must notify the Chief Medical Executive.[226] If the Chief Medical Executive agrees with the prognosis, the doctor must notify the Warden, and the Department of Corrections must refer the matter to the court for compassionate release within forty-five days.[227] The notice to the court triggers the incarcerated person's right to counsel if the incarcerated person is deemed indigent by the judge.[228] The warden must also notify the person or their family member within forty-eight hours of the warden receiving notice of the referral to the court.[229]

Once the Department of Corrections refers the incarcerated person's matter to the court, there must be a hearing within ten days in front of a judge in the county of the conviction.[230] If possible, the same judge that handled the original sentence conducts this hearing.[231] One of the most exciting pieces of California's new law is the presumption, once the case is referred to court, in favor of resentencing and receiving compassionate release; the judge may deny a motion only if the defendant poses an unreasonable risk of committing a

221. *See* Press Release, Fams. Against Mandatory Minimums, FAMM Releases Statement After Gov. Newsom Signs Compassionate Release Bill (Sept. 30, 2022) [hereinafter FAMM Statement], https://famm.org/famm-releases-statement-after-gov-newsom-signs-compassionate-release-bill/ [https://perma.cc/7DE4-VLM9]; Piper French, *California Legislature Passes Bill to Expand Prison Releases for Terminally Ill People*, BOLTS (Sept. 2, 2022), https://boltsmag.org/california-legislature-passes-bill-to-expand-prison-releases-for-terminally-ill-people/ [https://perma.cc/4LE2-FF3B].

222. *See* FAMM Statement, *supra* note 221; CAL. PENAL CODE § 1172.2(d) (West, Westlaw through Ch. 1002 of 2024 Reg. Sess.).

223. FAMM Statement, *supra* note 221; French, *supra* note 221.

224. Family members of incarcerated people can ask for a prison doctor to evaluate their loved one's health. The same process starts even when it is the family that asks for the evaluation. *See* CAL. PENAL CODE § 1172.2(g) (West, Westlaw through Ch. 1002 of 2024 Reg. Sess.).

225. *Id.* § 1172.2(d).

226. *Id.*

227. *Id.* § 1172.2(d)–(e).

228. *Id.* § 1172.2(k).

229. *Id.* § 1172.2(d).

230. *Id.* § 1172.2(c).

231. *Id.* § 1172.2(i).

violent "superstrike" felony.[232] If the court grants release, the department must release the defendant within forty-eight hours.[233]

Colorado recently adopted a middle-ground approach to other compassionate release programs called "Special Needs Parole." Instead of going directly to the courts, like in California, the final decision-maker remains the Board of Parole.[234] This addresses the criticism that empowering incarcerated people may overburden the courts. However, incarcerated people may initiate the process themselves and the Department of Corrections must investigate the claim within thirty days of the request.[235] Incarcerated people can seek a referral by "inquiring with [the] case manager[]" once "every six months or upon a significant change in their medical or mental health condition."[236] Colorado even provides public defender liaisons to assist incarcerated individuals with Special Needs Parole applications.[237]

As the First Step Act recognized, the BOP controlled the gates of compassionate release for nearly forty years. During that time, the BOP barely used its power and people who were not a risk to society (the very purpose of incarceration) died in prison. If more states provided for what California or Colorado have designed—a direct line for incarcerated people themselves to file for compassionate release—states could expand on existing statutes to decarcerate their prisons.[238]

B. Expand Compassionate Release Beyond Imminent Death and Severe Illness

Another important improvement within the First Step Act and the Amendments is that the Commission recognized a need to expand the reasons incarcerated individuals could be released from prison under compassionate release. The Amendments not only expand the health reasons for release but also recognize that there may be other "extraordinary and compelling" reasons for release.

The Commission purposely did not define "extraordinary and compelling" reasons so that courts could determine what fit this category based on the nature of the case and the defendant.[239] An offender's age, the length of the

232. *See id.* §§ 1172.2(b), 1170.18(c), 667(e)(2)(c); *see also* People v. Randall, No. B317549, 2022 WL 4243944, at *3 (Cal. Ct. App. Sept. 15, 2022) (noting that the crimes are "a so-called superstrike").

233. PENAL § 1172.2(l) (Westlaw).

234. COLO. REV. STAT. § 17-22.5-403.5(1)(b) (2022).

235. *Id.* § 17-22.5-403.5(3)(a).

236. COLO. DEP'T OF CORR., Admin. Regul. 250-81 § IV(A)(1)(a) (2023).

237. *See* COLO. REV. STAT. § 21-1-104(6) (2021).

238. *See* EVERYWHERE AND NOWHERE, *supra* note 35, at 7–11. From a purely economic standpoint, it costs about $35,000 a year to manage the health-care costs of an aging and sick incarcerated person. *See* Fred Clasen-Kelly, *Frail People Are Left to Die in Prison as Judges Fail to Act on a Law to Free Them*, NPR (Feb. 21, 2023, 5:00 AM), https://www.npr.org/sections/health-shots/2023/02/21/1157058152/sick-elderly-people-left-to-die-federal-prison-law-judges [https://perma.cc/AUK6-FDSK].

239. *See* U.S. SENT'G COMM'N, *supra* note 162, at 16–17.

original sentence imposed, and the amount of time the offender had already served emerged as the main factors that impacted whether an offender would be granted relief.[240] After reviewing public comments carefully, the Commission decided that the courts were in the best position to make the determination of "extraordinary and compelling" reasons.[241] Furthermore, even over the Department of Justice's objection, the Commission expanded "extraordinary and compelling" reasons to include nonretroactive changes in law to be considered as long as the defendant had an unusually long sentence, served ten years of it,[242] and the change in law produced a gross disparity between the sentence imposed and what would be imposed today.[243]

Currently, even in states like California and Colorado that are expanding the use of compassionate release, state programs require a terminal illness, severe medical condition, or geriatric age to be eligible for compassionate release. Most require a prognosis of the incarcerated person's life expectancy ranging from thirty days to two years.[244] None of the compassionate release statutes consider other forms of compassion the way the federal government has recognized in "extraordinary and compelling" reasons for relief.[245]

While advocates and legislators work to make new laws in second-look sentencing, another avenue for relief would be to expand the current definitions of compassionate release. For example, those diagnosed with mental incapacitation like dementia or Alzheimer's may not have a short enough life expectancy to qualify for compassionate release, but they are certainly no longer able to participate in rehabilitation, be aware of the consequences of their past actions, and be deterred by punishment.[246] If state compassionate release

240. In fiscal year 2020, older offenders "were more likely to be granted relief compared to younger offenders." FIRST STEP ACT AND COVID-19 PANDEMIC, *supra* note 129, at 4. "The grant rate was highest (61.5%) for offenders 75 years or older and lowest (below 20%) for offenders under 45 years old." *Id.*; *see also* PROPOSED AMENDMENTS, *supra* note 189, at 1–2.

241. *See* Ferraro, *supra* note 41, at 2477.

242. "Commission data show[ed] that between fiscal year 2013 and fiscal year 2022, fewer than 12 percent (11.5%) of all offenders were sentenced to a term of imprisonment of ten years or longer." PROPOSED AMENDMENTS, *supra* note 189, at 6.

243. *See* sources cited *supra* note 198.

244. EVERYWHERE AND NOWHERE, *supra* note 35, at 28–33.

245. *See supra* Section III.A. Several bills have been introduced recently to eliminate the medical component in compassionate release. An Illinois proposed law would make people fifty-five and older who have served twenty-five years eligible for parole without any medical component. *See* H.B. 2045, 103d Gen. Assemb., Reg. Sess. (Ill. 2023). Massachusetts seeks to establish parole eligibility for people fifty-five and older who have served fifteen years of their sentence without a medical requirement. *See* S. 1547, 193d Gen. Ct, Reg. Sess. (Mass. 2023); H. 2397, 193d Gen. Ct, Reg. Sess. (Mass. 2023). Maryland desires to make people eligible to seek a reduction in sentence if they are at least sixty years old and have served at least twenty years of their sentence without regard to health. *See* S.B. 389, 446th Gen. Assemb., Reg. Sess. (Md. 2024). New Jersey legislation would make defendants sixty years or older (sixty-two if convicted of murder) who have served twenty years (thirty years if murder) eligible for resentencing without regard to health. *See* S. 2338, 221st Legis, Reg. Sess. (N.J. 2024).

246. States like Rhode Island and Hawaii address these points in their compassionate release schemes. *See* 13 R.I. GEN. LAWS § 13-8.1-2(a) (2021) ("Medical parole is made available for humanitarian reasons and to alleviate exorbitant medical expenses associated with inmates whose chronic and incurable illness render

programs offered a second look at sentencing based on changes in state laws, many more individuals would be eligible for compassionate release.[247]

C. Allow Incarcerated Individuals to Apply for Compassionate Release Regardless of the Type of Conviction

Another barrier to compassionate release is that eligibility is often restricted by the type of conviction the individual received. In other words, even sick or dying prisoners are forbidden from applying for compassionate release if they have committed certain types of crimes and are serving long sentences. Even in states like California with expansive compassionate release laws, individuals are excluded from applying if they are serving a life sentence without parole.[248]

Restrictions based on the type of conviction and sentence are particularly troubling because almost half of the people serving life without parole sentences are over the age of fifty.[249] Because age is a criterion that favors compassionate release both on the federal and state levels, this restriction on the type of conviction goes against the stated purpose of compassionate release. Moreover, 60% of those serving life without parole have already served a substantial amount of time—at least twenty years.[250] And it should come as no surprise that there is an overrepresentation of elderly Black people serving life without parole; two-thirds of those sentenced when twenty-five or younger are Black.[251] Compassionate release schemes that restrict eligibility based on conviction and sentence perpetuate the disproportionate amount of Black individuals and people of color serving in prison.

States can learn from the First Step Act and its Amendments, as compassionate release under the federal scheme does not seek to limit eligibility by type of conviction. Because people who have lengthy sentences tend to be older, restricting compassionate release by type of conviction necessarily excludes the aging and sick prison population that needs it the most.[252] Research also shows that people over the age of fifty who have served decades in prison

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their incarceration non-punitive and non-rehabilitative."); *see also* HAW. DEP'T OF PUB. SAFETY, Corrections Administration Policy and Procedures § 10.1G.11, at 3 (2014).

247. For example, many states have changed drug-sentencing laws to eliminate mandatory minimum sentencing. *E.g.*, Press Release, N.Y.C.L. Union, State Legislature Passes Historic Drug Law Reforms (Apr. 2, 2009), https://www.nyclu.org/press-release/state-legislature-passes-historic-drug-law-reforms [https://perma.cc/ADN6-GUL2]. However, those same reforms are not always retroactive, so they are only applied to people who are sentenced after the law changed.

248. CAL. PENAL CODE § 1172.2(o) (West, Westlaw through Ch. 1002 of 2024 Reg. Sess.).

249. ASHLEY NELLIS, THE SENT'G PROJECT, NOTHING BUT TIME: ELDERLY AMERICANS SERVING LIFE WITHOUT PAROLE 3 (2022), https://www.sentencingproject.org/app/uploads/2022/10/Nothing-But-Time-Elderly-Americans-Serving-Life-Without-Parole.pdf [https://perma.cc/Y78P-HDX8].

250. *Id.* ("In Arizona, Illinois, Louisiana, Michigan, Nebraska, and Pennsylvania, between 66% and 85% of the elderly population serving [life without parole] has already served at least [twenty] years.").

251. *Id.*

252. *See* Rachael Bedard et al., *Elderly, Detained, and Justice-Involved: The Most Incarcerated Generation*, 25 CUNY L. REV. 162, 162–63 (2022).

have very low rates of recidivism.[253] Focusing on the conviction, instead of who the person is today, is misguided and demonstrates that current compassionate release policy is a lost opportunity for second-look sentencing.[254]

CONCLUSION

In developing the Amendments, the Sentencing Commission reviewed the First Step Act decisions of district courts across the country, reviewed hundreds of public comments from stakeholders on both sides of the sentencing issue, and determined that they were "back in business."[255] If the United States is serious about second chances, decarceration, and righting the wrongs of the past in terms of racial injustice in the criminal legal system, then state legislatures need to be "back in business" too.

It is time for states to recognize that imposed sentences, particularly overly long sentences, do not always serve the purpose for which they were initially imposed. There are currently few mechanisms in place in the states that ensure that only those who pose a serious safety risk still remain behind bars. Second-look legislation is critical to ending mass incarceration and allowing incarcerated individuals to show district attorneys, judges, and the public that they are worthy of living a life outside of a cage. As states try to pass second-look legislation, they should also consider expanding their already-established compassionate release schemes, just as the federal government has done through the First Step Act and the Commission's Amendments.

States do not have to look very far for a model of how to do that. The First Step Act and the Commission's Amendments offer a roadmap for positive change in the compassionate release space, one that could help many individuals as well as end the prison system's financial strain on communities across the country. Returning sentencing decisions to judges who are in the best position to evaluate individual rehabilitation and circumstances is the first step in this process, one that California has recognized in its new statute. States should also

253. *See* U.S. SENT'G COMM'N, THE EFFECTS of AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 26 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf [https://perma.cc/CSB7-NEDJ]; *see also* N.Y. CORR. & CMTY. SUPERVISION, 2015 RELEASES FROM CUSTODY: THREE YEAR POST-RELEASE FOLLOW-UP 17–18 (2021), https://doccs.ny.gov/system/files/documents/2022/06/2015-releases_three-year-post-release-follow-up_final_20211117.pdf [https://perma.cc/6DLJ-3A8B] (finding that people released after serving time for murder had the lowest return-to-prison rate of all crimes).

254. Some states recently introduced bills that do not exclude certain convictions from applying for compassionate release. *See, e.g.*, H.B. 2045, 103d Gen. Assemb., 1st Reg. Sess. (Ill. 2023); H.B. 731, 2024 Leg., Reg. Sess. (La. 2024); S. 1535, 193d Gen. Ct., Reg. Sess. (Mass. 2023); H. 2319, 193d Gen. Ct., Reg. Sess. (Mass. 2023); S.B. 389, 446th Gen. Assemb., Reg. Sess. (Md. 2024); H.R. 1863, 131st Me. Leg., 1st Spec. Sess. (Me. 2023). However, even states that introduced more liberal compassionate release bills for geriatric incarcerated people still exclude those who committed murder and sex offenses or are serving life without parole. *See e.g.*, Gen. Assemb. 2902, 221st Leg., 1st Ann. Sess. (N.J. 2024); A.B. 9347, 246th Leg., Reg. Sess. (N.Y. 2023); S.B. 1560, 82nd Legis. Sess., Reg. Sess. (Or. 2024).

255. *See* U.S. Sent'g Comm'n, *supra* note 7.

align their thinking with the Commission's guidance on what qualifies as compassionate release, as the Commission determined that many other reasons besides health could be "extraordinary and compelling." Finally, compassionate release should be available to all those incarcerated, but especially for those serving overly long sentences typically associated with the most serious crimes. The First Step Act and its Amendments do not prohibit those serving a life sentence from applying for compassionate release and neither should the states. It is imperative that the states follow the federal government's lead on compassionate release given that most incarcerated people are imprisoned in the states. The states have the power to help end mass incarceration by releasing compassion.