IN SEARCH OF JUDICIAL COMPASSION: THE *CANTU-LYNN* DIVIDE OVER COMPASSIONATE RELEASE FOR FEDERAL PRISONERS

Marielle Paloma Greenblatt*

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* J.D. Candidate 2021, Columbia Law School. The author would like to thank Professor Daniel Richman and Professor Shon Hopwood, as well as the staff of the *Columbia Human Rights Law Review* for their thoughtful work on this piece.

INTRODUCTION

Kevin Zeich was nearly blind, battling terminal cancer, and unable to eat or walk when he filed for compassionate release from federal prison in 2015.[1] Zeich, who was fifty-five at the time, had served twenty-four years of a twenty-seven-year non-violent drug sentence for distribution of methamphetamine. Though he had three years remaining on his sentence, prison doctors believed he had only eighteen months left to live.[2] Upon being diagnosed with advanced bile duct cancer, Zeich applied for compassionate release three times. Zeich's warden approved one of his requests, but federal Bureau of Prisons ("BOP" or "the Bureau") officials overrode his approval and rejected his claim, arguing that his life expectancy was "indeterminate." [3] On Zeich's fourth try, he was granted compassionate release. He died two days before he was set to head home.[4]

Between 2013 and 2017, the Bureau of Prisons[5] received 5,400 requests for compassionate release from people in federal prison[6] but approved just 6% of them, taking an average of 141 days

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1. Christie Thompson, *Frail, Old and Dying, But Their Only Way Out of Prison Is in a Coffin*, N.Y. TIMES (Mar. 7, 2018), https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release-.html (on file with the *Columbia Human Rights Law Review*).

2. Christie Thompson, *Old, Sick, and Dying in Shackles*, MARSHALL PROJECT (Mar. 7, 2018), https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles [https://perma.cc/J5QU-PCLG].

3. *Id*.

4. *How Much Compassion in 'Compassionate' Release?*, WNYC STUDIOS: THE TAKEAWAY (Mar. 19, 2018), https://www.wnycstudios.org/podcasts/takeaway/segments/despite-compassionate-relief-program-prisoners-find-little [https://perma.cc/MUR2-EYYU].

5. The BOP, with "over 163,000 people in [its] custody . . . is America's largest jailer," making its bureaucratic decisions and leadership particularly worthy of study. Keri Blakinger & Keegan Hamilton, *"I Begged Them to Let Me Die": How Federal Prisons Became Coronavirus Death Traps*, MARSHALL PROJECT (Jun. 18, 2020), https://www.themarshallproject.org/2020/06/18/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps [https://perma.cc/DZ6G-YS4P].

6. Although this Note focuses exclusively on federal compassionate release, state prisoners also have access to compassionate release through their parole systems, almost all of which include some provision for compassionate release of terminally ill defendants. *See* Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse Than the Disease?*, 3 WIDENER J. PUB. L. 799, 816–36 (1994) (reporting that, in a 50-state and federal survey, Russell found that the federal system is by far the most

to make a decision.[7] These delays proved deadly: 266 prisoners, nearly 5% of all applicants, died while waiting for the BOP's answer.[8] In 2013, a Department of Justice ("DOJ") report found that the BOP lacked basic timeliness standards for reviewing initial compassionate release requests.[9] The appeals process for individuals denied compassionate release was similarly unregimented: the Bureau failed to consider urgent or special medical circumstances in expediting appeals, even when applicants had life expectancies of less than one year.[10] The DOJ report found that the appellate review process for compassionate release requests could take more than five months to complete.[11]

Given these realities, scholars as well as government watchdog groups have long suggested that compassionate release would benefit from judicial oversight of BOP determinations.[12] In particular, some scholars urged legislative reform to permit people in prison to seek direct review of their compassionate release claims before Article III courts.[13]

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restrictive for ill prisoners). Because the First Step Act covered only federal reform, state prisoners' experiences are not included in this analysis, though they represent the vast majority of those imprisoned in the U.S. today.

7. Letter from Stephen E. Boyd, Assistant Att'y Gen., U.S. Dep't of Just., Off. of Legis. Aff., to Sen. Brian Schatz, at 1 (Jan. 16, 2018), https://www.themarshallproject.org/documents/4369114-1-2018-BOP-response [https://perma.cc/RZH3-XSZH].

8. Thompson, *supra* note 2, at 6 (presenting empirical findings).

9. *See* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 27–29 (2013) [hereinafter DOJ, BOP COMPASSIONATE RELEASE PROGRAM] (finding that the BOP does not consider "the special circumstances of medical compassionate release requests" in timeliness standards, and further concluding that the BOP does not consistently expedite the administrative review process, even when inmates had less than a year to live).

10. *Id*.

11. *Id.*

12. *See, e.g.*, Press Release, U.S. Sent'g Comm'n, U.S. Sentencing Commission Approves Significant Changes to the Federal Sentencing Guidelines (Apr. 15, 2016), https://www.ussc.gov/about/news/press-releases/april-15-2016 [https://perma.cc/C75F-NMHD] [hereinafter April 2016 Sentencing Press Release] ("[T]he BOP has failed to use its authority to recommend compassionate release in the past. We encourage BOP to use its discretion consistent with this new policy so that eligible applications are reviewed by a trial judge.").

13. *See, e.g.*, Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 912–13 (2016) (suggesting that Congress "eliminate the provision barring a district court from considering a compassionate release petition unless the BOP has asked the court to consider it . . . [because] the

On December 21, 2018, Congress empowered Article III judges to overrule the BOP's compassionate release determination for the first time. The 116th Congress passed and the President signed the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act ("the First Step Act" or "the FSA"), which included a number of significant changes to federal compassionate release.[14] The FSA alters compassionate release in two ways: first, it gives prisoners the power to appeal the BOP's denial or neglect of the prisoner's request for a compassionate release directly to their sentencing court, providing federal district courts the ability to review and overrule BOP decisions for the first time.[15] Second, the Act gives judges newfound discretion to grant release under a catch-all "other reasons" provision. Clemency experts have deemed the Act's catch-all provision "the hidden, magical trapdoor in the First Step Act that has yet to come to everyone's attention";[16] indeed, scholars have yet to analyze how U.S. district courts are interpreting and applying the catch-all.

Though it is only in its second year, the Act's changes to compassionate release have transformed federal prison resentencing. Nearly three times more defendants were granted relief in the first nine months of 2019 alone than in all of 2018.[17] As of October 2020, approximately 1,800 federal prisoners have been granted compassionate release since the FSA's passage, with the

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recidivism rate for federal prisoners granted compassionate release is far lower than the rate for other federal inmates").

14. *See* Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791, 795, 816–17, n.114 (2019).

15. FAMILIES AGAINST MANDATORY MINIMUMS, COMPASSIONATE RELEASE AND THE FIRST STEP ACT: THEN AND NOW 3, https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf [https://perma.cc/PZH6-8SY3].

16. RJ Vogt, *How Courts Could Ease the White House's Clemency Backlog*, LAW360 (Aug. 29, 2019), https://www.law360.com/articles/1191991/how-courts-could-ease-the-white-house-s-clemency-backlog [https://perma.cc/733W-87LE] (reporting on the statement of Margaret Love, former U.S. pardon attorney and clemency expert).

17. Oversight of the Federal Bureau of Prisons and Implementation of The First Step Act of 2018: Hearing Before the H. Judiciary Comm. Subcomm. on Crime, Terrorism, and Homeland Sec., 116th Cong. 23–25 (2019) (statement of Antoinette Bacon, Associate Deputy Att'y Gen.) (announcing that, as of October 2019, 109 prisoners had been granted compassionate release, compared to just 34 total in 2018); DEP'T OF JUST., DEPARTMENT OF JUSTICE ANNOUNCES THE RELEASE OF 3,100 INMATES UNDER FIRST STEP ACT, PUBLISHES RISK AND NEEDS ASSESSMENT SYSTEM (2019) (discussing the FSA's impact in its first six months).

overwhelming majority coming from judicial approvals overturning BOP denials.[18] Many district court judges have responded quickly to their new role under the Act, with some granting relief within just a few days of prisoners' requests.[19] The COVID-19 epidemic only heightened judicial responsiveness to compassionate release claims, with some judges taking extraordinary efforts, including bypassing time length and exhaustion requirements, in order to release prisoners more quickly.[20]

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18. The 1,800 number comes from two sources: DOJ reports for 2019 and the Marshall Project's 2020 reporting. Press Release, Dep't of Justice, Department of Justice Announces Enhancements to the Risk Assessment System and Updates on First Step Act Implementation (January 15, 2020) (announcing that, as of January 2020, "124 requests have been approved, as compared to 34 total in 2018."); Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied*, MARSHALL PROJECT (Oct. 7, 2020), https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied [https://perma.cc/YQG4-SL95] ("So far, more than 1,600 people have been let out on compassionate release since the start of the pandemic—many of them despite the bureau's best efforts to thwart them."); Off. of Sen. Dick Durbin, *Durbin, Grassley Introduce New Legislation New, Bipartisan Legislation To Reform Elderly Home Detention And Compassionate Release Amid COVID-19 Pandemic* (Jun. 23, 2020), https://www.durbin.senate.gov/newsroom/press-releases/durbin-grassley-introduce-new-bipartisan-legislation-to-reform-elderly-home-detention-and-compassionate-release-amid-covid-19-pandemic [https://perma.cc/5APJ-N48Y] (noting that "nearly all [compassionate release approvals have been] by court order over the objections of the Department of Justice and BOP. BOP has reportedly refused to approve any compassionate releases based on vulnerability to COVID-19.").

19. Carrie Johnson, *Seriously Ill Federal Prisoners Freed as Compassionate Release Law Takes Effect*, NPR NEWS (Mar. 15, 2019), https://www.npr.org/2019/03/15/703784886/seriously-ill-federal-prisoners-freed-as-compassionate-release-law-takes-effect [https://perma.cc/PSN6-M4JV].

20. United States v. Sanchez, No. 18-cr-00140-VLB-11, 2020 U.S. Dist. LEXIS 70802, at *10–11 (D. Conn. Apr. 22, 2020) (granting relief despite prisoner's failure to exhaust administrative requirements within the BOP because "the Court finds it has the discretion to waive the 30-day waiting period where strict enforcement would not serve the Congressional objective of allowing meaningful and prompt judicial review. The immediate case, where each day threatens irreparable harm to a uniquely susceptible defendant, calls for such a waiver."); United States v. Decator, No. CCB-95-0202, 2020 U.S. Dist. LEXIS 60109 (D. Md. Apr. 6, 2020) (granting release on similar grounds); United States v. Colvin, No. 3:19cr179 (JBA), 2020 U.S. Dist. LEXIS 57962 (D. Conn. Apr. 2, 2020) (excusing failure to exhaust administrative remedies); *cf.* United States v. Field, No. 18-CR-426 (JPO), 2020 U.S. Dist. LEXIS 68655 (S.D.N.Y. Apr. 20, 2020) (noting that it cannot grant release outright due to failure to exhaust administrative remedies, but urging BOP to release prisoner outright because his preexisting conditions, including obesity, made him high-risk for COVID-19).

Yet there is an emerging circuit split between the courts that construe this newfound discretion broadly and those that continue to grant compassionate release only in cases of terminal or debilitating illness.[21] Moreover, the courts that construe their discretion more expansively (which this paper calls "*Cantu* courts") continue to use the catch-all "other reasons" provision to grant relief.[22] *Cantu* courts stand in marked disagreement with the courts construing their discretion narrowly ("*Lynn* courts"), which have continued to adhere strictly to preexisting policy guidance by federal agencies.[23]

This Note examines the *Cantu-Lynn* doctrinal split and its implications for the United States' federal prisoners. The analysis proceeds in three parts. First, Part I considers how the Act altered compassionate release by authorizing courts to engage in BOP oversight and to grant relief to deserving defendants. Part II examines the emerging circuit split concerning whether federal district courts have license to consider an expansive range of factors under the First Step Act. Part II then provides data on the key factors and judicial outcomes across U.S. courts evaluating compassionate release claims. Part III provides a close reading of the Act's statutory text and builds off of Shon Hopwood's historical research into "second look" resentencing, ultimately concluding that the *Cantu* approach to compassionate release criteria best serves Congress's statutory intent in enacting the FSA. Finally, the Conclusion considers how the *Cantu* construction could reduce recidivism and promote rehabilitation among America's federal prisoners.

I. COMPASSIONATE RELEASE—THEN VS. NOW

A. Broken Safety Valve—Compassionate Release Before the First Step Act

Compassionate release was first introduced [24] in the Sentencing Reform Act of 1984 ("SRA"), but it was widely regarded as both underutilized and dysfunctional[25] before the passage of the First

21. *See infra* Section II.B.
22. *See infra* Section II.A.
23. *See id.*
24. *See generally* Paul Larkin, Jr., *The Future of Presidential Decisionmaking*, 16 U. ST. THOMAS L.J. 399 (2020) (discussing the creation of compassionate release via the SRA).
25. Before the FSA, a number of scholars argued that compassionate release should be abandoned in its entirety, believing that key reforms were

Step Act.[26] Scholars largely attribute compassionate release's pre-FSA inefficacy to two interrelated factors: (1) the BOP narrowly construed what constituted "extraordinary and compelling" circumstances meriting a prisoner's release and (2) prisoners could not independently seek judicial review if the BOP denied their plea for compassionate release.[27]

Georgetown Law Professor Shon Hopwood argues that when Congress passed the SRA in 1984, it intended for courts to exercise oversight over the BOP's administration of compassionate release. Hopwood cites text from Senate reports, wherein legislators stated their desire for compassionate release to act as "'safety valves' for modification of sentences … [to] assure the availability of specific review and reduction to a term of imprisonment for 'extraordinary and compelling reasons' [to allow courts] to respond to changes in the guidelines."[28] Notably, Senate debate emphasized that this approach would keep "the sentencing power in the judiciary where it belongs" by permitting "later review of sentences in particularly compelling situations."[29] Moreover, Hopwood argues that Congress included compassionate release in the SRA to balance the abolishment of federal parole. The aim was to give judges the safety valve option to

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unlikely and that incremental changes to the program would not result in substantially improved outcomes for federal inmates. *See, e.g.*, Casey Ferri, *A Stuck Safety Valve: The Inadequacy of Compassionate Release For Elderly Inmates*, 43 STETSON L. REV. 198, 243 (2013) (arguing that compassionate release "should not be relied upon as a saving grace for prisons" as it "looks good on paper but has insufficient practical application . . . [w]ith only a 0.01% release rate for the entire prison population a compassionate release program simply does not reach enough inmates to make a tangible difference"); Russell, *supra* note 6, at 817; *see also* Shon Hopwood, *Second Looks and Second Chances*, 41 CARDOZO L. REV. 101, 120 (2019) (arguing that "[l]eaving the BOP Director with ultimate authority to trigger and set the criteria for sentence reductions created several problems," including administrative delays, agency opacity, and lack of access to judicial review).

26. 18 U.S.C. § 3582(c)(1)(A).

27. Larkin, Jr., *supra* note 24, at 417 (arguing that "[w]hat the text of section 603 [of the FSA] clearly says is that the BOP failed to exercise the judgment and compassion that Congress expected it would exercise when Congress passed the SRA in 1984"); *see also* Hopwood, *supra* note 25, at 119 (noting that before 2018, "[e]ven if a federal prisoner qualified under the Commission's definition of extraordinary and compelling reasons, without the BOP Director filing a motion, the sentencing court had no authority to reduce the sentence . . . . This process meant that, practically, the BOP Director both initiated the process and set the criteria.").

28. S. REP. NO. 98-225, at 52, 53 n.196 (1983).

29. *Id.*

retroactively cut sentences short in "extraordinary and compelling" circumstances.[30]

Yet after the SRA's enactment, federal agencies and commissions struggled to define the circumstances that qualified as extraordinary and compelling. When it passed the SRA, Congress explicitly delegated to the U.S. Sentencing Commission ("the Sentencing Commission" or "the Commission")[31] the authority to promulgate policy statements to guide the BOP—and courts—in evaluating compassionate release claims.[32] Despite this delegation, the Commission failed to identify what extraordinary and compelling circumstances might look like.[33] This left the BOP free to create its own parameters in defining extraordinary and compelling circumstances compelling relief. Providing the BOP free rein over criteria-setting created what both government actors and scholars have derided as an overly narrow interpretation of the compassionate release system that Congress had envisioned.[34]

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30. Hopwood, *supra* note 25, at 117 (arguing that Congress "intended to give federal sentencing courts an equitable power that, unlike parole, would be employed on an individualized basis to correct fundamentally unfair sentences. And there is no indication that Congress limited the compassionate release safety valve to medical or elderly release").

31. The Sentencing Commission is an independent federal agency housed under the judicial branch. Its members are appointed by the President, and three of its seven sitting members must be federal judges. SENT'G COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 3 (2011) [hereinafter SENTENCING COMM'N OVERVIEW (2011)], https://web.archive.org/web/20110322115415/http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf [https://perma.cc/32TK-HQ4Q].

32. *See* 28 U.S.C. § 994(t) (declaring that "[t]he [Sentencing] Commission . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples"). Congress' sole limitation was that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.*

33. Hopwood, *supra* note 25, at 118 (noting that "[t]he Commission initially neglected its duty, leaving the BOP to fill the void and create the standards for extraordinary and compelling reasons that warrant resentencing").

34. Jalila Jefferson-Bullock, *Are You (Still) My Great and Worthy Opponent?: Compassionate Release of Terminally Ill Offenders*, 83 UMKC L. REV. 521, 523 (2015) (arguing that the "Bureau of Prisons has chosen to usurp court power, and only grant compassionate release in the most narrow of circumstances"); Stephen R. Sady & Lynn Deffebach, *Second Look Resentencing Under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies That Result in Overincarceration*, 21 FED. SENT'G REP. 167, 168 (2009) ("The BOP . . . is instructing wardens by rule to deprive sentencing judges of the opportunity to

In 2007, over two decades later, the Sentencing Commission promulgated a policy defining extraordinary and compelling reasons to include (A) medical conditions—either a terminal diagnosis or serious medical illness that prevented the given prisoner from being able to care for themselves in prison, (B) advanced age, (C) family circumstances, such as the ailing health of a parent or spouse for which the prisoner was the sole caretaker, and (D) *any "other reasons" the BOP determines to be "extraordinary and compelling"* other than, or in combination with, the reasons described in A through C.[35] It is this "other reasons" catch-all category that has invoked the *Cantu-Lynn* debate among district courts.[36]

Despite the Sentencing Commission's 2007 promulgation, BOP procedure regarding compassionate release claims did not improve. Scholars ultimately agreed that the BOP had received—and apparently ignored—policy guidance from the Commission to consider both a wider breadth of medical circumstances that merited release *and* any other reasons as provided by the catch-all.[37] Multiple government reports found that the BOP considered only terminal illness with an eighteen-month trajectory, despite the Commission's guidelines to consider a broader swath of serious conditions.[38]

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exercise their discretion and is, in effect, assuring that the range of discretion contemplated by the statute and the Sentencing Commission is never exercised.").

35. U.S.S.G. § 1B1.13, at Application Note 1(A) (emphasis added); *see also* Hopwood, *supra* note 25, at 127 (summarizing the promulgation's definition of extraordinary and compelling circumstances justifying sentence reduction).

36. United States v. Rodriguez, 424 F. Supp. 3d 674, 681 (N.D. Cal. 2019) (discussing the judicial divide over interpretation of the catch-all).

37 . William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 852–53 (2009) (evaluating the impact of the BOP's failure to consider the policy guidance, noting that "in limiting its need to review compassionate release petitions to medical cases, [the BOP] thus abandons the flexibility to consider truly compelling cases"); *see also* HUM. RTS. WATCH, THE ANSWER IS NO: TOO LITTLE COMPASSION IN COMPASSIONATE RELEASE (2012) (describing the BOP's interpretation as "narrow" and noting that even in its 1994 amended regulations, which acknowledged that compassionate release could be based on medical and non-medical circumstances, "internal guidance to staff and in its practice, the BOP sharply limited the grounds for compassionate release to certain dire medical situations").

38. DOJ, BOP COMPASSIONATE RELEASE PROGRAM, *supra* note 9 at 26; U.S. DEP'T OF JUST., COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582(C)(1)(A) AND 4205(G) 2–4 (2015) (urging the BOP and its medical staff to "develop and issue medical criteria to help evaluate the inmate's suitability for consideration [for compassionate release].").

Further, one watchdog report found that BOP often denied release even over the objections of the prison officials closest to the individual, like their doctors and wardens.[39] Moreover, reports concluded that the existing BOP compassionate release program was "poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided."[40]

As a result, the BOP began to face increased scrutiny, even from within the Justice Department, over its narrow interpretation of "medical conditions"[41] and its complete disuse of the "other reasons" catch-all option.[42] The Sentencing Commission then released a report stating that it "was concerned about testimony and public comment documenting that the BOP has failed to use its authority to recommend compassionate release in the past." The Commission added that it "encourages the Bureau of Prisons (BOP) to use its current authority if an eligible offender meets *any of the circumstances* defined by the Commission's expanded criteria for compassionate release."[43] Despite this guidance, the BOP granted

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39. Thompson, *supra* note 2, at 5. While prison doctors estimated that federal prisoner Anthony Bell had less than six months to live, the BOP took six months to respond to his request. They ultimately denied Mr. Bell's request, concluding that he had more than 18 months to live. He died two days later. *See id*.; *see also* HUM. RTS. WATCH, *supra* note 37, at 8 (noting that the BOP informed a prisoner with advanced cancer that "[w]e are aware that your prognosis is poor and you are progressively getting worse. Although the [oncology staff] supports a reconsideration of [compassionate release], it is from a medical standpoint only.").

40. DOJ, BOP COMPASSIONATE RELEASE PROGRAM, *supra* note 9, at i (2013).

41. Scholars agree that before the FSA, the BOP interpreted "medical conditions" to require a terminal diagnosis. Berry III, *Extraordinary and Compelling*, *supra* note 37, at 853 ("The Bureau of Prisons has read this language very narrowly for many years, considering only terminally ill inmates as candidates for compassionate release."); HUM. RTS. WATCH, *supra* note 37, at 45 (discussing a 2012 interview with BOP Medical Director Dr. Newton Kendig, who underscored that sentence reduction was often the result of particular illness, like terminal cancer. The report concluded that their research "reveals that the majority of compassionate release motions brought by the BOP are for prisoners who are terminally ill").

42. April 2016 Sentencing Press Release, *supra* note 12. The Commission was concerned about testimony and public comment documenting that the BOP has failed to use its authority to recommend compassionate release in the past. We encourage BOP to use its discretion consistent with this new policy so that eligible applications are reviewed by a trial judge. *See id.*; *see also* HUM. RTS. WATCH, *supra* note 37 and accompanying text (discussing the BOP's failure to expand its categorization of prisoners eligible for compassionate release).

43. April 2016 Sentencing Press Release, *supra* note 12.

compassionate release to a mere thirty-four individuals in 2018,[44] two years after receiving unequivocal instruction from the Sentencing Commission to consider a more expansive breadth of circumstances beyond terminal illness alone.[45]

The Bureau was also heavily criticized for the infrequency with which it brought motions for compassionate release sentence reductions before federal courts. In its 2016 recommendations, the Sentencing Commission asked "the BOP [to] use its discretion . . . so that eligible applications are reviewed by a trial judge." When the BOP failed to grant more compassionate claims despite this guidance, prison watchdog groups decried that "the Bureau has usurped the role of the courts. Indeed, it is fair to say the jailers are acting as judges."[46]

Before the Act, all district courts agreed that they lacked jurisdiction to grant compassionate release if the BOP had not moved to do so on defendant's behalf. This meant that the BOP's denial of a compassionate release request was judicially unreviewable. [47] Additionally, given that the BOP was required to bring compassionate release claims on incarcerated persons' behalves and did so extremely infrequently,[48] judicial review over compassionate

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44. Press Release, 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) (confirming that only 34 federal prisoners had been granted compassionate release during all of 2018).

45. April 2016 Sentencing Press Release, *supra* note 12.

46. HUM. RTS. WATCH, *supra* note 37, at 3; *see also* Ferri, *supra* note 25, at 220–21 (defining compassionate release as a "rarely used provision" and a "stuck safety valve").

47. Fernandez v. United States, 941 F.2d 1488, 1493 (11th Cir. 1991) (holding, pre-FSA, that the BOP's decision on whether to seek compassionate release was unreviewable); Engle v. United States, 26 F. App'x 394, 397 (6th Cir. 2001) (same); Crowe v. United States, 430 F. App'x 484, 485 (6th Cir. 2011) (holding that "a federal court lacks authority to review a decision by the BOP to not seek a compassionate release for an inmate"); Berry III, *supra* note 37, at 866 (noting that "a district court does not have jurisdiction to address a sentence reduction motion . . . in the absence of a motion by the [BOP]"); *see also* Russell, *supra* note 6, at 22 (lamenting that "judicial review of Bureau inaction is precluded . . . [so] prisoners in the federal system have little practical ability to pursue compassionate release").

48. United States v. Gutierrez, No. CR 05-0217 RB, 2019 WL 1472320, at *1 (D.N.M. Apr. 3, 2019) (adopting the *Lynn* approach, but noting that "[p]rior to the passage of the First Step Act, only the Director of the BOP could file a motion for compassionate release, and that very rarely happened"); HUM. RTS. WATCH, *supra* note 37, at 2 (noting that "[s]ince 1992, the annual average number of prisoners who received compassionate release has been less than two dozen" and

release was consequently quite limited. Further, with the BOP declining to approve relief requests even in cases of imminent, end-stage illness, and with judges unable to overrule their determinations,[49] courts lacked jurisdiction to grant a sentence reduction.[50] The lack of judicial review[51] almost certainly contributed to a compassionate release system that regularly allowed aging and ill incarcerated persons to die in prison.[52]

"[c]ompassionate release is conspicuous for its absence"); DOJ, BOP COMPASSIONATE RELEASE PROGRAM, *supra* note 9, at 1 (finding that, between 2006 and 2011, an average of "only 24 inmates [were] released each year through the BOP's compassionate release program").

49. Before the FSA, when the BOP would deny an inmate compassionate release, the inmate would typically file a writ of habeas corpus to try to compel the BOP to file a compassionate release motion on their behalf. STEPHEN R. SADY & ELIZABETH G. DAILY, FED. DEF. OF OR., COMPASSIONATE RELEASE BASICS 3 (2019), https://or.fd.org/system/files/case_docs/Compassionate%20Release%20Basics_REVISED_2templates.pdf [https://perma.cc/FLJ4-5BXJ].

50. Before 2018, federal judges and even federal prosecutors would reach out to the BOP directly in support of incarcerated individuals' compassionate relief claims. For Kevin Zeich, records indicate that both his sentencing judge, Chief United States District Judge for the Eastern District of California Lawrence J. O'Neill, and the federal prosecutors repeatedly contacted the BOP's general counsel on Mr. Zeich's behalf. Letter from James B. Craven III, Kevin Zeich's Att'y, to Kathleen M. Kenney, Gen. Couns. of the Fed. Bureau of Prisons (Feb. 4, 2016) (on file with the *Columbia Human Rights Law Review*). Chief Judge O'Neill even strategized with Zeich's counsel to obtain additional end-of-life medical evaluations in order to persuade the BOP. Letter from James B. Craven III, Kevin Zeich's Att'y, to Kathleen M. Kenney, Gen. Couns. of the Fed. Bureau of Prisons (Mar. 1, 2016) (on file with the *Columbia Human Rights Law Review*). When Judge O'Neill first learned that Kevin had died in prison, he responded that he was "saddened beyond description." Letter from James B. Craven III to Kathleen Cooper Grilli, Gen. Couns. of U.S. Sent'g Comm'n (Mar. 10, 2016) (on file with the *Columbia Human Rights Law Review*).

51. Many pre-FSA courts were acutely aware of the infrequency with which the BOP brought compassionate release cases. In some opinions, judges urged the BOP to approve more requests. *See, e.g.*, United States v. Dimasi, 220 F. Supp. 3d 173, 178 (D. Mass. 2016) (granting relief to a BOP-approved inmate and noting that: "The future conduct of the United States Attorney and, particularly, the Bureau of Prisons will determine whether releasing [the defendant] . . . will avoid unwarranted [sentencing] disparities . . . . *If in the future the Bureau evaluates the requests of elderly, ill inmates more generously* . . . [the defendant's shortened sentence] will not be injurious to this important interest." (emphasis added)).

52. Russell, *supra* note 6, at 817 ("[J]udicial review of Bureau inaction is precluded. . . . [Consequently], prisoners in the federal system have little practical ability to pursue compassionate release, particularly those "who become ill or whose conditions deteriorate after incarceration.").

B. Compassionate Release and the 2018 First Step Act

1. Increased Judicial Access for Prisoners

This Section introduces the Act's overhaul of federal compassionate release and then examines how these changes produced the doctrinal split between *Lynn* and *Cantu* courts. Passed with bipartisan support under a Republican President and Senate, the First Step Act's compassionate release provision expanded resentencing reform,[53] and its changes to compassionate release were welcomed by public defenders [54] and fiscal conservatives [55] alike. Congress passed and the President signed the First Step Act [56] seeking to increase the use and transparency of compassionate release.[57] Hopwood argues that Congress intended to repair the stuck

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53. Beyond opening the door for judicial oversight, the Act also expands the rights of incarcerated persons with terminal illnesses by requiring expedient family notification, expanding their visitation rights, and requiring the BOP to expedite processing of their compassionate relief requests. 18 U.S.C. §§ 3582(d)(2)(A)(i), (d)(2)(B)(i). The FSA also requires that the BOP, in cases of terminal illness and disability, "inform the defendant's attorney, partner, and family members that they may prepare and submit" a request for compassionate release on the defendant's behalf. 18 U.S.C. §§ 3582(d)(2)(A)(i), (d)(2)(B)(i). The Act further requires BOP employees, upon request, to assist attorneys and family members with the administrative process of seeking compassionate release in those cases. 18 U.S.C**.** §§ 3582(d)(2)(A)(iii), (d)(2)(B)(iii).

54. SADY & DAILY, *supra* note 49, at 1 ("For over three decades, the BOP claimed unlimited and unreviewable discretion to refuse to file motions to reduce, no matter how clearly our clients deserved a second look by the sentencing judge. All that has fundamentally changed . . . .").

55. *See generally Elderly in Prison & Compassionate Release*, AM. CONSERVATIVE UNION FOUND., https://conservativejusticereform.org/issue/elderly-in-prison-and-compassionate-release [https://perma.cc/7BFC-LZL5] (praising compassionate release reform); Khalida Sarwari, *How Kim Kardashian, the Koch Brothers, and Jared Kushner Moved the Needle On Criminal Justice Reform*, NEWS @ NORTHEASTERN (Dec. 20, 2018), https://news.northeastern.edu/2018/12/20/how-kim-kardashian-the-koch-brothers-and-jared-kushner-moved-the-needle-on-criminal-justice-reform [https://perma.cc/6556-3G52] (discussing the bipartisan alliance around the FSA).

56. *See* First Step Act of 2018, Pub. L. No.115–391, 132 Stat. 5194 (2018). The sentencing judge now has jurisdiction to consider a defense motion for a sentence reduction when "the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier[.]" § 603(b)(1), 132 Stat. at 5239.

57. The title of the First Step Act section that amends compassionate release is "Increasing the Use and Transparency of Compassionate Release." *See*

safety valve by liberalizing judicial review of compassionate release claims for both prisoners and judges.[58] For prisoners, it allowed them to file a compassionate release motion with their sentencing court as long as "they can demonstrate they have tried and failed to convince the BOP to do so for them."[59]

2. Increased Discretion & Oversight for Judges

After widespread dissatisfaction with how the BOP had handled compassionate release, the First Step Act transferred significant discretion to Article III judges in evaluating prisoners' claims directly. For judges, the Act granted the power for the first time to overturn BOP determinations and grant compassionate release if extraordinary and compelling circumstances were present.[60] Under the FSA, federal district court judges may grant sentence reductions without deferring to the BOP, so long as the prisoner has

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First Step Act of 2018, Pub. L. No.115–391, § 603(b), 132 Stat. 5194, 5239 (2018). Scholars and federal courts have argued that this lends further weight to the conclusion that judges should optimize the Act and grant compassionate release whenever extraordinary and compelling circumstances are present. *See, e.g.*, United States v. Cantu, 423 F. Supp. 3d 345, 351 (S.D. Tex. 2019) ("Titles are useful 'when they shed light on some ambiguous word or phrase' because in modern practice 'the title is adopted by the legislature.'" (citation omitted)); *see also* Hopwood, *supra* note 25, at 121 ("Congress made these changes in an effort to expand the use of compassionate release sentence reductions."). Senator Ben Cardin noted in the congressional record that the First Step Act made several reforms to the federal prison system, including that: "[t]he bill expands compassionate release . . . and expedites compassionate release applications." 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin). Congressman Jerry Nadler noted that the First Step Act included "improving application of compassionate release." 164 CONG REC. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerry Nadler).

58. Hopwood, *supra* note 25, at 121 (discussing that, when it passed the FSA, "Congress intended the judiciary not only to take on the role that BOP once held . . . to be the essential adjudicator of compassionate release requests, but also to grant sentence reductions on the full array of grounds reasonably encompassed by the 'extraordinary and compelling' standard . . .").

59. FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 15, at 3. Generally, the "tried and failed" requirement mandates that an inmate has exhausted their administrative options before bringing their compassionate release claim before the sentencing court. *See id.* at 3–4 ("A prisoner exhausts administrative rights when one of two things happens: . . . the BOP rejects a warden's recommendation that the BOP file a compassionate release motion, or [t]he warden refuses to recommend the BOP file a compassionate release motion and the prisoner appeals the denial.").

60. *Id.* at 3.

exhausted their administrative remedies before filing for relief in district court.[61] As a result, many judges have granted release based on substandard treatment of ill and elderly prisoners.[62] Additionally, some judges have responded to recent sentencing reform by indicating that sentencing disparities caused by now-defunct mandatory minimum sentences can amount to extraordinary and compelling reasons warranting relief.[63]

Notably, federal statute also requires that any sentence reduction ordered by a court must be "consistent with applicable policy statements issued by the Sentencing Commission."[64] In its most recent form, updated in 2015, the Sentencing Commission's policy statement provides that the BOP may grant relief if, "*as determined by the Director of the Bureau of Prisons*, there exists in the defendant's case an *extraordinary and compelling reason other than*, or in combination with [medical, age, or familial circumstances]."[65] This clause is essentially a catch-all provision.[66] Courts and scholars continue to debate the parameters of judicial discretion when the Sentencing Commission is inoperative and cannot

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61. Doug Berman, *Another District Court Finds Statutory Sentence Reform Among "Extraordinary And Compelling Reasons" For Reducing Sentence By 40 Years Under 18 U.S.C. § 3582(C)(1)(A)*, SENT'G L. & POL'Y (Nov. 16, 2019), https://sentencing.typepad.com/sentencing_law_and_policy/2019/11/another-district-court [https://perma.cc/KQE4-2AFM] (noting that compassionate release now allows sentence reductions "without awaiting a motion by the Bureau of Prisons" and that, "if applied appropriately and robustly, this provision could and should enable many hundreds, and perhaps many thousands, of federal prisoners to have excessive prison sentences reduced").

62. *See infra* Section II.C.1.

63. *See infra* Section II.C.3.

64. 18 U.S.C. § 3582(c)(1)(A).

65. U.S. DEP'T OF JUST., COMPASSIONATE RELEASE/REDUCTION IN SENTENCE, *supra* note 38; U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(d) (U.S. SENT'G COMM'N 2018), https://sentencing.typepad.com/sentencing_law_and_policy/2019/11/another-district-court-finds-statutory-sentence-reform-among-extraordinary-and-compelling-reasons-fo.html [https://perma.cc/FAB3-VRZL] (emphasis added).

66. U.S.S.G. § 1B1.13, Application Note (1)(D)'s is recognized as a catch-all provision by scholars and by a number of both *Cantu* and *Lynn* courts. *See, e.g.*, Hopwood, *supra* note 25, at 122 ("[T]he Sentencing Commission created a catch-all provision for compassionate release under U.S.S.G. § 1B1.13, Application Note (1)(D) . . . ."); United States v. Dresbach, 806 F. Supp. 2d 1039, 1040 (E.D. Mich. 2011) ("The [Sentencing Commission's] guideline includes a fourth provision, which is a catch-all . . . .").

offer guidance or even update its own guidelines to be up-to-date with the FSA.[67]

Both scholars and district courts have argued that because the First Step Act shifted determination authority from the BOP to the courts, it abrogated the Sentencing Commission's 2016 policy statement, which explicitly underscores BOP discretion in compassionate release determinations.[68] Further, these scholars argue that because the previous policy statement vested discretion to determine "other" circumstances in the BOP, that authority is now vested with the courts under the FSA.[69] Hopwood asserts that:

> Congress has decided federal judges are no longer to be constrained or controlled by how the BOP Director sets the criteria for what constitutes extraordinary and compelling reasons for a sentence reduction. Consequently, those sections of the [Sentencing Commission] guideline application notes requiring a BOP determination or motion are not binding on courts.[70]

An increasing majority of courts[71] have agreed with Hopwood's conclusion that because the Sentencing Commission's

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67. United States v. Rodd, No. CR 13-230 ADM/JSM, 2019 WL 5623973, at *3 (D. Minn. Oct. 31, 2019), aff'd, 966 F.3d 740 (8th Cir. 2020) (citing United States v. Brown, No. 4:05-CR-00227-1, 2019 U.S. Dist. LEXIS 175424, at *10 (S.D. Iowa Oct. 8, 2019)) (noting that "a judge has discretion to determine, at least until the Sentencing Commission acts, what qualifies as 'extraordinary and compelling reasons'"); *see also* Thomas L. Root, *Too Many Questions, Too Few Commissioners*, LEGAL INF. SERV. ASSOCIATES (Oct. 16, 2019), https://www.lisa-legalinfo.com/tag/sentencing-commission/ [https://perma.cc/W8NE-9HH2] (noting that some "courts have decided that this means the district judge can consider anything—or at least anything the BOP *could* have considered (whether it did or not)—when assessing a defendant's motion").

68. Berman, *supra* note 61; Annie Wilt, *The Answer Can Be Yes: The First Step Act and Compassionate Release*, HARV. C.R.-C.L. L. REV. ONLINE (Oct. 23, 2019), https://harvardcrcl.org/the-answer-can-be-yes-the-first-step-act-and-compassionate-release/ [https://perma.cc/933D-T4TH].

69. *Id*.

70. Hopwood, *supra* note 25, at 122; *see also* Stinson v. United States, 508 U.S. 36, 38 (1993) (declaring that "[w]e decide that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution *or a federal statute*, or is inconsistent with, or a plainly erroneous reading of, that guideline." (emphasis added)).

71. United States v. Adeyemi, No. 06-124, 2020 U.S. Dist. LEXIS 117743, at *29 (E.D. Pa. July 6, 2020) ("A vast majority of judges considering whether courts may independently evaluate extraordinary and compelling reasons to reduce sentences have concluded they can.").

guidelines are out of step with the FSA's mandate to courts, the Commission's requirements, while helpful, are no longer binding upon federal district judges.[72] Most of these courts have further interpreted the guidelines to conclude that the BOP Director's discretion in interpreting the catch-all "other reasons" provision was implicitly *transferred* to reviewing courts under the Act. These judges have concluded that they will "treat the previous BOP discretion to identify other extraordinary and compelling reasons as assigned now to the courts."[73]

Further, some of these courts have used the catch-all to consider non-medical factors that may warrant a prisoner's compassionate release.[74] Sentencing courts have considered factors such as individuals' rehabilitation while in prison,[75] the families

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72. *See, e.g.*, United States v. Cantu, 423 F. Supp. 3d 345, 351 (S.D. Tex. 2019)

("U.S.S.G § 1B1.13 cmt. n.1(D) is not applicable when a defendant requests relief . . . . [I]f . . . the BOP were still the sole determiner . . . [the] defendants' own . . . motions for reduction of sentence would be to no avail. Such a reading would contravene the explicit purpose of the new amendments.").

73. United States v. Fox, No. 2:14-CR-03-DBH, 2019 WL 3046086, at *3 (D. Me. July 11, 2019) (adopting the *Cantu* reading but denying relief, agreeing "with the courts that have said that the Commission's existing policy statement provides helpful guidance on the factors that support compassionate release, although it is not ultimately conclusive given the statutory change.").

74. A number of medical approvals have underscored the BOP's failure to provide prisoners appropriate medical treatment for advanced or debilitating illnesses. *See, e.g.*, United States v. Beck, 425 F. Supp. 3d 573, 574 (M.D.N.C. 2019) ("[R]epeated delays . . . have prevented [Ms. Beck] from timely obtaining urgent tests and treatment. In the meantime, her cancer spread to her lymph nodes and possibly to her right breast" and concluding that the "BoP's [sic] history of indifference to her treatment constitute extraordinary and compelling reasons."); United States v. Schmitt, No. CR12-4076-LTS, 2020 WL 96904, at *4 (N.D. Iowa Jan. 8, 2020) (granting release on similar grounds).

75. *See* United States v. Marks, 2020 U.S. Dist. LEXIS 68828 (W.D.N.Y. 2020) (discussing Mr. Marks' rehabilitation during his incarceration); United States v. Stephenson, No. 3:05-CR-00511, 2020 U.S. Dist. LEXIS 89591, at *17 (S.D. Iowa May 21, 2020) (considering a defendant's rehabilitation in granting compassionate release); United States v. Wade, No. 2:99- CR-00257-CAS-3, 2020 WL 1864906, at *6–7 (C.D. Cal. Apr. 13, 2020) (defendants' "exceptional personal growth." in combination with other factors, warranted compassionate release); United States v. Chan, No. 96-CR-00094-JSW-13, 2020 WL 1527895, at *6 (N.D. Cal. Mar. 31, 2020) (defendant's "rehabilitation efforts *in combination* with [other factors] . . . demonstrated extraordinary and compelling reasons . . . ."); United States v. Perez, No. 88-10094-1-JTM, 2020 WL 1180719, at *3 (D. Kan. Mar. 11, 2020) (evaluating rehabilitation as a key factor in granting release).

supporting them upon their release,[76] and whether the BOP has provided them adequate medical treatment and can provide such care in the future.[77] Courts have indicated that BOP medical mismanagement can constitute extraordinary and compelling reason for release if the BOP's behavior impacted the defendant's prognosis.[78] Courts have also considered that sentencing disparities can amount to extraordinary and compelling circumstances in cases where there is an extraordinary difference between the sentence given and what the defendant would likely receive if sentenced today.[79] However, a circuit split has emerged among district courts in their interpretation of the Act's compassionate release provision.[80] This divide has significant implications for individuals incarcerated in the federal system.

In construing their discretion under the catch-all broadly, *Cantu* courts have concluded that they have the authority to identify any factors that constitute extraordinary and compelling circumstances in the cases before them.[81] However, *Lynn* courts have

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76. *See Cantu*, 423 F. Supp. 3d at 354.

77. *See* United States v. Beck, 425 F. Supp. 3d 573, 579 (M.D.N.C. 2019)

78. *Id*. *See also* United States v. Rodriguez, 424 F. Supp. 3d 674, 683 (N.D. Cal. 2019); United States v. Flores, 2020 WL 3041640 at *2 (W.D.N.Y. June 8, 2020) (granting petitioner's motion for compassionate release conviction where BOP's neglect in managing the COVID-19 conditions at her prison was "disturbing" and "demonstrated deliberate indifference to the health needs of the inmates.") (citation omitted).

79. These sentences were often the result of mandatory minimum sentences that have now been statutorily outlawed, and "stacking" sentences consecutively under 18 U.S.C. § 924(c)(1)(C). *See, e.g.*, United States v. Marks, No. 6:03-cr-06033, 2019 U.S. Dist. LEXIS 199429, at *3 (W.D.N.Y. Mar. 14, 2019) (describing the defendant's "draconian, mandatory 25-year consecutive sentence" and observing that "[i]f convicted now, Marks would not . . . [face] the possibility of a 30-year consecutive sentence"); *Brown*, 411 F. Supp. 3d at 453 (noting that "if sentenced today, a court would add only five years to Defendant's sentence . . . not thirty . . . a district court assessing a compassionate release motion may still consider the resulting sentencing disparity when assessing if there are extraordinary and compelling reasons supporting release").

80. United States v. Stone, No. 3:17-cr-0055-JAJ-SBJ, 2019 U.S. Dist. LEXIS 182081, at *24 (S.D. Iowa Oct. 22, 2019) (noting that "there is a split in how district courts have treated the policy statement"); United States v. Ingram, No. 2:14-cr-40, 2019 WL 3162305, at *2, (S.D. Ohio July 16, 2019) (same).

81. *See, e.g.*, *Beck*, 425 F. Supp. 3d 573, 579 (granting relief under the catch-all, noting that "the policy-statement provision . . . no longer fits with the statute and thus does not comply with the congressional mandate," and therefore "does not constrain the Court's independent assessment . . . it is consistent with the old policy statement and with the Commission guidance more generally for

taken a more conservative approach, declining to embrace the *Cantu* construction of newly assigned discretion under the Act.[82] These courts conclude that irrespective of whether the Sentencing Commission's guidance is outdated, judges "may not stray beyond the specific instances listed" in the policy statement.[83]

Even after the enactment of the First Step Act, courts and scholars have continued to debate the proper amount of deference federal judges should give to agency determinations about compassionate release eligibility.[84] Yet when it enacted the FSA, Congress explicitly underscored judicial oversight and autonomy. Recent legislation indicates that, for compassionate release claims, judicial deference to agency decision-making and criteria may be a relic of the past.[85]

Because the Sentencing Commission is presently inoperative,[86] judges continue to grant compassionate release motions

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courts to exercise similar discretion as that previously reserved to the BOP . . . in evaluating motions by defendants for compassionate release.").

82. *See, e.g.*, White v. United States, 378 F. Supp. 3d 784, 787 (W.D. Mo. 2019) (holding that compassionate release "due to a medical condition" is generally treated as "a rare event."); *Ingram*, 2019 WL 3162305, at *2 (describing that "family circumstances that constitute 'extraordinary and compelling reasons' simply do not include" a parent's serious medical condition, as "many, if not all, inmates have aging and sick parents").

83. United States v. Fox, 2019 WL 3046086, at *3 (summarizing the contrary approach).

84. United States v. Lynn, No. CR 89-0072-WS, 2019 WL 3805349, at *4 (S.D. Ala. Aug. 13, 2019) (arguing that "if the policy statement needs tweaking . . ., that tweaking must be accomplished by the Commission, not by the courts."). For the scholarly approach, *see, e.g.*, Larkin, Jr., *supra* note 24, at 22 (arguing that judicial discretion in compassionate release criteria-setting is beyond what the statute can bear).

85. Hopwood, *supra* note 25, at 110.

86. The fact that the Sentencing Commission's latest Policy Statement and its accompanying Guidelines are out-of-date with new legislation would not traditionally be a topic of extensive judicial debate. While receiving four votes in favor of an Amendment is not typically difficult, it is presently impossible, as the Commission has only two members and therefore lacks quorum to publish or promulgate anything. *See* 28 U.S.C. § 994(x) (2006). Traditionally, the Commission would simply meet to promulgate new, up-to-date guidelines during an annual amendment cycle, during which it must publish proposed guideline amendments and solicit public comment. In order for an amendment to move forward after that, at least four Commissioners must vote in favor of promulgating the amendment. *Id. See also* SENT'G COMM'N OVERVIEW (2011), *supra* note 31, at 3 (discussing the role of commissioners).

without up-to-date guidance.[87] There is no indication that the Commission will become operative for the foreseeable future.[88] As such, district courts will certainly continue to evaluate the merits of compassionate release claims while the parameters of their judicial discretion remain "unclear."[89]

However, even if the President nominated enough members for the Sentencing Commission to gain quorum, district courts may maintain significant criteria-setting authority in compassionate resentencing. Any future regulations promulgated by the Commission would likely follow the FSA's lead, leaving Article III courts with significant discretion under the Act to make an individualized

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87. In the past, the Sentencing Commission regularly passed amendments and promulgated comments and guidance to the BOP. Passages were often unanimous. *See, e.g.*, U.S. SENT'G COMM'N, U.S. SENTENCING COMMISSION APPROVES SIGNIFICANT CHANGES TO THE FEDERAL SENTENCING GUIDELINES (2016) (noting that the amendments and updated guidance were passed unanimously); *The First Step Act: The Sentencing Commission's First Look*, FED. DEFS. SERV. OFF. (Jan. 18, 2019), https://www.fd.org/news/first-step-act-sentencing-commissions-first-look [https://perma.cc/ELQ8-S3FA].

88. As of 2019, scholars and courts predicted that there was no indication that the Commission would attain quorum for the foreseeable future. *See, e.g.*, Root, *supra* note 61 (arguing that "[t]he Trump Administration apparently sees the Commission as a backwater for which no urgency exists in nominating replacement commissioners. For the foreseeable future, the Commission remains impotent, and the compassionate release policy cannot be updated."). When President Trump announced in August 2020 his intent to nominate a new slate of commissioners, most experts noted that his nominees were unlikely to be confirmed by the Senate in 2020. Eli Hager, *Before Election, Trump Tries to Stack Prison-Sentencing Agency with Right Wing Allies*, MARSHALL PROJECT (Sept. 17, 2020) https://www.themarshallproject.org/2020/09/17/before-election-trump-tries-to-stack-prison-sentencing-agency-with-right-wing-allies ("Judiciary Committee staffers said that one or two of Trump's picks may get confirmed, but probably not all. Reform advocates say there is not enough time to properly evaluate the candidates, and that any vote on them should wait until next year."); Doug Berman, *Trump Finally Announces Full Slate of (Unlikely to Be Confirmed?) New Nominees for the US Sentencing Commission*, SENT'G L. & POL'Y BLOG (Aug. 13, 2020), https://sentencing.typepad.com/sentencing_law_and_policy/2020/08/prez-trump-finally-announces-full-slate-of-unlikely-to-be-confirmed-new-nominees-for-the-us-sentenci.html [https://perma.cc/M88P-YV7B] (arguing that "it is unlikely for any slate of USSC nominees to get confirmed by the US Senate in 2020.").

89. United States v. Gonzales, No. SA-05-CR-561-XR, 2019 U.S. Dist. LEXIS 177043, at *6 (W.D. Tex. Oct. 10, 2019) (ultimately concluding that the Guidelines are no longer binding on judges, but noting that "with the First Step amendments, it is unclear how courts are to consider motions to reduce a sentence for 'extraordinary and compelling reasons").

determination for each defendant.[90] As a result, federal district judges will continue to grapple with decisions that can literally determine life or death[91] for a federal prisoner.[92]

II. KEY FINDINGS & EMERGING THEMES IN COMPASSIONATE RELEASE POST-FSA

This Part analyzes qualitative data across all U.S. circuits to illustrate the varied landscape of compassionate release. Section II.A explains how cases were evaluated. Section II.B frames the emerging doctrinal split between *Cantu* and *Lynn* courts. Section II.C summarizes comparative data and highlights key themes across circuits, including factors tending to weigh in a defendant's favor. Part II concludes by evaluating the broader implications of a liberal statutory construction and increased judicial discretion under the FSA.

A. Case Selection and Evaluation

The following analysis has two prongs. First, it presents the doctrinal clash between *Cantu* and *Lynn* courts. Next, it reports on emerging trends generally, with a focus on broader regional trends and their implications for federal prisoners seeking relief. This portion of the analysis also reports on key factors that tended to weigh in a defendant's favor, such as an outstanding rehabilitative

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90. Hopwood, *supra* note 25, at 126. For a contrary view, see Larkin, Jr., *supra* note 24, at 18 (arguing that district courts are *not* "now open for the business of resentencing offenders and answering for themselves all of the questions that we would have expected Congress to answer").

91. Despite the FSA, people in prison continue to die when their compassionate release claims are administratively delayed or opposed by the government. *See, e.g.*, United States v. Fredette, No. 19-3306, 2020 U.S. App. LEXIS 2276, at *1 (7th Cir. Jan. 24, 2020) (noting that when the now-deceased defendant was battling "late[]stage colon cancer, he appealed the denial of his emergency motion to reduce his sentence . . . seeking compassionate release . . . [but, a] few weeks later, [he] died in federal custody").

92. DOJ, BOP COMPASSIONATE RELEASE PROGRAM, *supra* note 9, at iii (2013)(finding that "in 13 percent [28 of 208] of the cases where inmate requests had been approved by a Warden and Regional Director, the inmate died before a final decision was made by the BOP Director"); *see also* United States v. Beck, No. 1:13-CR-186-6, 2019 WL 2716505, at *2 (M.D.N.C. June 28, 2019) (noting, in examining BOP neglect, that Ms. Beck's cancer might not have progressed so severely if she had been compassionately released to receive medical care outside her prison's medical center).

record, or evidence that the BOP had failed to provide adequate medical care that resulted in a significantly worse prognosis for the individual seeking relief.

While approximately 1,800 federal prisoners[93] have been granted compassionate release since the Act's passage,[94] thousands more have filed compassionate release requests[95] ripe for consideration before the proper sentencing court.[96] This Note

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93. Blakinger & Neff, *supra* note 18 ("So far, more than 1,600 people have been let out on compassionate release since the start of the pandemic—many of them despite the bureau's best efforts to thwart them."). For 2019 statistics, see Oversight of the Federal Bureau of Prisons and Implementation of The First Step Act of 2018: Hearing Before the H. Judiciary Comm. Subcomm. on Crime, Terrorism, and Homeland Sec., 116th Cong. 23–25 (2019) (statement of Antoinette Bacon, Associate Deputy Attorney General).

94. In 2019, though the DOJ reported that hundreds of individuals were granted release under the FSA's compassionate release provision, administrative delays continue to cause inmates to die in prison. Steven Cheatham was one of the first inmates granted compassionate release under the Act. He died of advanced-stage cancer before he was released. Cheatham's case was bogged down by administrative confusion: his sentencing judge and the BOP had different dates on record for when Cheatham filed for relief, and the government shutdown further ossified political opportunities to lobby for his immediate release. Mitch Smith, *A New Law Made Him a Free Man on Paper, But He Died Behind Bars*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/criminal-justice-reform-steve-cheatham.html (on file with the *Columbia Human Rights Law Review*).

95. Per author's own data collection, which evaluated federal judicial opinions available via LexisNexis, Westlaw, Bloomberg, Pacer, as well as watchdog sites including Doug Berman's SENTENCING LAW AND POLICY (https://sentencing.typepad.com/) and the PRISON PROFESSORS BLOG (https://prisonprofessors.com/), among others.

96. Administrative denials and jurisdictional rejections were not considered for this analysis. A number of courts have deemed compassionate release requests to be unripe *or* jurisdictionally inappropriate for their consideration. Under the First Step Act, the inmate must file their compassionate release request before the sentencing court after having properly exhausted their administrative remedies with respect to the BOP. The Act states that an inmate must have "fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A). Courts have therefore regularly declined to hear cases because they either lack proper jurisdiction or the claim is unripe. *See* Bradin v. Thomas, No. 19-3041-JWL, 2019 U.S. Dist. LEXIS 115878, at *29 (D. Kan. July 12, 2019) ("[T]his Court lacks jurisdiction to consider Petitioner's request for compassionate release under the First Step Act. Petitioner must seek such relief from his sentencing court." (citing Deffenbaugh v. Sullivan, No. 5:19-HC-2049-FL, 2019 U.S. Dist. LEXIS 69290, (E.D. N.C. Apr. 23, 2019)); United States v. Edwards, No. 3:14-CR-30173-NJR-3, 2019 U.S. Dist. LEXIS 186254, at *11-12

therefore considers a breadth of outcomes, including successful requests for immediate release, sentence reductions, stays pending further briefing, and denials of relief. All opinions were categorized based on outcome, all available characteristics such as gender, age, race, information regarding the seriousness of the initial offense, previous criminal history, and the defendant's record while incarcerated, as well as the requested basis for relief: whether the defendant sought compassionate release on medical, familial, rehabilitative, or other grounds. Cases were then categorized based on whether the reviewing court addressed the emerging doctrinal split, and, if so, how the reviewing court ruled on the issue.

B. The *Cantu* and *Lynn* Approaches

As previously noted, there is an emerging doctrinal split between *Cantu* courts, which envision a broad expansion of judicial discretion to issue compassionate release, and *Lynn* courts, which emphasize a more limited degree of judicial discretion under the Act.[97] As of August 2020, a majority of U.S. district courts have adopted the *Cantu* approach in determining their discretion in weighing compassionate release claims.[98] While this trend preceded the COVID-19 pandemic, many more district courts adopted the *Cantu* approach in the midst of the pandemic, deeming COVID-19 an "extraordinary and compelling" circumstance warranting relief for vulnerable or immunocompromised defendants.[99]

While the *Cantu* approach is characterized as the more "liberal" approach for the purposes of this analysis, a number of conservative-leaning districts—and Republican-appointed district court judges—have adopted it.[100] Moreover, this analysis indicates

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(S.D. Ill. Oct. 28, 2019) (declining review because "there is no evidence or even an allegation that Edwards exhausted his administrative remedies").

97. *See infra notes* 105–07 and accompanying text.

98. United States v. Adeyemi, No. 06-124, 2020 U.S. Dist. LEXIS 117743, at *29 (E.D. Pa. July 6, 2020) ("A vast majority of judges considering whether courts may independently evaluate extraordinary and compelling reasons to reduce sentences have concluded they can.").

99. United States v. Amarrah, No. 17-20464, 2020 WL 2220008, at *6–8 (E.D. Mich. May 7, 2020).

100. Notably, two key proponents of the *Cantu* approach were appointed to the federal bench by Republican presidents. Senior Judge David G. Larimer of the Western District of New York, a Reagan appointee, and Senior Judge D. Brock Hornby of the District of Maine, an H.W. Bush appointee, both adopted the *Cantu* approach. United States v. Marks, No. 03-CR-6033, 2019 U.S. Dist. LEXIS 199429 (W.D.N.Y. Mar. 14, 2019); United States v. Fox, No. 2:14-CR-03-DBH, 2019 WL

that the *Cantu-Lynn* divide does not track with a given state's partisan affiliation. Indeed, certain judges in conservative states, such as Texas, have been early *Cantu* adopters, while some judges in more liberal California have favored the *Lynn* approach. On the whole, the *Lynn* approach appears to be heavily favored in the Southern District of Alabama, the Middle District of Florida, the Southern District of Georgia, the Northern and Southern Districts of Ohio, the Western District of North Carolina, and the District of New Mexico.[101]

3046086 (D. Me. July 11, 2019). However, three other key early adopters were Obama appointees: Judge Marina Garcia Marmolejo of the Southern District of Texas, Judge Dana Christensen of the District of Montana, and Judge Catherine C. Eagles of the Middle District of North Carolina. United States v. Cantu, 423 F. Supp. 3d 345, 350 (S.D. Tex. 2019); United States v. Brittner, No. CR 16-15-M-DLC, 2019 U.S. Dist. LEXIS 73653 (D. Mont. May 1, 2019); United States v. Beck, 425 F. Supp. 3d at 588.

101. The Southern District of Alabama is the district court that has advocated most consistently for the *Lynn* approach. The original architect of the *Lynn* approach is William H. Steele, Senior United States District Judge of Southern District of Alabama, who is a George W. Bush appointee. United States v. Lynn, No. 89-0072-WS, 2019 U.S. Dist. LEXIS 135987, at *8–9 (S.D. Ala. Aug. 12, 2019). Two other early *Lynn* proponents are also George W. Bush appointees: Chief Judge J. Randall Hall of the Southern District of Georgia, and Chief Judge William Paul Johnson of the District of New Mexico. United States v. Willingham, No. CR 113-010, 2019 U.S. Dist. LEXIS 212401, at *3–4 (S.D. Ga. Dec. 10, 2019) (endorsing the *Lynn* approach and further arguing that a *Cantu* construction "rest[s] upon a faulty premise that the First Step Act somehow rendered the Sentencing Commission's policy statement an inappropriate expression of policy."); *see also* United States v. Mollica, No. 2:14-CR-329-KOB, 2020 WL 1914956, at *4 (N.D. Ala. Apr. 20, 2020) (citing *Lynn* and *Willingham* and noting that "the most compelling guidance comes from close to home. Multiple district courts within this Circuit that have addressed the issue have found that the policy statement, as written, remains in effect until the Sentencing Commission sees fit to change it."); United States v. Cutchens, No. CR 609-044, 2020 U.S. Dist. LEXIS 48976 (S.D. Ga. Mar. 13, 2020); United States v. Nasirun, No. 8:99-CR-367-T-27TBM, 2020 U.S. Dist. LEXIS 23686 (M.D. Fla. Feb. 11, 2020); United States v. Dickson, No. 19-CR-251-17, 2020 WL 1904058, at *3 (N.D. Ohio Apr. 17, 2020); United States v. Hunter, No. 3:06-cr-61, 2020 U.S. Dist. LEXIS 4305 (S.D. Ohio Jan. 9, 2020); United States v. Gray, No. 1:04-CR-00580, 2019 U.S. Dist. LEXIS 161315 (N.D. Ohio Sep. 20, 2019); United States v. Clark, 2019 WL 1052020, at *2 (W.D.N.C. Mar. 5, 2019); United States v. Mangarella, No. 3:06-cr-151-FDW-DCK-3, 2020 U.S. Dist. LEXIS 46083 (W.D.N.C. Mar. 15, 2020); United States v. Willis, 382 F. Supp. 3d 1185, at 1187–88 (D.N.M. 2019)**;** United States v. Lotts, No. CR 08-1631 JAP, 2020 U.S. Dist. LEXIS 29042 (D.N.M. Feb. 20, 2020); United States v. Natera, No. CR 00-1424 RB, 2020 U.S. Dist. LEXIS 51645 (D.N.M. Mar. 25, 2020).

The *Cantu* construction is favored in the Eastern District of Pennsylvania, the District of Connecticut, the District of Maine, the Eastern District of Louisiana, the Eastern District of Virginia, the Eastern District of Michigan, the Southern District of Texas, the Middle District of North Carolina, the District of Nebraska, the District of Kansas, the Eastern and Western Districts of New York, and the District of Nebraska.[102] Additionally, because district courts are not bound by the precedents of other judges within their district, mixed *Cantu-Lynn* districts persist in some states. Districts that remain internally split include the Southern District of New York, the Northern District of California, and the Western District of Virginia.[103]

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102. United States v. Adeyemi, No. 06-124, 2020 U.S. Dist. LEXIS 117743, at *29 (E.D. Pa. July 6, 2020); United States v. Sotelo, No. 14-652-6, 2019 U.S. Dist. LEXIS 135051, at *32 (E.D. Pa. Aug. 7, 2019); United States v. Gagne, No. 3:18-cr-242 (VLB), 2020 U.S. Dist. LEXIS 57957 (D. Conn. Apr. 2, 2020); United States v. Gileno, No. 3:19-cr-161-(VAB)-1, 2020 U.S. Dist. LEXIS 47590 (D. Conn. Mar. 19, 2020); United States v. Sapp, No. 14-cr-20520, 2020 U.S. Dist. LEXIS 16491 (E.D. Mich. Jan. 31, 2020); United States v. Atwi, No. 18-20607, 2020 U.S. Dist. LEXIS 68282, at *13-14 (E.D. Mich. Apr. 20, 2020); *Amarrah*, 2020 WL 2220008, at *6–8; *Cantu*, 2019 U.S. Dist. LEXIS 100923, at *9–10; United States v. Cantu-Rivera, No. H-89-204, 2019 U.S. Dist. LEXIS 105271 (S.D. Tex. June 24, 2019); United States v. Nevers, No. 16-88, 2019 U.S. Dist. LEXIS 223249 (E.D. La. Dec. 27, 2019); United States v. Crinel, No. 15-61, 2020 U.S. Dist. LEXIS 33353 (E.D. La. Feb. 26, 2020); United States v. Perdigao, No. 07-103, 2020 U.S. Dist. LEXIS 57971, at *11-12 (E.D. La. Apr. 2, 2020); United States v. Derrick, No. 1:97-cr-00006-AJT, 2020 U.S. Dist. LEXIS 45977 (E.D. Va. Mar. 16, 2020); United States v. Crawford, No. 1:07CR317-1, 2019 U.S. Dist. LEXIS 209648 (M.D.N.C. Dec. 5, 2019); United States v. O'Bryan, No. 96-10076-03-JTM, 2020 U.S. Dist. LEXIS 29747 (D. Kan. Feb. 21, 2020); United States v. Perez, No. 88-10094-1-JTM, 2020 U.S. Dist. LEXIS 45635 (D. Kan. Mar. 10, 2020); United States v. Wong Chi Fai, No. 93-CR-1340 (RJD), 2019 WL 3428504, at *3–4 (E.D.N.Y. July 30, 2019); United States v. Marks, No. 03-CR-6033L, 2020 U.S. Dist. LEXIS 68828, at *17–18 (W.D.N.Y. Apr. 20, 2020); United States v. Liggins, No. 4:12-CR-3057, 2020 U.S. Dist. LEXIS 68456 (D. Neb. Apr. 20, 2020).

103. *See, e.g.*, United States v. Goode, No. 14 CR 810-07 (CM), 2020 U.S. Dist. LEXIS 2341 (S.D.N.Y. Jan. 3, 2020) (favoring the *Lynn* approach); *cf.* United States v. Scparta, No. 18-CR-578 (AJN), 2020 U.S. Dist. LEXIS 68935 (S.D.N.Y. Apr. 19, 2020) (adopting the *Cantu* construction); United States v. Zukerman, 2020 U.S. Dist. LEXIS 59588 (S.D.N.Y. Apr. 3, 2020) (same); United States v. Shields, No. 12-cr-00410-BLF-1, 2019 U.S. Dist. LEXIS 93574 (N.D. Cal. June 4, 2019) (endorsing the *Lynn* construction); United States v. Eidson, No. 88-cr-00021-SI-1, 2019 U.S. Dist. LEXIS 134778 (N.D. Cal. Aug. 9, 2019) (same); *cf.* United States v. Rodriguez, No. 17-cr-00021-WHO-1, 2019 U.S. Dist. LEXIS 204440 (N.D. Cal. Nov. 25, 2019) (rejecting *Eidson* and endorsing a *Cantu* construction); United States v. Mady Chan, No. 96-cr-00094-JSW-13, 2020 U.S. Dist. LEXIS 56232 (N.D. Cal. Mar. 31, 2020) (favoring a *Cantu* construction);

Regional divides notwithstanding, virtually all courts recognize that Congress sought to expand and democratize compassionate release to some extent through the FSA. Courts often cite the fact that the FSA's compassionate release provision begins with the title "Increasing the Use and Transparency of Compassionate Release."[104] Yet courts disagree over the degree to which Congress intended to transfer greater discretion to judges.[105]

Lynn courts argue that the FSA liberalized compassionate release by providing prisoners an additional method of review, not by expanding judicial discretion via the catch-all provision. In adopting a narrow construction, these courts argue that "[p]ermitting a defendant to move for compassionate release of itself increases the use of compassionate release, because it ensures that a greater volume of such motions . . . will be presented to the courts."[106] *Lynn* courts further contend that, while the statute explicitly provided

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United States v. Edwards, No. 6:17-cr-3, 2020 WL 1650406 (W.D. Va. Apr. 2, 2020) (endorsing the *Cantu* construction and granting compassionate release to an immunocompromised defendant whose cancer, chemotherapy and vulnerabilities put him at substantially greater health risks on account of spreading COVID-19 in his facility.) *cf.* United States v. Casey, No. 1:06CR00071, 2019 WL 1987311 (W.D. Va. May 6, 2019) (appearing to endorse the *Lynn* approach).

104. Multiple courts have inferred increased judicial discretion via the title of the act. *See, e.g.*, United States v. Sotelo, No. 14-652-6, 2019 U.S. Dist. LEXIS 135051, at *32 (E.D. Pa. Aug. 7, 2019) (arguing that "Congress expanded compassionate release under the First Step Act with the express intent of increasing the use and transparency of compassionate release" (citation omitted)); *Cantu*, 2019 U.S. Dist. LEXIS 100923, at *9–10 (noting that "[t]itles are useful . . . because in modern practice the title is adopted by the legislature . . . [and] 'Increasing the Use and Transparency of Compassionate Release' . . . supports the reading that U.S.S.G § 1B1.13 cmt. n.1(D) is not applicable when a defendant requests relief" (citations omitted)). *But see Willingham*, No. CR 113-010, 2019 U.S. Dist. LEXIS 212401, at *4 (criticizing the *Cantu* approach as an "interpretation gleaned primarily from the salutary purpose expressed in the title of Section 603(b) of the First Step Act [that] contravenes express Congressional intent that the Sentencing Commission, not the judiciary, determine what constitutes an appropriate use of the 'compassionate release' provision.").

105. For an example of increased judicial discretion over BOP determinations, see *Wong Chi Fai*, 2019 WL 3428504, at *3–4 (granting compassionate release over the government's objection, disregarding the Bureau's statement regarding Mr. Wong Chi Fai's life expectancy because "this informal policy holds no weight for the Court . . . [and] does not hold weight in its analysis").

106. United States v. Lynn, No. 89-0072-WS, 2019 U.S. Dist. LEXIS 135987, at *8–9 (S.D. Ala. Aug. 12, 2019).

defendants an extra venue to make their case, its text does not support an inference of expanded judicial discretion.[107] They further argue that deference to the Sentencing Commission's guidelines is mandatory.[108]

Cantu courts contend that the Act sought to expand compassionate release broadly, evidenced by the fact that its text did not "place any limits on what extraordinary and compelling reasons might warrant a sentence reduction."[109] These courts often argue that the reviewing judge "steps into the shoes of the BOP [D]irector, and makes its own determination"[110] to "provide relief to petitioners who do not fall directly within the Sentencing Commission's current policy statement."[111] In emphasizing their discretion, *Cantu* courts often cite to the legislative history: before the Act's passage, compassionate release originally appeared as a stand-alone bill.[112] The proposed Granting Release and Compassion Effectively Act of 2018 (the "Grace Act") explicitly stated its intention to "improve the compassionate release process of the Bureau of Prisons"[113] via increased judicial

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107. *See* United States v. Wilson, No. 5:08-CR-50051-KES, 2019 U.S. Dist. LEXIS 222979, at *3 (D.S.D. Dec. 31, 2019) (concluding that the FSA merely amended compassionate release to permit only those inmates in "specified circumstances to file motions [for compassionate release]").

108. *See* United States v. Willis, 382 F. Supp. 3d 1185, at 1187–88 (D.N.M. 2019); *see also* United States v. Shields, 2019 WL 2359231 (N.D. Calif. June 4, 2019) (stating that there is no "authority for the proposition that the Court may disregard guidance provided by the Sentencing Commission where it appears that such guidance has not kept pace with statutory amendments").

109. *Cantu*, 2019 WL 2498923, at *5 (internal citations omitted); United States v. Beck, 2019 WL 2716505, at *21.

110. United States v. Marks, No. 03-CR-6033L, 2020 U.S. Dist. LEXIS 68828, at *17–18 (W.D.N.Y. Apr. 20, 2020) ("In short, when a defendant brings a motion for sentence reduction based on extraordinary and compelling circumstances, the court effectively steps into the shoes of the BOP director, and makes its own determination.").

111. Dinning v. United States, No. 2:12-cr-84, 2020 WL 1889361, at *2 n.1 (E.D. Va. Apr. 16, 2020) (granting compassionate release and further reasoning that "this Court has the discretion to provide relief to petitioners who do not fall directly within the Sentencing Commission's current policy statement.").

112. *See, e.g.*, United States v. Brown, 411 F. Supp. 3d 446, 451 n.3 (S.D. Iowa 2019) (noting that "[t]he First Step Act's compassionate release provisions originally appeared as a stand-alone bill" that "explicitly sought to 'improve the compassionate release process of the Bureau of Prisons'").

113. Granting Release and Compassion Effectively Act of 2018, S. 2471, 115th Cong. (2018). United States v. Brown, 411 F. Supp. 3d 446, 451 n.3 (S.D. Iowa 2019) ("The First Step Act's compassionate release provisions originally appeared as a stand-alone bill. That bill explicitly sought to 'improve the compassionate release process of the Bureau of Prisons.'").

oversight over the BOP's compassionate release determinations. Notably, the Grace Act indicates that the same Congress that passed the FSA was, within the very same term, focused specifically on broad compassionate release reform.[114] Critically, Congress appears to have envisioned increased judicial discretion as critical to achieving that reform. *Cantu* courts further conclude that Congress sought to institute a broad expansion of compassionate release with Article III courts at the helm.[115]

Where *Lynn* courts promote a view of the Sentencing Commission and the BOP as the expert agencies to whom broad standard-setting authority is delegated under the FSA and SRA, *Cantu* courts read statutory intent more broadly. *Cantu* proponents often underscore that Congress, publicly dissatisfied with the BOP's record on compassionate release,[116] placed their faith in judges via the FSA.[117] These courts argue that, in contrast to their displeasure with

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114. Notably, lobbying efforts targeted compassionate release throughout the process, with widows of inmates who were denied compassionate release and died in prison leading key lobbying efforts. Alan Blinder, *The Real People Who Lobbied for Criminal Justice Reform: A Son, a Widow, an Expectant Mother*, N.Y. TIMES (Dec. 12, 2018), https://www.nytimes.com/2018/12/12/us/criminal-justice-reform-lobbying-family.html (on file with the *Columbia Human Rights Law Review*).

115. Shon Hopwood, *A Second Look at a Second Chance: Seeking a Sentence Reduction Under the Compassionate Release Statute, 18 U.S.C. § 3582(c)(1)(A), as Amended by the First Step Act*, PRISON PROFESSORS BLOG (June 18, 2019), https://prisonprofessors.com/a-second-look-at-a-second-chance-seeking-a-sentence-reduction-under-the-compassionate-release-statute-18-u-s-c-§-3582c1a-as-amended-by-the-first-step-act/ [https://perma.cc/XA2L-R936] ("Congress took the power that previously resided with the BOP Director to trigger and set the criteria for sentence reductions and transferred it to Article III courts—where it should be.").

116. Press Release, Sen. Brian Schatz, Schatz, Lee, Leahy Introduce Bipartisan Legislation To Improve Compassionate Release Process, Save Taxpayer Money (Feb. 28, 2018), https://www.schatz.senate.gov/press-releases/schatz-lee-leahy-introduce-bipartisan-legislation-to-improve-compassionate-release-process-save-taxpayer-money [https://perma.cc/Y9D2-ZAR7] (sharing the statement of Sen. Leahy, who notes that compassionate release "is one of the few tools the Bureau of Prisons has at its disposal to safely reduce the federal inmate population, but it inexplicably fails to use it"); *see also* Larkin, Jr., *supra* note 24, at 417 ("What the text of section 603 clearly says is that the BOP failed to exercise the judgment and compassion that Congress expected it would exercise when Congress passed the SRA in 1984." (footnote omitted)).

117. Courts have noted that the FSA's text seems to speak more directly to Article III judges than to the BOP or the Sentencing Commission. *See* United States v. Mack, No. 00-323-02 (KSH), 2019 U.S. Dist. LEXIS 122653, at *9 (D.N.J.

the BOP's handling of compassionate release, Congress and the Commission envisioned judges as a "unique" arbiters of equitable relief.[118]

Cantu courts further contend that Congress has publicly indicated its preference that further discretion be placed in Article III judges over the BOP if the Sentencing Commission was inoperative or otherwise unable to weigh in.[119] Further, these courts assert that the "only way direct motions to district courts would increase the use of compassionate release is to allow district judges to consider the vast variety of circumstances that may constitute extraordinary and compelling" as provided by the catch-all.[120] And, as Hopwood asserts, perhaps this merely echoes Congress's view in 1984 that judges should serve as the ultimate "safety valve" for compassionate release claims.[121]

It is worth noting that both *Cantu* and *Lynn* courts appear attentive to legitimate questions of judicial competency in this realm. Post-FSA courts appear cognizant of the limits of the judiciary serving as the backstop in an area that may be delicate,

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July 23, 2019) (noting that "[t]he Act does not contain any directives to the [Sentencing] Commission").

118. U.S. SENT'G GUIDELINES MANUAL supp to app. C, AMEND. TO THE SENT'G GUIDELINES 3 (U.S. SENT'G COMM'N 2016) (stating that "[the] Commission finds that 'the court is in a unique position to assess whether [extraordinary and compelling] circumstances exist.'"); United States v. Haynes, 456 F. Supp. 3d 496, 508 (E.D.N.Y. 2020) (adopting the *Cantu* approach, noting that "[t]he court is in a unique position to determine whether the circumstances warrant a reduction" (citations omitted)).

119. United States v. Beck, 425 F. Supp. 3d 573, 587 (M.D.N.C. June 28, 2019) ("[T]he terms of the First Step Act give courts independent authority to grant motions for compassionate release and says nothing about deference to BoP [sic], thus establishing that Congress wants courts to take a *de novo* look at compassionate release motions.").

120. United States v. Brown, No. 4:05-CR-00227-1, 2019 U.S. Dist. LEXIS 175424, at *9 (S.D. Iowa Oct. 8, 2019) (declining relief but noting that "[a]lthough titles are not dispositive, sometimes they can be especially valuable . . . [t]hat title is especially valuable here," and further holding that "[h]ere, Congress knew of the BOP's rare granting of compassionate release petitions" (internal citations omitted)). Courts also argue that lenity should govern an ambiguous statutory construction of compassionate release. *See, e.g.*, United States v. Sotelo, No. 14-652-6, 2019 U.S. Dist. LEXIS 135051, at *26–27 (E.D. Pa. Aug. 7, 2019) ("[A]pplying the rule of lenity and giving preference to the most recently enacted statute, we may now find a sentence reduction is warranted without the Bureau of Prisons' initial determination, and we will not be acting inconsistent with the Sentencing Commission's policy statements.").

121. Hopwood, *supra* note 25, at 117.

unpredictable, and scientifically complex.[122] Both *Lynn* and *Cantu* courts appear increasingly willing to examine the medical literature on whether a given illness compels release.[123] In doing so, these courts underscore the increasing role of generalist Article III judges in being tasked with evaluating often complex, technical elements of science and research.[124]

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122. For the Lynn approach to this question, see United States v. Edwards, 456 F. Supp. 3d 953, 957–58 (M.D. Tenn. 2020) ("[E]ach inmate is unique and each requires the same individualized determinations that we have always made in this context. The BOP is the institution with the expertise to conduct this analysis in the first instance, not a court." (citations omitted)). For the *Cantu* approach, see *Sotelo*, 2019 U.S. Dist. LEXIS 135051, at *35 ("What is too soon? Or too late? How do we measure rehabilitation or genuine remorse? . . . . We . . . cannot ignore the possibility some defendants may engage in criminal conduct after a terminal medical diagnosis and . . . a judge may release them."); *Brown*, 2019 U.S. Dist. LEXIS 175424, at *9 ("There admittedly are compelling policy arguments against this reading. Releasing defendants from incarceration is a delicate business—although not any more so than incarcerating them initially. But the Court's reading does not allow judges to release any prisoner through compassionate release.").

123. United States v. Brittner, No. CR 16-15-M-DLC, 2019 U.S. Dist. LEXIS 73653, at *5 (D. Mont. May 1, 2019) (reviewing the World Health Organization literature as well as emerging cancer research, and concluding that "Defendant's diagnosis indicates he suffers from an IDH-wildtype tumor . . . Grade III astrocytomas . . . ha[ve] a poorer prognosis" (citations omitted)); United States v. Beck, No. 1:13-CR-186-6, 2019 U.S. Dist. LEXIS 108542, at *6–8 (M.D.N.C. June 28, 2019) (reviewing at length the testimony of an expert Wake Forest oncologist who reviewed Ms. Beck's medical records and further discussing the use of chemotherapy to shrink "invasive" and "extensive" tumors); United States v. Rodriguez, No. 17-cr-00021-WHO-1, 2019 U.S. Dist. LEXIS 204440, at *12 (N.D. Cal. Nov. 25, 2019) (reviewing the testimony of a third independent medical expert authorized by the court, and evaluating findings of increasing knee contractures and their implications for paraplegics with spinal cord injuries); United States v. Rodriguez, No. 2:03-cr-00271-AB-1, 2020 U.S. Dist. LEXIS 58718, at *401—403 (E.D. Pa. Apr. 1, 2020) (examining the testimony of a clinical medical expert on COVID-19 comorbidities who reviewed Mr. Rodriguez's medical records, and considering emerging CDC and WHO reports on COVID-19 spread, as well as the testimony of an infectious disease epidemiologist).

124. Debates over judicial competency in increasingly complex areas are well covered in the literature. Though the issue is by no means decided, many scholars argue that the Supreme Court endorsed the view that Article III judges are generalists who must engage in complex and technical areas for individual cases in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). *See* Herbert Kritzer, *Where Are We Going? The Generalist vs. Specialist Challenge* 74 TULSA L. REV. 51, 62 (2011).

C. Key Findings

1. BOP Medical Indifference as Extraordinary and Compelling

This Section reports on emerging themes in compassionate release cases post-FSA and evaluates how the *Cantu* approach in practice promotes key goals of the Act, such as greater BOP oversight. One striking finding is that reviewing courts evaluate the BOP's track record of medical treatment in deciding whether to grant compassionate release.[125] This judicial inquiry focuses not only on the defendant's medical condition,[126] but also on the treatment the BOP has provided. [127] Further, multiple circuits have indicated a willingness to grant compassionate release to an incarcerated person [128] who can show that the Bureau has exhibited clear indifference to the individual's treatment and that mistreatment has

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125. United States v. Flores, 2020 WL 3041640 at *2 (W.D.N.Y. June 8, 2020) (granting petitioner's motion for compassionate release conviction where BOP's neglect in managing the COVID-19 conditions at her prison was "disturbing" and where separate civil litigation had found that her prison facility "demonstrated deliberate indifference to the health needs of the inmates.").

126. There have been numerous denials of relief for individuals suffering from chronic illnesses that are not end-stage, where they have not shown an inability to self-care within the BOP facility. *See, e.g.*, United States v. Rivernider, No. 3:10-cr-222, 2019 U.S. Dist. LEXIS 137134, at *6 (D. Conn. Aug. 14, 2019) (denying compassionate relief where the defendant required bypass surgery and care after a heart attack); White v. United States, 378 F. Supp. 3d 784, 786–87 (W.D. Miss. 2019) (denying compassionate relief where the defendant was legally blind and had osteoarthritis in both knees).

127. Mere negligence does not warrant release. Instead, courts appear inclined to grant release when the BOP has failed to act and therefore made the defendant vulnerable to a terminal illness, as in Beck. *See, e.g.*, *Brown*, 2019 U.S. Dist. LEXIS 175424, at *12 n.5 (considering but declining to deem BOP medical staff's botched surgery as extraordinary or compelling because while the surgery "led to severe complications . . . a gruesome syndrome and . . . intolerable pain for years as his seemingly avoidable condition progressed into permanent nerve damage . . . . Defendant makes no claim in his motion that the condition has led to a terminal illness or bars him from caring for himself in prison.").

128. Critically, Article III courts lack the discretion to require the BOP to transfer an inmate to a better-equipped prison medical facility. Zheng Yi Xiao v. La Tuna Fed. Corr. Inst., EP-19-CV-97-KC, 2019 U.S. Dist. LEXIS 57602, 2019 WL 1472889, at *3 (W.D. Tex. Apr. 3, 2019) (holding that the Attorney General has "exclusive authority and *discretion* to designate the place of an inmate's confinement"). Consequently, if a court wants to improve the incarcerated individual's care regimen or alter access to specialists, granting compassionate release may be its most viable option.

impacted their prognosis.[129] To be clear, this is more grave than mere differences in quality of care between free society and prison.[130] With limited exceptions,[131] courts continue to both assume and accept that the BOP "is not the best place for anyone to receive medical care."[132] Instead, reviewing courts appear attentive to critical lapses in care and their consequences for the individual's health.[133]

The most striking example of BOP medical treatment amounting to extraordinary and compelling reasons justifying release is *United States v. Beck*,[134] and its approach has been followed in

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129. United States v. York, No. 3:11-CR-76, 2019 WL 3241166, at *2 (E.D. Tenn. July 18, 2019) (granting release and noting that "defendant further contends that medical recommendations by outside specialists are being ignored by the Bureau . . . the facility is ill-equipped to handle his medical issues, and he has tolerated an ill-fitted wheelchair because the BOP states that they are unable to provide one").

130. United States v. Israel, No. 05 CR 1039(CM), 2019 U.S. Dist. LEXIS 211974, at *30 (S.D.N.Y. Dec. 4, 2019) ("I take it as a matter of settled fact that the Bureau of Prisons is not the best place for anyone to receive medical care.")

131. Notably, many courts *do* evaluate differentials in specialized care, in part recognizing a prison facility's inability to provide requisite care. United States v. Carter, No. CR 05-00347, 2020 WL 6515956, at *2 (W.D. Pa. Nov. 5, 2020) (granting compassionate release where defendant was unable to receive requisite specialized care outside of the prison due to COVID-19 restrictions); United States v. Gasich, No. 2:14-CR-63, 2019 U.S. Dist. LEXIS 152694, at *4 (N.D. Ind. Sept. 9, 2019) (for a defendant with metastatic breast cancer, considering that "[W]hile she is certainly receiving medical care at the BOP . . . access to medical specialists and sub-specialists is more limited in the BOP than in the community.").

132. The mere fact that an incarcerated person could receive better, or more specialized care in the community is not typically a factor warranting compassionate release. *See Israel*, 2019 U.S. Dist. LEXIS 211974, at *1 (declining to grant compassionate release on retributive grounds, "notwithstanding his compromised medical condition or the undoubted fact that he could receive better medical care in the private sector."); *see also* United States v. Shmuckler, No. 1:11-CR-344, 2019 U.S. Dist. LEXIS 203406, at *8 (E.D Va. Nov. 22, 2019) (distinguishing *Beck* and noting that "[Schmuckler] admits that the BOP 'is obviously doing the best it can for' him. He has submitted documentation from several relatively recent visits with healthcare professionals, including specialists.").

133 . *See supra* note 125 and accompanying text; United States v. Rodriguez, 424 F. Supp. 3d 674, 683 (N.D. Cal. 2019) (finding that the "BOP mishandled Rodriguez's case in an extraordinary way, repeatedly neglecting to provide him with the services that he needs . . . [t]his is indefensible. ").

134. United States v. Beck, 425 F. Supp. 3d 573, 580—81 (M.D.N.C. 2019); *see also* United States v. Agomuoh, No. 16-20196, 2020 WL 2526113, at *2 (E.D. Mich. May 18, 2020) (during COVID-19 outbreak, granting relief where vulnerable defendant resided in a facility that lacked adequate treatment sources,

multiple circuits.[135] Ms. Beck was serving a 189-month sentence for methamphetamine distribution, drug conspiracy, and firearms offenses.[136] When Ms. Beck was diagnosed with metastatic breast cancer, the BOP ignored her oncologist's directions to bring Ms. Beck back to begin chemotherapy. Months later, the BOP returned Ms. Beck to see a specialist. By this time, her cancer was so advanced that chemotherapy was no longer a possibility. The district court found that the BOP's conduct likely contributed to the metastasis of Ms. Beck's stage IV cancer[137] and further held that:

> [T]he abysmal health care BoP [sic] has provided qualify as 'extraordinary and compelling reasons' warranting a reduction in her sentence . . . . While the old policy statement is not directly applicable . . . a reduction is consistent with its general guidance and the Sentencing Commission's intent.[138]

The court's approach in *Beck* underscores the potential for both increased oversight of BOP medical treatment writ large *and* the opportunity for release if the individual has received substandard care.[139] Additionally, if a defendant can produce evidence of BOP indifference to their treatment and evidence that this neglect has

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noting that the government did not dispute that "[t]here's no medical treatment after 5:00 PM. [Defendant] would have to wait until the next day. There's usually . . . only one doctor on staff with a handful of nurses [for a facility housing 700 prisoners]." (citation omitted)).

135. *See* United States v. Schmitt, No. CR12-4076-LTS, 2020 WL 96904, at *4 (N.D. Iowa Jan. 8, 2020); United States v. Rodriguez, No. 17-CR-00021-WHO-1, 2019 U.S. Dist. LEXIS 204440, at *23 (N.D. Cal. Nov. 25, 2019); *Gasich*, 2019 U.S. Dist. LEXIS 152694, at *8.

136. The record indicates that Ms. Beck continued to manufacture and distribute methamphetamine while released on bond on two separate occasions. She was initially sentenced to 189 months (15.75 years), though that was retroactively reduced to 165 months (13.75 years). *Beck*, 425 F. Supp. 3d at 574.

137. Beck v. Hurwitz, 380 F. Supp. 3d 479, 484–85 (M.D.N.C. 2019) (in Ms. Beck's civil suit, noting that "the defendants' failures to provide prompt and effective medical treatment for her cancer constitutes deliberate indifference … [without release] Ms. Beck is likely to suffer irreparable harm in that further delays may result in the spread of her cancer . . . ." (citation omitted)).

138. United States v. Beck, 425 F. Supp. 3d at 588.

139. For example, in *Schmitt*, an Iowa district court, following the framework laid out in *Beck*, granted compassionate release to a woman suffering from end-stage metastatic breast cancer. In reaching this decision, the court was attentive to whether the BOP had provided adequate medical care, declining to determine it had and instead stating that, "I note that Schmitt has missed at least one chemotherapy appointment, although this alone does not constitute an extraordinary and compelling reason." *Schmitt*, 2020 WL 96904, at *4 n.3.

exacerbated or contributed to an end-stage illness, they can present a strong claim that the BOP's history of indifference amounts to extraordinary and compelling reasons warranting release.

A more recent opinion from the Eastern District of California underscores *Cantu* courts' willingness to weigh in on appropriate methods of treatment when the sentencing court believes prison medical care has been "abysmal."[140] The court in *United States v. Rodriguez* outlines at great length that the BOP's placement of a paraplegic man in solitary confinement due to its inability to provide proper housing and adequate resources for him constituted extraordinary and compelling circumstances meriting compassionate release.[141]

Critically, however, medical mistreatment may not automatically trigger compassionate release, even among *Cantu* courts. It remains to be seen whether courts will choose to trust the BOP when officials promise improvements in the individual's care, as the court did in *Rodriguez*, [142] or whether a record of BOP misstatements (or deception) will suffice to compel release, like in *Beck*.[143] Interestingly, this determination may depend on the court's willingness to engage with Bureau officials and wardens.[144] While *Cantu* courts seem increasingly willing to dialogue with prison officials about care,[145] this approach may actually weigh *against* the

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140. *Rodriguez*, 2019 U.S. Dist. LEXIS 204440, at *23.

141. *Id.* at 10.

142. The court in *Rodriguez* has insisted that Mr. Rodriguez's compassionate release request will be granted due to BOP mistreatment of his medical treatment *if* BOP does not follow through on its promises to improve Mr. Rodriguez's care. *Id.* at 23.

143. *Beck*, 2019 U.S. Dist. LEXIS 108542, at *33 ("BoP [sic] . . . has provided erroneous information about her recent appointments to the Court. The quality of Ms. Beck's cancer treatment at BoP [sic] in the past remains the best predictor of what it will be in the future."). A contrary example is United States v. Brown, No. 4:05-CR-00227-1, 2019 U.S. Dist. LEXIS 175424, at *12 n.5 (S.D. Iowa Oct. 8, 2019) (declining relief where botched BOP surgery "led to severe complications . . . [and] permanent nerve damage . . . . Defendant makes no claim in his motion that the condition has led to a terminal illness or bars him from caring for himself in prison."). *Brown* indicates that defendants should stress the difficulties of caring for themselves in prison as a result of Bureau care, particularly when prison medical staff have proved unhelpful or, as in *Brown*, irreparably harmful. *Id.* at 10.

144. *See supra* Section II.B. (discussing the *Lynn* and *Cantu* courts' differing levels of deference to BOP determinations).

145. United States v. Gasich, No. 2:14-cr-63, 2019 U.S. Dist. LEXIS 152694, at *4 (N.D. Ind. Sep. 9, 2019); United States v. Schmitt, No. CR12-4076-

likelihood of release in some cases. If the court is likely to take the Bureau "at its word" when prison officials promise improvements, as in *Rodriguez*, a defendant may have to wait longer to receive relief.[146]

2. COVID-19 as Extraordinary and Compelling

In March 2020, *Cantu* courts' willingness to exercise oversight of BOP practices and procedures increased significantly.[147] As the COVID-19 pandemic began to spread across U.S. cities, so too did it begin to impact federal prison facilities. Early reports indicated that a number of federal prisons were not adhering to Centers for Disease Control ("CDC") guidelines necessary to contain the virus from spreading rapidly throughout federal prisons. These reports alleged that BOP Prison facilities were not properly quarantining infected persons, that staff were not receiving or wearing personal protective equipment ("PPE"),[148] and that staff who had been exposed to infected

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LTS, 2020 WL 96904, at *4 (N.D. Iowa Jan. 8, 2020); *Rodriguez*, 2019 U.S. Dist. LEXIS 204440, at *23 (noting the mistreatment but finding persuasive the BOP's promises for improvement, and concluding that "I choose instead to take the government at its word . . . . I direct that Probation . . . file a written report . . . informing me and the parties whether the RRC is providing the promised services.").

146. *Rodriguez*, 2019 U.S. Dist. LEXIS 204440, at *23.

147. United States v. Brown, 457 F. Supp. 3d 691, 699 (S.D. Iowa 2020) (adopting the *Cantu* approach and recognizing its increasing prevalence, noting that "[t]he number of courts adopting this position has grown since . . . as Courts have begun to grapple with the profound penological consequences of COVID-19." The court in *Brown* further held that "the district court can consider anything—or at least anything the BOP could have considered—when assessing a defendant's motion." *Id*. at 699. *See also* United States v. Resnick, No. 1:12-cr-00152-CM, 2020 U.S. Dist. LEXIS 59091, at *17–18 (S.D.N.Y. Apr. 2, 2020) (granting release to white collar defendant in part because the COVID-19 pandemic rose to constitute extraordinary and compelling circumstances warranting release, and further noting that "I would be a fool not to consider what has happened in this country . . . . I do not believe for one minute that BOP was unaware of the rapid deterioration of conditions due to the coronavirus, or that BOP did not have those circumstances in mind as it evaluated Resnick's original request for compassionate release. If it did not, then BOP actually failed to follow the direct order of Attorney General Barr . . . ."); *cf*. United States v. Raia, 954 F.3d 594, 597 (3d Cir. 2020) (finding that "the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP's . . . extensive . . . efforts to curtail the virus's spread.").

148. One critical shortfall is "that the Bureau of Prisons defines PPE as surgical masks and nothing more[.]" Carli Teproff & Devoun Cetoute, *COVID-19 Races Through Miami's Federal Prison*, MIAMI HERALD (July 17, 2020), https://www.miamiherald.com/news/local/community/miami-dade/

prisoners were not quarantining but were instead being staffed and interacting with high-risk, uninfected prisoners who did not yet have COVID-19, putting them at risk of contracting the virus.[149] As of June 2020, eighty-five federal prisoners had died of COVID-19, with seventy-thousand U.S. prisoners and prison staff infected.[150]

As U.S. prisons became the nation's largest COVID-19 hotspots, [151] hundreds of vulnerable prisoners began to request compassionate release. When the BOP rejected immunocompromised prisoners' compassionate release claims, many courts stepped in to grant relief.[152] In doing so, these courts noted that a prisoner with comorbidities that made them vulnerable to develop complications from COVID-19, or one that was unable to practice social distancing in a cramped prison facility, had presented extraordinary and compelling circumstances justifying their release. [153] In granting

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article244236662.html (on file with the *Columbia Human Rights Law Review*); *see also* Blakinger & Hamilton, *supra* note 5 (noting that a number of BOP prison officials either received counterfeit, substandard PPE, or lacked access to necessary equipment entirely).

149. United States v. Sanders, No. 19-20288, 2020 WL 2320094, at *8 (E.D. Mich. May 11, 2020) (lamenting "[t]he health risks posed by the close quarters of confinement during a highly contagious respiratory pandemic"); United States v. Haney, No. 19-cr-541 (JSR), 2020 U.S. Dist. LEXIS 63971, at *14 n.6 (S.D.N.Y. Apr. 13, 2020) (discussing prisons' inability to contain COVID-19); *see also* United States v. Gonzalez, 2020 U.S. Dist. LEXIS 56422, at *8–9 (E.D. Wash. Mar. 31, 2020) (finding that a 64 year-old prisoner's COPD and emphysema, in conjunction with the COVID-19 crisis and her prison's inability to contain it, merited granting her compassionate release).

150. Blakinger & Hamilton, *supra* note 5 (relaying data); *The Coronavirus Crisis Inside Prisons Won't Stay Behind Bars*, N.Y. TIMES (Jun. 25, 2020), https://www.nytimes.com/2020/06/25/opinion/coronavirus-prisons-compassionate-release.html (on file with the *Columbia Human Rights Law Review*) (same).

151. *Id.*

152. *See* United States v. Scparta, No. 18-cr-578 (AJN), 2020 U.S. Dist. LEXIS 68935 (S.D.N.Y. Apr. 19, 2020) (granting relief); Josh Gerstein, *Judge Rips Feds over Prison Quarantine Policies*, POLITICO (Apr. 20, 2020), https://www.politico.com/news/2020/04/20/judge-quarantine-prison-196656 [https://perma.cc/7QXM-CHSJ] (discussing the court's holding in *Scparta*).

153. United States v. Smith, No. 12 CR. 133 (JFK), 2020 WL 1849748, at *12 (S.D.N.Y. Apr. 13, 2020) (granting motion for compassionate release on the grounds of incarcerated individual's heightened risk from COVID-19 (citing U.S.S.G. § 1B1.13 comment n.1(A)(ii))); United States v. Campagna, No. 16 CR. 78-01 (LGS), 2020 WL 1489829, at *1 (S.D.N.Y. Mar. 27, 2020) (granting motion for compassionate release where defendant was immunocompromised); United States v. Jepsen, No. 3:19-cv-00073(VLB), 2020, 2020 WL 1640232, at *5 (D. Conn. Apr. 1, 2020) (same); United States v. Sanchez, No. 18-cr-00140-VLB-11, 2020 U.S. Dist. LEXIS 70802, at *5 (D. Conn. Apr. 22, 2020) (granting

relief, one *Cantu* court noted that there is no circumstance "more extraordinary and compelling than [the COVID-19] pandemic" for a diabetic inmate.[154] Another court noted that "[t]he sentencing purpose of '*just* punishment' cannot warrant a sentence that includes exposing a particularly vulnerable individual to a life-threatening illness which threatens him uniquely."[155]

Notably, the DOJ issued internal guidance on May 18, 2020 which directed the BOP, courts, and AUSAs to concede extraordinary and compelling reasons exist when defendants present certain health conditions that made them vulnerable to COVID-19.[156] At least one *Cantu* court has observed that many of the conditions the DOJ urged judges to consider "fall more naturally into the catchall provision," suggesting that the DOJ endorsed the *Cantu* approach to judicial discretion when weighing COVID-19-based claims for relief. [157] However, the BOP issued and rescinded its compassionate release COVID-19 guidance at such a rapid clip that its approach was derided by at least one court as "Kafkaesque" and "a bizarre limbo."[158]

In some of these cases, *Cantu* courts granted relief in part because the prisoner did not have access to necessary resources to mitigate their individual health risk should they contract the virus. This included cases where an asthmatic incarcerated person was not provided with an inhaler, or in a prison facility being ravaged by the

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compassionate release where defendant suffered from a comorbidity and was at a higher risk of developing complications from COVID-19); United States v. Muniz, 4:09-CR-0199-1, 2020 WL 1540325, at *2 (S.D. Tex. Mar. 30, 2020) (granting compassionate release where defendants' preexisting conditions, including hypertension, made them "particularly vulnerable to severe illness from COVID-19."); United States v. Dunlap, 458 F. Supp. 3d 368, 370–71 (M.D.N.C. 2020) (granting compassionate release to an elderly defendant with hypertension, among other comorbidities, who the court noted was at heightened risk of developing COVID-19 complications).

154. United States v. Rodriguez, No. 2:03-cr-00271-AB-1, 2020 U.S. Dist. LEXIS 58718, at *394 (E.D. Pa. Apr. 1, 2020).

155 . *Sanchez*, 2020 U.S. Dist. LEXIS 70802, at *16–17 (granting compassionate relief) (emphasis in original).

156. United States v. Adeyemi, No. CR 06-124, 2020 WL 3642478, at *10 (E.D. Pa. July 6, 2020 (discussing the policy change and its impact in other cases).

157. *Id.* at *29 n.121 (E.D. Pa. July 6, 2020) (granting release).

158. United States v. Scparta, No. 18-CR-578 (AJN), 2020 U.S. Dist. LEXIS 68935, at *1 (S.D.N.Y. Apr. 19, 2020) ("Given this dangerous set of conditions and Kafkaesque approach, Mr. Scparta presses the Court to grant his still pending motion for compassionate release . . . . Without any hesitation, the Court concludes that Mr. Scparta is entitled to compassionate release.").

virus where social distancing was particularly impractical.[159] Although not all *Cantu* courts began reviewing such reports and granting relief to high-risk individuals in such facilities, many noted access to critical medical resources and PPE in their decisions to grant (or decline) relief.[160] Additionally, a number of *Cantu* courts noted that one extraordinary and compelling factor weighing in favor of granting relief was lack of COVID-19 testing at the facility itself.[161] In such cases, some judges argued that COVID-19 numbers were likely higher than what the BOP had conveyed, and that lack of access to proper testing could rise to extraordinary and compelling circumstances warranting relief.[162]

Lynn courts during COVID-19 continued to defer to BOP decision-making regarding sufficient social distancing practices and defendant eligibility for relief amidst the pandemic. These arguments often proceeded in terms of institutional competency, such as that the

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159. *Adeyemi*, 2020 U.S. Dist. LEXIS 117743, at *50 ("We are concerned we do not see Mr. Adeyemi's plea for renewed inhaler prescriptions reflected in his updated medical records. Mr. Adeyemi's control of his asthma symptoms depends on access to these medications."); *Scparta*, 2020 U.S. Dist. LEXIS 68935, at *1 (noting that Mr. Scparta's facility had been one of the hardest hit by COVID-19, with no solution in sight for quarantining individuals).

160. United States v. Rabadi, No. 13-CR-353 (KMK), 2020 U.S. Dist. LEXIS 65199, at *1 {S.D.N.Y. Apr. 13, 2020); *cf.* United States v. Haney, No. 19-CR-541 (JSR), 2020 U.S. Dist. LEXIS 63971, at *14 n.6 (S.D.N.Y. Apr. 13, 2020) (noting that "initially the MDC did not fully comply with relevant safety protocols . . . [and] inmates who had tested positive were returned to regular housing units . . . [and] were not quarantined," but declining to grant compassionate relief as the facility had improved its hygiene and was, at the time of the decision, adhering to COVID-19 health guidelines).

161. United States v. Asaro, No. 17-cr-127 (ARR), 2020 U.S. Dist. LEXIS 68044, at *8 (E.D.N.Y. Apr. 17, 2020) (granting compassionate release even though no COVID-19 cases had been reported or confirmed at defendant's facility, noting that "absent more information about how much testing the BOP is conducting, it is possible that undetected cases are present in the facility"). *But see* United States v. Morgan, No. 4:16-CR-71(5), 2020 U.S. Dist. LEXIS 112102, at *13 (E.D. Tex. June 25, 2020) (declining relief, noting that the BOP had responded swiftly to provide extensive testing to all incarcerated individuals).

162. *See* United States v. Amarrah, No. 17-20464, 2020 WL 2220008, at *6–8 (E.D. Mich. May 7, 2020) (granting compassionate relief, noting that "[z]ero *confirmed* COVID-19 cases is not the same thing as zero COVID-19 cases. The Bureau of Prisons recently discovered this when it found that 70 percent of the inmates it tested were positive for the disease."); *see also* United States v. Agomuoh, No. 16-20196, 2020 WL 2526113, at *9 (E.D. Mich. May 18, 2020) (citing *Amarrah* and noting that "the lack of any confirmed testing . . . aggravates [the Court's] concerns about Defendant's likelihood to contract COVID-19 while in federal custody." (internal quotations omitted)).

BOP was "in a better position to understand a defendant's health and circumstances relative to the rest of the prison population and identify 'extraordinary and compelling reasons' for release."[163]

3. Sentencing Disparities as Extraordinary and Compelling

Another emerging trend among *Cantu* courts is to consider sentencing disparities as extraordinary and compelling grounds for relief.[164] An increasing number of district courts—most notably the Western District of New York, the Southern District of Iowa, the District of Arizona, the Southern District of Texas, and the District of Nebraska—have concluded that sentencing disparities can constitute extraordinary and compelling circumstances urging compassionate relief.[165] Many of these decisions sound in congressional intent, arguing that Congress explicitly repudiated now-defunct mandatory minimums and consecutive sentence mechanisms when it enacted criminal justice reform legislation that barred such "draconian"

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163. United States v. Dickson, No. 1:19-CR-251-17, 2020 WL 1904058, at *3 (N.D. Ohio Apr. 17, 2020) (declining relief on institutional competency grounds); United States v. Edwards, 456 F. Supp. 3d 953, 957–58 (M.D. Tenn. 2020) (declining relief and holding that the BOP, not the courts, is the party in the best position to determine which prisoners should be released amid the COVID-19 pandemic).

164. It merits consideration that, in this realm, what some defendants are receiving is non-medical compassionate *relief* via a sentence reduction, not immediate release. A number of courts have nonetheless concluded that such a reduction is both proper and pragmatic. *See* United States v. Urkevich, No. 8:03CR37, 2019 U.S. Dist. LEXIS 197408, at *8–9 (D. Neb. Nov. 14, 2019) ("A reduction in the sentence at this juncture will help Urkevich and the Bureau of Prisons plan for his ultimate release from custody and may assist him in his pending efforts to seek clemency from the Executive Branch.").

165. United States v. Marks, No. 03-CR-6033, 2019 U.S. Dist. LEXIS 199429, at *3 (W.D.N.Y. Mar. 14, 2019) (describing the defendant's "draconian, mandatory 25-year consecutive sentence"); United States v. Brown, No. 4:05-CR-00227-1, 2019 U.S. Dist. LEXIS 175424, at *14 (S.D. Iowa Oct. 8, 2019) (holding that "a district court assessing a compassionate release motion may still consider the resulting sentencing disparity when assessing if there are 'extraordinary and compelling reasons' supporting release" (citing *Marks*, 2019 U.S. Dist. LEXIS 199429)); United States v. Spears, No. 3:98-cr-0208-SI-22, 2019 U.S. Dist. LEXIS 177991, at *17 (D. Or. Oct. 15, 2019) (holding that "any possible disparity resulting from a reduced sentence is not unwarranted given the special circumstances that Spears currently faces in prison as a result of his health and age"); United States v. Johns, No. CR 91-392-TUC-CKJ, 2019 WL 2646663, at *3 (D. Ariz. June 27, 2019) (in granting relief, noting that "[t]he Court agrees with defense counsel's argument that now drug trafficking defendants are often sentenced to lower terms of incarceration than when Johns was sentenced.").

practices. A number of courts have concluded that [166] because Congress has now deemed stacked sentences and mandatory minimums to be inappropriate, this "fundamental change to sentencing policy" indicates that extraordinary circumstances are present.[167] Most recently, in *United States v. Urkevich*, the district court determined that:

> A reduction in [the defendant's] sentence is warranted by extraordinary and compelling reasons, specifically the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed.[168]

In considering whether a given sentencing disparity amounts to an extraordinary and compelling basis for relief, courts look to both congressional intent[169] and real-world impact.[170] As articulated by one

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166. Courts tend to consider sentencing disparities as extraordinary and compelling when assessing federal sentencing factors, specifically the duty to impose a sentence that is "sufficient but not greater than necessary." *See* United States v. Brittner, No. CR 16-15-M-DLC, 2019 U.S. Dist. LEXIS 73653, at *2 (D. Mont. May 1, 2019); *Urkevich*, 2019 U.S. Dist. LEXIS 197408, at *8; *Spears*, 2019 U.S. Dist. LEXIS 177991, at *16.

167. United States v. Cantu-Rivera, No. H-89-204, 2019 WL 2578272, at *2 (S.D. Tex. June 24, 2019) (recognizing "the *fundamental change to sentencing policy carried out in the First Step Act's elimination of life imprisonment* as a mandatory sentence solely by reason of a defendant's prior convictions. The combination of all of these factors establishes the extraordinary and compelling reasons justifying the reduction in sentence . . . ." (emphasis added) (citation omitted)) .

168. *Urkevich*, 2019 U.S. Dist. LEXIS 197408, at *8. Mr. Urkevich was found guilty at trial for weapons and drug offenses. His 300-month sentence was reduced to 188 months in 2016 and further reduced in November 2019. Notably, the opinion granting Mr. Urkevich's release contains no information about his health, suggesting that this was non-medical relief. In a footnote, the court emphasized that Mr. Urkevich "had no disciplinary actions during his incarceration . . . [and] ha[d] completed several educational, vocational, and other rehabilitative programs . . . ." *Id.* at *4 n.1.

169. *See Marks*, 2019 U.S. Dist. LEXIS 199429, at *2 (characterizing stacking as "frequently criticized as unwarranted and excessive. . . . In part, because of this criticism, with bipartisan support, Congress . . . has recognized the inequities and harsh consequences of the stacking provisions and has eliminated it under circumstances like those facing Marks as part of the First Step Act . . . .").

170. United States v. McPherson, No. CR94-5708RJB, 2020 WL 1862596, at *5 (W.D. Wash. Apr. 14, 2020) ("It is extraordinary that a civilized society can allow this to happen to someone who, by all accounts, has long since learned his lesson."); *See also Cantu-Rivera*, 2019 WL 2578272, at *2 (granting compassionate release and further adding that "[t]his sentence will also avoid unwarranted disparities among defendants with similar records convicted of similar

court, and echoed by others, certain stacking sentences "would be laughable if only there weren't real people on the receiving end of them."[171] While some courts initially urged prosecutors to vacate stacked convictions rather than grant compassionate release, more recent decisions indicate judges' willingness to authorize release outright.[172]

Cantu courts also appear attentive to the sentencing disparities that may result from *granting* release, thereby shortening an incarcerated person's sentence compared to similarly situated defendants.[173] In weighing any potential disparities, courts have begun to consider the difficulties that ill or handicapped persons face while incarcerated.[174] In doing so, these courts consider—often at

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conduct . . . because this 30-year sentence exceeds the sentences imposed on other members of the drug-trafficking conspiracy").

171. United States v. Holloway, 68 F. Supp. 3d 310, 312 (E.D.N.Y. 2014); *see also* United States v. Brown, No. 4:05-CR-00227-1, 2019 U.S. Dist. LEXIS 175424, at *12–13 (S.D. Iowa Oct. 8, 2019) (quoting *Holloway*, 68 F. Supp. 3d at 312, when commenting on the defendant's 510-month sentence for two counts of firearm possession under 18 U.S.C. § 924(c)); *Urkevich*, 2019 U.S. Dist. LEXIS 197408, at *9 (commenting on the need for sentences to "'reflect the seriousness of the offense . . . and to provide just punishment" as well as "the need to avoid unwarranted sentence disparities among [similarly situated] defendants").

172. *See Urkevich*, 2019 U.S. Dist. LEXIS 197408, at *1 (granting release and noting that Mr. Urkevich's sentence (848 months) was "forty years longer than the sentence he likely would have received (368 months) if he were sentenced under the law (18 U.S.C. § 924(c)(1)(C)) as it now exists"); *see also* Berman, *supra* note 61 (citing *Urkevich*, 2019 U.S. Dist. LEXIS 197408, at *8, for the proposition that "[a] reduction in [the defendant's] sentence is warranted by extraordinary and compelling reasons, specifically the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed"). It is also possible that judges have noticed AUSAs' unwillingness to vacate these convictions writ large and have taken matters into their own hands. *See Cantu-Rivera*, 2019 WL 2578272, at *1.

173. *See Brown*, 2019 U.S. Dist. LEXIS 175424, at *14; *see also* United States v. Stone, No. 3:17-cr-0055-JAJ-SBJ, 2019 U.S. Dist. LEXIS 182081, at *30 (S.D. Iowa Oct. 22, 2019) (holding that "even if a compassionate release might result in a sentencing disparity, that disparity may be warranted, in light of the 'extraordinary and compelling' circumstances presented."); United States v. Spears, No. 3:98-cr-0208-SI-22, 2019 U.S. Dist. LEXIS 177991, at *17 (D. Or. Oct. 15, 2019) (considering, and not finding, that a sentence reduction in that case would create unwarranted sentence discrepancies).

174. *See* United States v. Bellamy, No. 15-165(8) (JRT/LIB), 2019 WL 3340699, at *7 (D. Minn. July 25, 2019) ("While Bellamy's record warranted a longer sentence, any disparity resulting from a reduced sentence is not unwarranted given the special circumstances he faces in prison as a result of his health and age."); *see also Spears*, 2019 U.S. Dist. LEXIS, at *3–4, *17 (noting the

great length—the extent to which the incarcerated person's daily life in prison is exacerbated by infirmities, illness, and old age.[175] In *United States v. Bellamy,* the court concluded that:

> Bellamy has . . . served a significant portion of his sentence . . . in extraordinary and compelling circumstances given his deteriorating health. . . . [His] health issues made his sentence "significantly more laborious than that served by most inmates."[176]

Additionally, courts have underscored that any sentencing disparities resulting from compassionate relief can be mollified by an extended term of supervised release.[177] Further, courts have held that an incarcerated person's incapacitation via disability or illness outweighs the need to punish the defendant for the seriousness of the initial offense, thereby reducing any resulting disparity.[178] Finally,

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same consideration of the defendant's age and deteriorating health as its motivation).

175. *See* United States v. McGraw, No. 2:02-cr-00018-LJM-CMM, 2019 WL 2059488, at *4–5 (S.D. Ind. May 9, 2019) (noting that the defendant was "fully dependent on oxygen and a wheelchair," and therefore "has served much of his sentence while seriously ill and in physical discomfort. This means that his sentence has been significantly more laborious than that served by most inmates.").

176. *See Bellamy*, 2019 WL 3340699, at *7 (citing *McGraw*, 2019 WL 2059488, at *5, and further concluding that "[w]hile shorter than expected, Bellamy's time in prison under these circumstances provides just punishment and adequate deterrence"). In *Bellamy*, the court granted compassionate release even though the defendant had a violent criminal record, indicating that some courts may be willing to reconsider "danger to the community" 3353(a) factors in light of changed health circumstances. Similarly, in *United States v. Wong Chi Fai*, No. 93-CR-1340 (RJD), 2019 WL 3428504, at *4 (E.D.N.Y. July 30, 2019), a defendant serving a life sentence was granted compassionate release despite having a violent criminal history. Despite government opposition, the court cited both *McGraw* and *Bellamy* to determine that Mr. Wong Chi Fai's imprisonment had been particularly arduous given his health issues, and that "to require Mr. Wong to serve out the rest of his life sentence would be 'greater [punishment] than necessary.'" *Id.*

177. *See Spears*, U.S. Dist. LEXIS 177991, at *17 (finding that "[a]ny disparity also will be mitigated by imposing a lifetime period of supervised release"); *Wong Chi Fai*, 2019 WL 3428504, at *4 (noting that the prospect of supervised release contributed to the court's decision to grant compassionate release).

178. *See Bellamy*, 2019 WL 3340699, at *6 (noting that the "seriousness of [the] offense and criminal history 'are wholly outweighed by [the defendant's] serious, deteriorating conditions and dependence upon . . . a wheelchair' and assistance from a helper"); *see also* United States v. York, Nos. 3:11-CR-76, 3:12-CR-145, 2019 WL 3241166, at *7 (E.D. Tenn. July 18, 2019) (granting release and noting that "[d]efendant is disabled and wheelchair-bound. Given Defendant's age

even for non-medical releases like that in *Urkevich*, both scholars and courts argue that the prevalence of sentencing disparities in the U.S. federal system should not preclude deserving defendants from receiving relief.[179] Indeed, for resentencing reform to take hold at all, courts must grant a reduction to a deserving individual even if their release might benefit them relative to those who have not yet received compassionate relief.[180] Otherwise, resentencing will not occur for anyone. Moreover, the approaches in *Marks* and *Urkevich* have proved influential and have expanded the landscape of compassionate relief across U.S. district courts.[181]

Taken together, these findings indicate that judicial review of compassionate release claims under the FSA can extend far beyond a cursory review of the defendant's medical history. Instead, certain courts have conducted critical oversight, scrutinizing BOP mistreatment and releasing incarcerated persons to receive specialized care elsewhere when their treatment has been deemed substandard and harmful. Critically, some courts have gone further, examining whether the defendant's original sentence reflects a bygone era that Congress firmly repudiated when it enacted the FSA.

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and physical impairments, the Court is disinclined to find that Defendant poses any significant risk to the community at this time. . . . The Court cannot fathom . . . how Defendant could pose a danger to the community in light of his chronic physical impairments.").

179. *See* Hopwood, *supra* note 25, at 129 (noting that "[g]iven the large number of sentencing disparities already in the system, sentencing disparity is not a persuasive argument for leaving someone who has been rehabilitated in federal prison"); *see also* United States v. Tidwell, No. CR 94-353, 2020 WL 4504448, at *10 (E.D. Pa. Aug. 5, 2020) ("[W]hen a defendant demonstrates that extraordinary and compelling reasons warrant a sentence reduction, the ensuing sentence disparity has been authorized by Congress, and is therefore a 'warranted' disparity." (citations omitted)); United States v. Stone, No. 3:17-cr-0055-JAJ-SBJ, 2019 U.S. Dist. LEXIS ("[E]ven if a compassionate release might result in a sentencing disparity, that disparity may be warranted, in light of the 'extraordinary and compelling' circumstances presented." (citation omitted)).

180. Hopwood, *supra* note 25 at 121.

181. United States v. Maumau, No. 2:08-CR-00758-TC-11, 2020 WL 806121, at *7 (D. Utah Feb. 18, 2020) ("Like the Urkevich court, this court concludes that the changes in how § 924(c) sentences are calculated is a compelling and extraordinary reason to provide relief."); United States v. Haynes, 456 F. Supp. 3d 496, 513 (E.D.N.Y. 2020) (same).

III. STATUTORY ANALYSIS, CONGRESSIONAL INTENT, AND THE *CANTU* APPROACH

This Part evaluates compassionate release via two modes of analysis. First, it employs tools of statutory interpretation to ultimately conclude that the *Cantu* approach best aligns with both the statutory text and legislative intent. Second, it evaluates the key benefits of "second looks" and concludes that the *Lynn* approach fails to achieve the compassionate release overhaul Congress envisioned when it enacted the FSA. Most notably, this Note finds that funding shortfalls, tepid BOP commitment, and strong prosecutorial opposition to release indicate that compassionate release may remain underutilized absent key changes. This Part concludes by noting that, as it exists today, compassionate release remains an elusive privilege unavailable to most deserving federal prisoners.

A. Congressional Intent

A growing number of courts have begun to use the catch-all provision of "other reasons" to consider a broader swath of circumstances that can rise to the "extraordinary and compelling" standard. This includes, but is not limited to, a defendant's rehabilitation[182] and ability to contribute to society after receiving compassionate relief.[183] In adopting a holistic approach, these courts have recognized that Congress[184] sought to provide more second looks

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182. As the Supreme Court noted in *Pepper v. United States*, 131 S. Ct. 476 (2011), courts may indeed consider evidence of the defendant's rehabilitation since his prior sentencing. And, in *Pepper*, the Court further held that such evidence may, in appropriate cases, support a downward variance from the Guidelines. Resentencing would constitute an example of such a downward variance.

183. This may seem counterintuitive at first. If compassionate release was reserved solely for either terminal illness or debilitating medical conditions resulting in an inability to self-care within a prison facility, then evaluating employability seems both irrelevant and unnecessary. While evaluating employability as a proxy for rehabilitation only occurs in non-medical releases, courts still consider the rehabilitation of a defendant in medical cases when looking at dangerousness and threat to the community factors. *See, e.g.*, United States v. Tidwell, No. CR 94-353, 2020 WL 4504448, at *8 (E.D. Pa. Aug. 5, 2020) (finding that defendant's strong prison record, including educational course engagement and a "minimal, non-violent disciplinary record" signaled rehabilitation and mitigated the need to incarcerate based on the seriousness of the initial offense) (citation omitted).

184. *See* United States v. Brown, 411 F. Supp. 3d 446, 454 (S.D. Iowa 2019) ("As the Act's title indicated, Congress acknowledged it has just begun to rein in its past excesses. In cases where it has not—perhaps out of fear it would take too

for deserving individuals through the FSA.[185] To this end, compassionate release can play a crucial role in promoting just sentencing—and that includes resentencing—writ large. This analysis indicates that the *Cantu* court approach of evaluating rehabilitation best aligns with congressional intent, the text of the statute,[186] and the broader goals of the First Step Act.

Critically, both statutory text and legislative history indicate that Congress intended to promote second looks via a holistic evaluation of each defendant.[187] Scholars have noted that Congress long intended that "the sentencing power [staying] in the judiciary where it belongs" requires permitting "later [judicial] review of sentences" in particularly compelling situations.[188] Although Paul Larkin argues that 603(b) does not authorize non-medical relief, he concedes that what Congress did *not* say is quite probative.[189] Indeed, Congress cast judicial discretion over compassionate release in broad terms.[190] Furthermore, an *expressio unius* reading[191] would indicate a

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much effort to make so many people whole—*courts and those who appear before them should not hesitate to use their powers to right obvious wrongs*." (emphasis added)).

185. The legislative history indicates a general desire to promote early release for rehabilitated individuals who are prepared to be productive upon their release. The Senate Judiciary Committee report includes the statement of Lindsey Graham, Senator of South Carolina, who notes that "for a nonviolent offender to be released early, the offender has to acquire a necessary skill-set to be more productive once released. The bill also gives more latitude to judges to make sure lengthy sentences are not mandated for multiple nonviolent offenses." STAFF OF S. COMM. ON THE JUDICIARY, 116TH CONG., SENATE AND HOUSE LAWMAKERS RELEASE UPDATED FIRST STEP ACT 12 (Comm. Print 2018).

186. For a contrary approach, see Larkin, Jr., *supra* note 24, at 17 (asserting that "the best reading of Section 603(b) is that it does not create a general second-look mechanism")

187. STAFF OF S. COMM. ON THE JUDICIARY, 116TH CONG., SENATE AND HOUSE LAWMAKERS RELEASE UPDATED FIRST STEP ACT 12 (Comm. Print 2018) (statement of Congressman Bob Goodlatte) (emphasizing the importance of "ensur[ing] that offenders become productive members of society after they serve their time, and to adjust some sentences that are currently excessive").

188. *See* Hopwood, *supra* note 25, at 120.

189. *See* Larkin, Jr., *supra* note 24, at 18 (quoting *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991)).

190. Hopwood, *supra* note 25, at 121. While the text of the FSA does grant broad discretion to judges, the *Lynn* counterargument that the *Cantu* approach promotes unconstrained judicial activism is unfounded. To the contrary, *Cantu* courts are firmly limited by 3553(a) factors, which often dictate against granting relief even if the defendant's situation is extraordinary and compelling. *See, e.g.*, United States v. Brown, 411 F. Supp. 3d 446, 451 (S.D. Iowa 2019) ("The need to appropriately punish severe conduct and not introduce sentencing disparities

broad delegation of authority with minimal constraints over judicial discretion.[192] As Hopwood notes: "[T]here is nothing unusual about Congress legislating a broad and open standard and then delegating that particularized application of that standard to . . . the federal judiciary."[193] Extraordinary and compelling is such a standard.

Further, attention to the FSA's larger legislative context is critical to ascertaining the "best reading" of the statute.[194] Indeed, Congress's grant of authority to review courts was far from an afterthought. Publicly dissatisfied with the BOP, Congress "decided federal judges are no longer to be constrained or controlled by how

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between defendants convicted of similar crimes provides firm limits on a judge's ability to release people from custody.").

191. *Expressio unius est exclusio alterius*, or, the expression of one thing implies the exclusion of another, is a key canon of statutory interpretation that has been regularly used to divine legislative intent. *See, e.g*, U.S. v. Vonn, 535 U.S. 55, 65 (2002) (describing *expressio unius* and noting that "expressing one item of [an] associated group or series excludes another left unmentioned"); Chevron v. U.S.A. Inc. v. Echazabal, 536 U.S. 73, 81 (2002) (noting that the *expressio unius* "canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded"); Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006) (noting that "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute"); Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (noting that the *expressio unius* canon has force when "the items expressed are members of an associated group or series" (citations omitted)). The Roberts court has used *expressio unius* with regularity. Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 99–101 (2018).

192. Hopwood, *supra* note 25, at 116 n.83 ("Congress has, for example, delegated to the judiciary to define what constitutes a 'reasonable attorney's fee' under the various civil rights statutes"); *see also* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) ("The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law.")

193. *Id*.

194. King v. Burwell, 135 S. Ct. 2480, 2492 (2015) (discussing that the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal citations omitted)); United States v. Cantu, 423 F. Supp. 3d 345, 350 (S.D. Tex. 2019) (noting that "[s]tatutory construction . . . is a 'holistic endeavor' that must consider the entire statutory scheme"). Additionally, Paul Larkin describes the "music" approach of Justice Breyer's dissent in *Azar v. Allina Health Servs*., 139 S. Ct. 1804 (2019) as an analog to *King v. Burwell*. Larkin, Jr., *supra* note 24, at 417 n.78. I would argue that even Justice Gorsuch's "lyrics" approach would support the Cantu court approach.

the BOP Director sets the criteria for what constitutes extraordinary and compelling reasons for a sentence reduction."[195] Notably, Congress operated against a well-established backdrop of Sentencing Commission stasis, and it nevertheless delegated broad discretion to the judiciary.[196] Moreover, Congress had ample opportunity during the drafting and debate process to provide more restrictive guidance on the circumstances constituting the "other reasons" catch-all.[197] Instead, it deemed the judiciary the branch most capable of recognizing the circumstances where "extraordinary accomplishments . . . require extraordinary care and sometimes extraordinary relief."[198] In doing so, Congress solidified Article III judges as the key "safety valve" that legislators have long envisioned them to be.[199]

Notably, considering rehabilitation as part of a second look is supported by the text itself.[200] While rehabilitation *alone* cannot be

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195. Hopwood, *supra* note 25, at 122. Courts assume Congress legislates with the full knowledge of how agencies have interpreted earlier versions of a statute. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). As noted in *United States v. Brown*, the FSA "explicitly sought to improve the compassionate release process of the Bureau of Prisons" and explicitly transferred this newfound discretion to courts. 411 F. Supp 3d 446, 450 n.3 (S.D. Iowa 2019); *see also* United States v. Rodriguez, 424 F. Supp 3d 674, 682 (N.D. Cal. 2019) ("Congress knew that the BOP rarely granted compassionate release . . . and the purpose of the FSA was to allow defendants to file motions in district courts directly . . . . [J]udges [must be allowed to] consider the vast variety of circumstances that may constitute extraordinary and compelling.").

196. *See supra* note 88 and accompanying text.

197. *See* Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/VQF9-2CXQ] (providing a brief legislative history of the FSA).

198. United States v. Marks, No. 03-CR-6033, 2019 U.S. Dist. LEXIS 199429, at *4 (W.D.N.Y. Mar. 14, 2019); *see also* United States v. Sanchez, No. 18-cr-00140-VLB-11, 2020 U.S. Dist. LEXIS 70802, at *10 (D. Conn. Apr. 22, 2020) (looking at the legislative history, and noting that "Senate co-sponsor Senator Cardin observed that the First Step Act 'expands compassionate release' and 'expedites compassionate release applications.'" (citing 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin)).

199. Hopwood, *supra* note 25, at 117.

200. Mendelson, *supra* note 191, at 73 (noting a decade-long commitment to textualist-focused statutory interpretation, with judges "merely reading words on a page."); Harvard Law School, *The Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE 9:26–9:48 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg&t=553s.

the sole basis for granting relief,[201] Congress indicated its willingness to consider rehabilitation as *one* of multiple contributing factors via its use of the "alone" modifier. Additionally, while a statute's title is certainly not the end of the inquiry, the Supreme Court's recent decision in *United States v. Yates* indicates that titles can provide informative context.[202] The FSA's full title is "The Formerly Incarcerated Reenter Society Transformed Safely." "Transformed" is synonymous with "rehabilitated" within the prison context. Further, the text of the Act's title on its face indicates that individuals returning safely to society after prison is a key goal. Moreover, "Transformed Safely" suggests that evaluating rehabilitation was Congress's intent in enacting the FSA. In this light, textual clues indicate that transformed prisoners *should return to society*, indicating a support for reducing the sentences of rehabilitated prisoners. Taken together, textual tools of statutory construction strongly support *Cantu* courts' consideration of factors including employability and rehabilitation.

Additionally, a number of courts have recognized that serving as "faithful agents" of Congress compels them to recognize the societal importance of key factors like rehabilitation and sentencing reform.[203] *Cantu* courts have noted that the Act's emphasis on

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201. This is per Congress's own mandate. United States v. Brown, 411 F. Supp. 3d 446, 452 (S.D. Iowa 2019) (noting that "while Congress largely left 'extraordinary and compelling reasons' undefined, it made clear rehabilitation, on its own, does not suffice"). But even before the FSA, the Supreme Court's decision in *Pepper v. United States* affirmed that evidence of post-sentencing rehabilitation carries great weight with reviewing courts at sentencing. 562 U.S. 476, 500 (2011) (noting that "evidence of post-sentencing rehabilitation may be highly relevant to several of the sentencing factors that Congress has expressly instructed district courts to consider").

202. Yates v. United States, 135 S. Ct. 1074 (2015). The Court in *Yates* looked to the titles and headings within a provision of the Sarbanes-Oxley Act to evaluate whether Congress intended for its prohibition on altering documents to include tangible objects such as a fish. Because the Act's headings and titles referred specifically to financial crimes and bankruptcy, the Court inferred that Congress did not intend for its application to sweep broadly to extend to all tangible objects. *Id*. at 1083, 1085.

203. Faithful agency is a core tenet of statutory interpretation. *See, e.g.*, James J. Brudney, *Faithful Agency Versus Ordinary Meaning Advocacy*, 57 ST. LOUIS UNIV. L.J., 975, 975 (2013) (summarizing Justice Scalia's positivist approach and further noting the scholarship of Professor John Manning, which argues that "because congressional actors bargain in complex and often unknowable ways over a statute's wording, courts' best (and perhaps only) hope as faithful agents is to search for those underlying legislative preferences in the bargained-for text itself" (internal citations omitted)).

rehabilitation and transformation may ultimately compel them to resentence a changed defendant.[204]

Consider, for example, the court's approach in *United States v. Walker*. In reaching the decision to grant release, the court considered factors like Mr. Walker's lucrative employment opportunity upon release and his PTSD diagnosis at the time of the original crime, among other factors. The court further concluded: "[Walker's] meaningful use of his time in prison; the failing health of his mother . . . the good that would allow him to do for his family and his community; and, the minimum time left remaining on his sentence; Mr. Walker has provided sufficiently extraordinary and compelling reasons . . . ."[205] In *Walker*, it is not clear whether any of the given circumstances, on their own, would have constituted extraordinary or compelling circumstances justifying release. Instead, the court considered the cumulative total of multiple compelling factors that, taken together, amounted to extraordinary and compelling circumstances warranting release.[206] In doing so, the court aligned with scholarship noting that, under the FSA, "a combination of factors can make the case for a sentence reduction."[207]

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204. United States v. Marks, No. 03-CR-6033, 2019 U.S. Dist. LEXIS 199429, at *4 (W.D.N.Y. Mar. 14, 2019). ("I believe that Marks . . . is not now the person convicted of these charges in 2008.") In *Marks*, the court noted that "[t]he record reflects extraordinary accomplishments. Extraordinary cases require extraordinary care and sometimes extraordinary relief." *Id.*

205. United States v. Walker, No. 1:11 CR 270, 2019 U.S. Dist. LEXIS 180084 (N.D. Ohio Oct. 17, 2019).

206. *Id.* These findings indicate that many district courts are willing to look at compassionate release as a totality-of-the-circumstances assessment, where a defendant is able to present a comprehensive picture of their rehabilitation and their potential lives upon release, along with the traditional familial circumstances and chronic illness considerations. Further, *Cantu* courts appear amenable to release individuals via such an approach. *See, e.g.*, United States v. Urkevich, No. 8:03CR737, 2019 U.S. Dist. LEXIS 197408, at *4 (D. Neb. Nov. 14, 2019) (evaluating a number of factors in deciding to grant release, including that Mr. Urkevich "has demonstrated post-offense rehabilitation."); *cf.* United States v. Loggins, No. 19-2689, 2020 U.S. App. LEXIS 24249, at *4 (8th Cir. July 31, 2020) ("[T]he [district] court did not feel constrained by the circumstances enumerated in the policy statement, but simply found that a non-retroactive change in law did not support a finding of extraordinary or compelling reasons for release.").

207. Doug Berman, *Author and Veteran and Bank Robber Gets Out a Few Months Early*, SENT'G L. & POL'Y (Oct. 22, 2019), https://sentencing.typepad.com/sentencing_law_and_policy/2019/10/author-and-veteran-and-bank-robber-gets-out-a-few-months-early-.html [https://perma.cc/C9CT-6KTL]; Hopwood, *supra*

Moreover, the First Step Act instructed judges to exercise that most "important judicial responsibility" of "eyeball[ing]" the defendant, this time at resentencing.[208] When "faced with a live human being in open court,"[209] the court recognized Mr. Walker as an extraordinarily rehabilitated individual who was prepared to care for his family and contribute to society upon release. Legislative cues indicate that this outcome is the one Congress envisioned when they enacted the First Step Act.

B. Policy Goals and the *Cantu* Approach

The *Cantu* approach also presents key benefits for the Bureau writ large. Because *Cantu* courts consider whether the defendant demonstrates extraordinary rehabilitation, employability, and ability to contribute to society when evaluating release,[210] this approach can create an incentive structure that serves critical policy goals both within prison and upon release. More specifically, by valuing rehabilitation and community engagement, courts can more effectively promote public safety, rehabilitation, and even prison stability. As Hopwood notes, "[i]f second looks became the norm, those in federal prison would be incentivized to start compiling a record of rehabilitation, including compliance with BOP rules and norms."[211]

Yet the *Cantu* approach yields benefits beyond promoting good behavior. Indeed, federal public defender offices across the United States have instructed staff attorneys to encourage incarcerated persons to engage in available rehabilitative and drug programming, as well as job training, because of the possibility of a

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note 25, at 114 (discussing, among many reasons for sentence reduction, the insufficiency of federal criminal law in fostering general deterrence from crime).

208. United States v. Faulks, 201 F.3d 208, 209 (3d Cir. 2000) (noting that eyeballing the defendant is far more than a mere formality, but "the embodiment of a value deeply embedded in our polity (and our jurisprudence)").

209. *Id.* at 213. (holding that a district court's assessment of what is an appropriate sentence may change "when faced with a live human being in open court").

210. The First Step Act created many programs that give incarcerated persons greater outlets for vocational training, mentorship, and educational opportunities. DEP'T OF JUST., DEPARTMENT OF JUSTICE ANNOUNCES ENHANCEMENTS TO THE RISK ASSESSMENT SYSTEM AND UPDATES ON FIRST STEP ACT IMPLEMENTATION (2020) (noting that the Act includes provisions that require the BOP to "assess prisoner recidivism risk; guide . . . program assignments; and incentivize and reward participation in and completion of recidivism reduction programs and productive activities").

211. Hopwood, *supra* note 25, at 112–13.

sentence reduction under the FSA.[212] Judges appear equally persuaded that a record of prison involvement contributes to an incarcerated person's eligibility for compassionate release, even in medical cases.[213] Hopefully, this approach will result in more robust engagement with the Act's provision for vocational programming and increased prison resources.[214] It may also help to promote the Act's key tenets of recidivism reduction and rehabilitation. Empirical evidence indicates that incarcerated persons granted compassionate release have extraordinarily low recidivism levels in the first place.[215] And, if future compassionate relief grantees benefit from the Act's programming upon their release, this may further incentivize the Congress and the BOP to fund and provide resources for such programming.

Critically, studies indicate that presently low levels of funding may effectively hamstring the Act's vocational training and rehabilitative programming.[216] It is clear that, without increases in

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212. *See The First Step Act: Practice Tips and Unexpected Traps*, FED. PUB. DEF. FOR THE MIDDLE DIST. OF PA. (Mar. 26, 2019), https://pam.fd.org/sites/pam.fd.org/files/uploaded/cja-training/2019/First%20Step%20Act.pdf [https://perma.cc/58GA-XEDJ]; *see also* SADY & DAILY, *supra* note 49, at 7 (noting that "[a]ny intervening favorable developments should be included, especially the completion of rehabilitative programming").

213. *See* United States v. Pesterfield, No. 3:14-CR-14-TAV-HBG-1, at 3 (E.D. Tenn. filed May 6, 2019) (granting release for a defendant with metastatic cancer and noting that the defendant "completed several programs and obtained her G.E.D. Defendant would have completed the BOP's Residential Drug Abuse Program, too, but failed after missing too many classes due to her illness, treatments, and hospitalizations" (citations omitted)).

214. *See generally* U.S. DEP'T OF JUST., *supra* note 17, at 1 (listing several new skills-training, drug education, and social support programs announced by the Justice Department in implementation of the First Step Act).

215. FAMILIES AGAINST MANDATORY MINIMUMS, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES 10 (2018), https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf [https://perma.cc/QJ8B-TKD7] (citing a Department of Justice review which found the recidivism rate of formerly incarcerated persons granted compassionate release to be 3.1%). However, data regarding recidivism and compassionate release could change in the future. *See, e.g.*, United States v. Sotelo, No. 14-652-6, 2019 U.S. Dist. LEXIS 135051, at *35 (E.D. Pa. Aug. 7, 2019) (contemplating that even a terminally ill incarcerated individual granted compassionate release could recidivate).

216. *See* Kanya Bennet, *The First Step Act Was Exactly That, a First Step. What Comes Next?*, ACLU NEWS & COMMENTARY (Oct. 25, 2019), https://www.aclu.org/news/smart-justice/the-first-step-act-was-exactly-that-a-first-step-what-comes-next [https://perma.cc/44JN-P2HM] (arguing that full implementation of the Act requires "four times" the existing congressional

funding and more robust BOP commitment to the Act itself, not all prisoners will have access to key resources to make compelling cases for relief. [217] This is particularly troubling given that some incarcerated persons have the opportunity to self-rehabilitate through paying for their own online degrees.[218] Funding shortfalls notwithstanding, there are cogent examples of the available programming's ability to rehabilitate incarcerated persons and persuade courts.[219] Persons granted compassionate release under the *Cantu* approach have demonstrated that when incarcerated persons are given access to key rehabilitative and vocational resources, they can make good use of their time in prison and receive preparation to contribute to society upon release. Now, under the FSA, they have the opportunity to convince their sentencing judge of this, too.[220]

Finally, a *Cantu* approach to compassionate release might improve BOP facilities as well. While not all sentencing courts conduct rigorous oversight of the Bureau's handling of compassionate release claims or its medical facilities, a number of courts following the *Lynn* and *Cantu* approaches have engaged in oversight to some

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allocation, that "[i]t is abundantly clear that the success of the First Step Act is contingent upon sufficient funding," and that "*without that programming, no one goes home*" (emphasis added)).

217. *Id*.

218. At least two defendants who received release in part due to their extraordinary rehabilitation paid for their educations when their prisons lacked key resources. The record in United States v. Marks, No. 03-CR-6033, 2019 U.S. Dist. LEXIS 199429 (W.D.N.Y. Mar. 14, 2019) indicates that Chad Marks worked to pay for an online degree when his prison lacked educational programming. Mem. Law. In Support of Chad Marks at 4–5, *Marks*, 2019 U.S. Dist. LEXIS 199429 (No. 03-CR-6033) (2019), https://www.lisa-legalinfo.com/wp-content/uploads/2019/05/Marks-Memo190522.pdf [https://perma.cc/CW4E-2H5N]. While incarcerated, Mr. Marks attempted to enroll in a college program offered through a local college, which had received federal funding to offer educational programming to prisoners. Mr. Marks' application was rejected "because the program was only offered to those inmates with six years or less remaining on their sentence . . . . Unwilling to accept that rejection[,] . . . Mr. Marks decided to earn his college degree through correspondence. At his own cost, he enrolled in the International School of Ministry." While admirable, this is deeply troubling for low-income defendants, as it indicates that insufficient funding may result in advantaging the resentencing petitions of wealthier or more able-bodied persons in prison. Because Mr. Marks' rehabilitation—and his eventual freedom—were possible in large part thanks to his *ability to pay* for access to higher education, it is essential that appropriate funding be allocated for such programming to ensure that wealthier defendants are not unduly advantaged under the Act).

219. *Id.* at *4–5.

220. *See supra* Section III.A.

degree.[221] However, *Cantu* courts appear far more willing to correspond directly with prison officials about improvements to prison conditions in accordance with individual prisoners' needs.[222] This may be due to a sense of responsibility in assessing conditions before making the decision to grant relief. The BOP appears to have responded by promising improvements in multiple cases, indicating that judicial oversight may ultimately improve the quality of medical care in the long-term. The *Cantu* construction could ultimately produce better medical outcomes and increased accommodations for prisoners as well. Moreover, because the BOP has vowed to do better when urged to do so by the court, increased oversight into medical neglect may improve Bureau care over time.

C. Second Looks, Clemency & Compassionate Release in 2020

Further, many scholars have long noted that second looks—reevaluating and even resentencing a changed defendant—have a long historical pedigree.[223] While Congress expanding prisoners' opportunities for early review is far from groundbreaking, *judicial* review as a second look provision may offer distinct benefits over other second look mechanisms, such as federal[224] clemency.[225] This analysis indicates that expanding judicial compassionate release would also help to relieve the overextended federal clemency system. Most notably, it entitles an incarcerated person to direct review by a court previously familiar with their characteristics and background,

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221. *See* United States v. Israel, No. 05 CR 1039 (CM), 2019 U.S. Dist. LEXIS 211974, at *31 (S.D.N.Y. Dec. 4, 2019) ("If the moment comes when he becomes so debilitated that the Bureau of Prisons cannot care for him, I expect the Director to let me know. Until then, in prison he stays."); *see also* United States v. Rodriguez, 424 F. Supp. 3d 674, at 683 (N.D. Cal. 2019) ("I choose instead to take the government at its word . . . . I direct that Probation . . . inform . . . me and the parties whether the RRC is providing the promised services.").

222. *Id*.

223. *See* Ferri, *supra* note 25, at 227; Larkin, Jr., *supra* note 13, at 842–70; Hopwood, *supra* note 25, at 107–09.

224. Of note is that while compassionate release is sometimes colloquially known as "medical clemency," clemency and compassionate release are two separate systems of release for federal prisoners.

225. Vogt, *supra* note 16 (reporting the statement of Margaret Love, former U.S. pardon attorney, that "the First Step Act's clemency-by-judge route . . . 'has obviated the need for the clemency process to take care of the great majority of commutation cases'").

and better able to assess any changes to the defendant since their original sentencing.[226]

Professor Hopwood argues that when Congress abolished federal parole via the Sentencing Reform Act of 1984, Congress intended for clemency and compassionate release to fulfill their roles in releasing deserving inmates.[227] Though the Obama administration sought to extend the use of federal clemency, the Office of the Pardon Attorney ("OPA") backlog is notorious, with over eleven-thousand incarcerated persons awaiting review in mid-2018.[228] Scholars have recognized the potential for compassionate release to assist in granting relief for meritorious claims [229] without replacing or

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226. There are, admittedly, drawbacks to having the sentencing court, which first found the defendant guilty and sentenced them to a term in prison, be the body charged with releasing a "changed" person. A judge's biased recall of the original crime, or unwillingness to familiarize themselves with changes to the defendant's characteristics and changed 3553(a) factors, might keep some meritorious defendants from gaining relief. But *Cantu* courts have shown that judges can and do exhibit humility to alter their initial sentences when the defendant's characteristics have changed, such as through extensive rehabilitation or debilitating illness. *Cantu* courts also seem to welcome the chance to resentence an incarcerated person when existing statutory minimums have changed. Finally, at least one appellate court has indicated a willingness to engage with the district courts' cursory denial of relief. United States v. Fredette, No. 19-3306, 2020 U.S. App. LEXIS 2276, at *1–4 (7th Cir. Jan. 24, 2020) (lamenting that, in a one-line decision, "[t]he district court summarily denied Fredette's motion on November 19, 2019, without including any reasoning to support its decision . . . . We granted [Fredette's] motion to expedite the proceedings . . . ."). Unfortunately, in *Fredette*, the defendant succumbed to his illness a few weeks before expedited oral argument could take place. *Id*. at *4–5.

227. Hopwood, *supra* note 25, at 117–18.

228. Katie Benner, *Pardon System Needs Fixing, Advocates Say, but They Cringe at Trump's Approach*, N.Y. TIMES (June 1, 2018), https://www.nytimes.com/2018/06/01/us/politics/pardons-justice-department-trump.html (on file with the *Columbia Human Rights Law Review*); *see also* Lindsey Martin, The Use of Compassionate Release for Elderly Offenders (Feb. 2019) (Ph.D. dissertation, Walden University) (on file with the *Columbia Human Rights Law Review*) (discussing the limitations of the clemency system and noting that "[t]hough clemency has been used, this is discretionary . . . and as such, was not a reliable policy to rely on to address elderly prisoners").

229. Doug Berman, *Exploring How Compassionate Release After FIRST STEP Might Indirectly Help with Persistent Federal Clemency Problems*, SENT'G L. & POL'Y BLOG (Aug. 26, 2019), https://sentencing.typepad.com/sentencing_law_and_policy/2019/08/exploring-how-compassionate-release-after-first-step-might-indirectly-help-with-persistent-federal-c.html [https://perma.cc/V9ZK-JQBS] (arguing that courts could "provide a safety valve in which the judiciary simultaneously helps alleviate mass incarceration and the OPA's commutation workload"); *see also* Vogt, *supra* note 16 (discussing tightening trends in the

encroaching upon the clemency system itself.[230] This analysis indicates that the *Cantu* approach is an apt vehicle through which to relieve the OPA's onerous backlog. Because the judiciary is the only body *compelled* to review the full record of an incarcerated person's achievements, per the FSA's changes to compassionate release, judges would likely see a given defendant *in person* long before the OPA could get to their case. Further, OPA review is typically only via a paper hearing, meaning that review takes place without argument or testimony,[231] whereas compassionate release requires a reviewing court to meet and speak with the defendant personally.

Additionally, because federal district judges have expansive autonomy in the original sentencing process,[232] increasing their role at the resentencing stage makes good policy sense. They are likely the neutral arbiter most familiar with the defendant's initial crime, his 3553(a) factors at the time of sentencing, and any subsequent changes to those factors.[233] In these cases, the *Cantu* construction would provide a method of release that is both statutorily proper and pragmatic.

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provision of executive clemency and the viability of court-based compassionate release to ease existing administrative burdens).

230. To be clear, compassionate release employed in this context would not constitute a usurpation of executive clemency power by the judiciary—the OPA would continue to function as usual, but with a decreased backlog. Liberalized compassionate release simply offers an *additional outlet for review* for incarcerated persons and would help to address an onerous backlog that has plagued both the Obama and the Trump administrations. Benner, *supra* note 228 (discussing key flaws in the OPA's clemency system); Vogt, *supra* note 16 (arguing that the FSA could help alleviate some of the backlog in the OPA system without usurping it).

231. Hopwood, *supra* note 25 at 130–31 (describing the OPA's information collection process and noting that "the [clemency] process is needlessly bureaucratic, requiring many rounds of sequential review . . . . For a single clemency petition to be granted, essentially seven different decision-makers must agree that a petition is deserving.")

232. *See* Dean v. United States, 137 S. Ct. 1170, 1175 (2017) (observing that "[s]entencing courts have long enjoyed discretion in the sort of information they may consider when setting an appropriate sentence"); *see also* United States v. Eberhard, 525 F.3d 175, 177 (2d Cir. 2008) (noting that "[t]he sentencing court's discretion is 'largely unlimited either as to the kind of information it may consider, or the source from which it may come'" (quoting United States v. Carmona, 873 F.2d 569, 574 (2d Cir. 1989))).

233. *See* United States v. Gasich, No. 2:14-cr-63, 2019 U.S. Dist. LEXIS 152694, at *4 (N.D. Ind. Sep. 9, 2019) (considering the defendant's 3553(a) factors and finding that "the history and characteristics of the defendant has changed, as has the need for the sentence imposed to provide the defendant with medical care in the most effective manner").

D. Implications for Prosecutors

An analysis of all compassionate release decisions strongly indicates that federal prosecutors play a fundamental role in limiting incarcerated persons' access to compassionate release. It is clear that the government's position—whether in favor of or opposing a given defendant's compassionate release—holds great weight across both *Lynn* and *Cantu* courts.[234] Because the government's position, while not dispositive, is a key factor in most courts' analyses,[235] prosecutors continue to wield great power in compassionate release cases. It is therefore imperative that AUSAs consider the normative implications of their opposition to compassionate release motions. The government has found itself in peculiar positions: AUSAs have opposed release for an inmate suffering from terminal brain cancer's failure to die fast enough[236] and have also argued that a now-deceased inmate with

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234. *See* United States v. Cantu, 423 F. Supp. 3d 345, 353 (S.D. Tex. 2019) (noting that "Government non-opposition is both the touchstone of [the court's] determination and rare"); *cf.* United States v. Hunter, No. 3:06-cr-61, 2020 U.S. Dist. LEXIS 4305, at *8 n.6 (S.D. Ohio Jan. 9, 2020) (distinguishing *Cantu* because, in that case, "the Government did not oppose the relief sought by the defendant, the court found the Government 'to advocate' for the court to grant such relief, [and] the court found that position by the Government to be an extraordinary and compelling reason").

235. *See, e.g.*, U.S. v. Anderson, No. 15-30015, 2020 U.S. Dist. LEXIS 86550, 2020 WL 2521513, at *3 (C.D. Ill. May. 18, 2020) ("The Government does not oppose Defendant's compassionate release motion" where the defendant had hypertension, hyperlipidemia, and obesity); U.S. v. Pinkerton, No. 15-30045-3, 2020 U.S. Dist. LEXIS 75941, 2020 WL 2083968, at *1 (C.D. Ill. Apr. 30, 2020) (noting that the "Government does not oppose Defendant's compassionate release motion" where defendant had hypertension, diabetes, and neuropathy); U.S. v. Williams, No. 17-121-1, 2020 U.S. Dist. LEXIS 72510, 2020 WL 1974372, at *1 (D. Conn. Apr. 24, 2020) (noting that the "Government . . . does not object" where the prisoner suffered from asthma, hypertension, and diabetes);U.S. v. Perez, No. 17-513-3, 2020 U.S. Dist. LEXIS 57265, 2020 WL 1546422, at *1 (S.D.N.Y. Apr. 1, 2020) (noting that the "Government does not object to Perez's release on the merits, conceding that Perez has a 'heightened risk of serious illness or death from COVID-19 due to his pre-existing medical issues,'" where defendant had ongoing pain and vision problems from two reconstructive surgeries); United States v. Adeyemi, No. 06-124, 2020 U.S. Dist. LEXIS 117743, at *29 n.121 (E.D. Pa. July 6, 2020) (granting release to vulnerable prisoner amid the COVID-19 pandemic).

236. United States v. Brittner, No. CR 16-15-M-DLC, 2019 U.S. Dist. LEXIS 73653 at *6–7 (D. Mont. May 1, 2019); *see also* C.J. Ciaramella, *A Terminally Ill, Wheelchair-Bound Inmate Applied for Compassionate Release. The Justice Department Argued He Wasn't Dying Fast Enough to Qualify*, REASON (May 3, 2019), https://reason.com/2019/05/03/a-terminally-ill-wheelchair-bound-inmate-applied-for-compassionate-release-the-justice-department-argued-he-

dementia was feigning a terminal illness to gain release.[237] The government's suspicions have not been borne out: in multiple cases where the government argued that the defendant was not truly terminally ill or was "faking" a terminal illness, the defendant died within weeks.[238]

As a preliminary matter, the U.S. government arguing that an incarcerated individual with a terminal brain cancer diagnosis is "not dying fast enough" is a difficult position both ethically and optically.[239] And, because courts will continue to spotlight both BOP and DOJ behavior by publishing compassionate release opinions that recap government misbehavior in clear and sometimes derisive terms, prosecutors can benefit strategically by *not* opposing certain compassionate release cases.[240] Moreover, AUSAs could avoid these

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wasnt-dying-fast-enough-to-qualify/ [https://perma.cc/MA2T-RUHJ] (discussing the government's perverse position opposing Mr. Brittner's release). Notably, press outlets and advocacy groups seized on the DOJ's position. For example, Kevin Ring, president of FAMM, commented that, in Brittner's case, "the First Step Act's reforms to compassionate release worked as intended . . . [but] it blows my mind that the Justice Department and BOP still fought tooth and nail to keep a low-level drug offender who is dying of brain cancer and bound to a wheelchair away from his family for the final weeks of his life." *Id*.

237. Scott Cohn, *NY Prosecutors Suggest Former WorldCom CEO Bernie Ebbers Is Faking Illness to Get Out of Jailtime*, CNBC (Nov. 19, 2019), https://www.cnbc.com/2019/11/19/ny-prosecutors-former-worldcom-ceo-bernie-ebbers-is-faking-illness.html [https://perma.cc/4BK4-4UNX] (noting that federal prosecutors suspected that Mr. Ebbers was exaggerating the extent of his debilitation); United States v. Ebbers, 432 F. Supp. 3d 421, 424 (S.D.N.Y. 2020) (same); *see also* United States v. York, No. 3:11-CR-76, 2019 U.S. Dist. LEXIS 119768, at *18 (E.D. Tenn. July 18, 2019) ("The Court is not compelled by the government's argument that Defendant has not shown that his heart condition is serious enough.").

238. United States v. Fredette, No. 19-3306, 2020 U.S. App. LEXIS 2276, at *1–4 (7th Cir. Jan. 24, 2020) (stating that Mr. Fredette died while waiting for appellate review); Walter Pavlo, *Bernie Madoff and Compassionate Release*, FORBES (Feb. 8, 2020), https://www.forbes.com/sites/walterpavlo/2020/02/08/bernie-madoff-and-compassionate-release/#7d9945584328 [https://perma.cc/N89X-9SDG] ("[J]ust over a month after his release, Ebbers passed away.").

239. *Washington Lawyers' Committee, NACDL Launch Compassionate Release Clearinghouse*, FAMILIES AGAINST MANDATORY MINIMUMS (June 19, 2019), https://famm.org/famm-washington-lawyers-committee-nacdl-launch-compassionate-release-clearinghouse/ [https://perma.cc/UW2P-R7PZ] ("Congress was clear that it wanted fundamental changes in compassionate release, yet we've seen prosecutors continue to fight requests from clearly deserving people, including individuals with terminal illnesses.").

240. This oversight appears to take place via small but cutting remarks indicating that the BOP is failing to meet its administrative burden or basic responsibilities. *See, e.g.*, United States v. Gray, 416 F. Supp. 3d 784, 787 (S.D.

situations by either supporting or taking no position in compassionate release cases that would require them to wade into squabbles over a given incarcerated individual's life expectancy.

In some situations, AUSAs have even recommended that the inmate receive, against their will, an end-stage medical treatment that might extend their life expectancy, thereby weakening their medical release claim.[241] Sentencing courts are beginning to recognize that these arguments tread into ethically perverse territory by advocating that the government violate individuals' personal liberties at the very end of their lives.[242] AUSAs must recognize the same.

Another critical issue is compassionate release's intersection with the plea-bargaining process.[243] In several cases, including *Eidson* and *Rodriguez*, the government argued that the defendant waived their right to compassionate release by taking a plea bargain in which they agreed not to attack their sentence via collateral review.[244] At least one court was persuaded by this line of argument, even though the defendant was now seventy-four years old and had been hospitalized for weeks on separate occasions due to complications from a chronic disease.[245] Notably, however, two courts within the

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Ind. 2019) (granting relief and highlighting that "[t]he warden responded to the request—and denied it—on March 22, 2019, significantly longer than 30 days after the warden received the request"); *Fredette*, 2020 U.S. App. LEXIS 2276, at *1–2 (noting that the BOP denied Fredette's request for relief, notwithstanding the fact that "[b]y the time prison officials transferred him to a secured medical facility . . . doctors determined that [he] had '18 months or less' to live").

241. One particularly graphic example is the BOP's suggestion of giving the terminally ill defendant an involuntary tracheostomy to extend his life expectancy as advocated by the AUSAs in *United States v. Wong Chi Fai*, No. 93-CR-1340 (RJD), 2019 WL 3428504, at *2 (E.D.N.Y. July 30, 2019).

242. *Id.* at *3; *see also* United States v. Rodriguez, 424 F. Supp. 3d 674, 681 n.4 (N.D. Cal. Nov. 25, 2019) ("Th[e government's] argument was not at all well taken . . . .");

243. Because we have "a system of pleas, not a system of trials," the intersection between compassionate release and the plea process is highly salient. Lafler v. Cooper, 566 U.S. 156, 170 (2012).

244. United States v. Eidson, No. 17-CR-00490-SI, 2019 WL 3767570, at *2 (N.D. Cal. Aug. 9, 2019) (arguing that defendant waived right to compassionate release in their plea agreement); United States v. Rodriguez, 424 F. Supp. 3d 674, 681 n.4 (N.D. Cal. Nov. 25, 2019) (holding that the right to compassionate release cannot be waived in a plea agreement).

245. *Eidson*, 2019 WL 3767570, at *2 (finding that the defendant waived right to compassionate release and holding that "[t]he Court . . . agrees that defendant waived his right to seek relief under § 3582 in his plea agreement").

same district have rejected the same argument.[246] While *Eidson* and *Rodriguez* offer strategic takeaways for inmates seeking compassionate release who were sentenced via guilty pleas,[247] there are also key normative considerations[248] for AUSAs contemplating a "waiver" argument in the compassionate release context.

It is common sense that defendants cannot foresee a terminal diagnosis or BOP medical mistreatment. Further, Congress recently passed the FSA, which provides an avenue for judicial review and release in a variety of circumstances. A court's ability to grant relief per congressional mandate should not be thwarted by a plea made before the legislation's passage.

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246. United States v. Burrill, 445 F. Supp. 3d 22, 25 (N.D. Cal. 2020) (granting relief and noting that, because the defendant pled guilty and was sentenced before the FSA was enacted, "[t]he waiver in Burrill's plea agreement . . . cannot encompass the relief he presently seeks, as he could not have knowingly waived rights that were not in existence, or even contemplated, at the time of his plea" (internal quotation omitted)); *Rodriguez*, 424 F. Supp. at 681 n.4 (finding, where the defendant suffered medical neglect by the BOP, that the defendant did not waive right to compassionate release and noting that "[t]he government also argued that Rodriguez had waived his right to seek compassionate release . . . [t]his argument was not at all well taken . . . . The First Step Act . . . was passed after his sentence, so he could not have waived the rights it contains . . . ."). Most courts have agreed with *Rodriguez* in the sentencing reduction context. *See* United States v. Ellerby, Crim. No. CCB-07-064, 2020 WL 3868997, at *1 (D. Md. July 9, 2020) (finding that defendant who waived his right to file "any future post-conviction motions" had not waived his right to file a motion for a sentence reduction under the FSA); United States v. Johnson, Crim. No. LTS-06-4031, 2019 WL 3938472, at *10 (N.D. Iowa Aug. 20, 2019) (finding that defendant "did not knowingly waive his right to apply for a sentence reduction" under the First Step Act because "defendant's appeal waiver does not explicitly contemplate a sentence reduction pursuant to a statutory change in the sentencing range"); United States v. Saulsbury, No. CR JKB-09-0288, 2020 WL 4732132, at *3 (D. Md. Aug. 14, 2020) (same).

247. Specifically, in *Eidson*, the defendant failed to argue that his plea was not knowing or voluntary. *Eidson*, 2019 WL 3767570, at *2. This was likely a critical lapse. In *Rodriguez,* a more recent decision within the same district, when the defendant raised the unknowing and involuntary nature of their plea, the court recognized that the defendant could not have "knowingly waived rights that were not in existence, or even contemplated, at the time of his plea." *Rodriguez*, 424 F. Supp. at 681 n.4.

248. As the court noted in *Rodriguez*, "[n]o inmate waives the right to be treated properly by the BOP in a plea agreement." *Id*. at 681 n.4. Further, at the time of sentencing, very few defendants can accurately predict that they will become terminally ill or unable to care for themselves during their incarceration.

E. Key Obstacles in Post-First Step Act Compassionate Release

Finally, there are a number of relevant policy concerns for defense counsel, pro se defendants, and policymakers. Federal defense offices across the U.S. have noted key difficulties in forcing defendants, who are often housed outside their home state, to seek relief in their sentencing court and not in their district of confinement.[249] Because inmates have to exhaust their administrative remedies in their area of confinement but seek judicial relief outside of it, this process may require two lawyers in two offices coordinating on a given case at a time. This presents key difficulties for inter-office coordination, particularly within offices that lack streamlined organization and ones that are geographically isolated.

Most notably, the FSA places public defenders in "relatively unfamiliar territory,"[250] as they are making claims for judicial review for the first time. Some offices have concluded that the initial request should be prepared and presented by clients themselves.[251] This can be nearly impossible for defendants who are incapacitated or so ill that they are not able to effectively communicate with their families or their attorneys. The BOP could alleviate these burdens by initiating more compassionate release requests themselves.

Moreover, the Bureau's continued failure to support inmates' compassionate release claims—even for those with mere weeks to live[252]—disadvantages the most vulnerable and the least dangerous

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249. *National Training on the First Step Act*, FED. PUB. DEF. (Mar. 26, 2019), https://pam.fd.org/sites/pam.fd.org/files/uploaded/cja-training/2019/First%20Step%20Act.pdf [https://perma.cc/4PF6-JAKK] (noting that defenders will need a "[l]awyer in district of confinement for client contact, work with BOP, establish solid record of relevant facts, exhaustion of administrative remedies . . . [and] a lawyer in district of conviction to file and litigate motion").

250. SADY & DAILY, *supra* note 49, at 3.

251. *Id*.

252. Blakinger & Neff, *supra* note 18 (noting that federal prison wardens "denied or ignored more than 98 percent of compassionate release requests" from March–May 2020); United States v. Fredette, No. 19-3306, 2020 U.S. App. LEXIS 2276, at *1–4 (7th Cir. Jan. 24, 2020) (relaying that an inmate with stage-four colon cancer and a prognosis of mere weeks to live was still administratively denied compassionate release, and while attempting to appeal, died before scheduled oral argument). Another example is that of Bernie Ebbers, who federal prosecutors suspected was exaggerating his deterioration. Contrary to their suspicions, Mr. Ebbers succumbed to his illness just over a month after he was granted compassionate release. In a statement after his passing, Mr. Ebbers' family stated that they would advocate for others "who are deserving of

subset of prisoners: the elderly and the infirm. The BOP's behavior has grave implications: dying in prison hospice leaves these inmates exactly where they were before the First Step Act. This is a wholly avoidable outcome that can be remedied through the Bureau becoming fully compliant with the FSA. Unless and until the BOP changes course, however, judicial oversight is the only way to keep deserving inmates from dying in prison hospice. Judges can and should embrace this role.

CONCLUSION

The current political climate on resentencing and rehabilitation demands innovative and thoughtful legal responses in compassionate release cases. Despite modest improvements, federal prisoners, including those with prognoses indicating that they have mere weeks to live, continue to die in federal custody.[253] As the Seventh Circuit noted in early 2020, summary denials of relief by district courts and administrative delays, among other issues, can thwart an inmate's sole opportunity to die at home.[254] And, because there is no possible manner for relief post-mortem, such cases should be treated with extraordinary care.[255]

Actors within the criminal legal system, most notably sentencing judges, AUSAs, and BOP officials, must adapt to their

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compassionate release to their families." *See supra* note 236 and accompanying text; *Bernard Ebbers, ex-CEO convicted in WorldCom scandal, dies,* CNBC (Feb. 3, 2020), https://www.cnbc.com/2020/02/03/bernard-ebbers-ex-ceo-convicted-in-worldcom-scandal-dies.html [https://perma.cc/7T9D-HSAY].

253. For example, the BOP denied a compassionate release claim by a 36-year-old prisoner at a low-security facility. The prisoner died of COVID-19 a month later. Carli Teproff, *Woman Asked for Compassionate Release. The Prison Refused. She Just Died of COVID-19*, MIAMI HERALD (Aug. 5, 2020), https://www.miamiherald.com/news/special-reports/florida-prisons/article244718922.html [https://perma.cc/ZX7Z-TQ5E].

254. *Fredette*, 2020 U.S. App. LEXIS 2276, at *4 (discussing the case of a now-deceased inmate who had weeks to live when "[t]he district court summarily denied Fredette's motion . . . without including any reasoning to support its decision. The court's one-sentence order reads, in full: 'Upon motions of the defendant for a reduced sentenced based on the First Step Act of 2018 . . . . IT IS ORDERED that the motion is DENIED.' Fredette filed an emergency notice of appeal. We granted his motion to expedite the proceedings . . . .").

255. *Id*. at *2. Because Mr. Fredette died before scheduled oral argument, the Seventh Circuit dismissed and vacated as moot his claim, finding that a court cannot "retain[] jurisdiction over cases in which . . . a plaintiff pursuing a non-surviving claim has died." *Id.* at *3.

new responsibilities in handling compassionate release under the First Step Act. This requires fostering innovative ways to bring compassionate release claims to underscore the rehabilitative ideal of resentencing. For all parties, reviewing compassionate release claims requires greater willingness to engage with Bureau shortcomings, such as underfunded rehabilitative and vocational programming, and a lack of medical resources that deprive inmates of adequate healthcare and put them at risk of dying of COVID-19.

Moreover, judges can and should provide increased oversight over the BOP in the First Step Act era through adopting the *Cantu* approach. In providing such oversight, *Cantu* courts fulfill the fundamental goals of federal resentencing and act with Congress's blessing. Particularly in the absence of a functioning Sentencing Commission to provide guidance to the courts, the judiciary must say what the law on compassionate release is. When Congress enacted broad sentencing reform and delegated a key role to the judiciary, the nation's representatives asked courts to send deserving inmates home to their families.