REDEEMING THE LOST GENERATION: THE SCOPE OF THE FIRST STEP ACT AND COMPASSIONATE RELEASE IN REVISITING PRE-*BOOKER* SENTENCING

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I. INTRODUCTION

In 1993, a single mother of five living in Memphis, Tennessee, got involved with a Memphis-based drug ring, assuming several roles in a trafficking conspiracy.[1] At trial, Alice Marie Johnson was convicted of conspiracy to possess with intent to distribute cocaine, conspiracy to commit money laundering, and attempted possession with intent to distribute.[2] Having been charged in 1993, Johnson was subject to the mandatory sentencing guidelines established by the United States Sentencing Commission in 1987. Under this mandatory sentencing regime, Johnson faced the maximum sentence of life in prison without the opportunity for parole.[3] She served what was presumed to be her final sentence for more than twenty years.[4]

In 2020, President Donald Trump pardoned Johnson after she spoke at the Republican National Convention.[5] Johnson, whose "transformation [had been] described as extraordinary," received the "ultimate" act of clemency.[6] The decision by the president to bestow a full pardon seemed fully justified. After her conviction in 1993, Johnson had turned her life around. She engaged in educational and vocational programs offered by the prison system.[7] She became a certified hospice

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1 Peter Baker, *Alice Marie Johnson Is Granted Clemency by Trump After Push by Kim Kardashian West*, N.Y. TIMES (June 6, 2018), https://www.nytimes.com/2018/06/06/us/politics/trump-alice-johnson-sentence-commuted-kim-kardashian-west.html.

2 *Id.*

3 *Id.*

4 *Id.*

5 Quint Forgey, *Trump Pardons Alice Johnson After Her RNC Speech*, POLITICO (Aug. 28, 2020, 2:55 PM), https://www.politico.com/news/2020/08/28/trump-pardons-alice-johnson-404470.

6 *Id.*

7 Baker, *supra* note 1.

worker and an ordained minister.[8] She even helped coordinate the prison Special Olympics.[9] In light of all this, it is hardly surprising that Johnson received one of the highest, albeit one of the rarest, forms of clemency.[10]

While Johnson walked free under the auspices of a presidential pardon, her co-conspirator, Curtis McDonald, sought relief in the courts in another way—in the form of compassionate release.[11] McDonald, much like his co-conspirator, was also considered an "exemplary prisoner."[12] Supporters spoke of him magniloquently, noting that he had "change[d] the lives of others . . . in prison with him" as well as his own.[13] Family, friends, and the press cried out for clemency.[14] Despite the strong pathos on his side, McDonald, unlike his co-conspirator, was denied his second chance.[15]

While such a decision might seem regrettable, only a few years ago McDonald would have had little ability to seek relief. But in 2018, Congress passed the First Step Act (FSA),[16] one of the most significant criminal justice reform bills in recent memory.[17] Among its more extensive provisions, the FSA called for the implementation of a risk and needs assessment system and the retroactive application of the Fair Sentencing Act of 2010.[18] The FSA also altered long-standing compassionate release provisions.[19] Under the FSA, inmates could now petition courts directly for compassionate release rather than through

[8] Leora Arnowitz, *Alice Marie Johnson Pens Book with Kim Kardashian Intro: 6 Things We Learn in 'After Life*,' USA TODAY (May 21, 2019, 11:40 AM), https://www.usatoday.com/story/life/books/2019/05/21/alice-marie-johnson-book-after-life-kim-kardashian-trump/3695343002/.

[9] Baker, *supra* note 1.

[10] *See* Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 807 (2015).

[11] United States v. McDonald, No. 94-cr-20256-1, 2020 U.S. Dist. LEXIS 106051, at *1–2 (W.D. Tenn. June 8, 2020).

[12] Tonyaa Weathersbee, *Alice Marie Johnson is Free. It's Past Time for Curtis McDonald to Join Her.*, COM. APPEAL (June 20, 2020, 8:00 AM), https://www.commercialappeal.com/story/news/local/2020/06/20/advocates-rally-free-alice-marie-johnson-co-defendant-curtis-mcdonald-risk-covid-19-juneteenth-march/3210730001/.

[13] *Id.*

[14] *Id.*

[15] *McDonald*, 2020 U.S. Dist. LEXIS 106051, at *28.

[16] First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

[17] Mirko Bagaric et al., *Erasing the Bias Against Using Artificial Intelligence to Predict Future Criminality: Algorithms are Color Blind and Never Tire*, 88 U. CIN. L. REV. 1037, 1040 (2020).

[18] First Step Act § 101(a), § 404(b).

[19] First Step Act § 603(b).

the intermediary of the Bureau of Prisons,[20] and courts could now grant such release should the inmate demonstrate extraordinary and compelling reasons for doing so.[21]

Although there are thousands of inmates like Alice Johnson who were sentenced under the now-defunct mandatory guidelines regime,[22] a severe minority will receive a personal pardon from the president, as evidenced by McDonald's case. Yet, the expansion of compassionate release under the FSA may seem like a natural means of granting more pardons, of correcting a time where judges were forced to impose what some considered "draconian" mandatory sentences,[23] or of providing incentives and clemency to those exempt from the FSA. This power, of course, is not unfettered. Any judge seeking to relieve inmates of their mandatory sentences must grapple with the question of what reasons establish extraordinary and compelling grounds for their complete release.[24]

This is the question before the courts today, and the answers from the district courts are far from uniform. And while every judge may hope to have a petition from an inmate as exemplary as Alice Johnson, each inmate will present nuanced factual contexts in which to consider the phrase "extraordinary and compelling." Factors such as old age, illness, or family obligations may lend themselves naturally to the inquiry (indeed, they were separate reasons for release in themselves),[25] and good behavior might be a natural place to start as well. Beyond that, however, little guidance has been given to the courts in defining what constitutes extraordinary and compelling reasons for release.

But what of the change in the guidelines regime itself? Could this alone be a factor in the compassionate release inquiry that carries weight? From the establishment of the United States Sentencing Commission in 1987 to the Supreme Court's decision in *United States v. Booker* in 2005 rendering them advisory, thousands of inmates were sentenced based on what are now considered unconstitutional guidelines, which failed to allow for judicial discretion.[26] What weight,

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[20] *Id.*

[21] 18 U.S.C. § 3582(c)(1)(A)(i).

[22] Richard A. Posner, *The Supreme Court, 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 31, 59 (2004).

[23] Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 127 (2018).

[24] 18 U.S.C. § 3582(c)(1)(A)(i).

[25] U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 app. n.1 (U.S. SENTENCING COMM'N 2018).

[26] Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL'Y 179, 215 (2014).

if any, should this change in the sentencing regime brought about by *Booker* carry when considering an inmate's petition for compassionate release?

This Comment proposes that, despite some optimism,[27] the compassionate release provisions of the FSA are inadequate to remedy a number of pre-*Booker* sentences based on a change in guidelines, and that guidance from the Sentencing Commission is necessary to address the concerns of judges and their disparate solutions. Part II provides a brief overview of both the sentencing guidelines and compassionate release as well as other second look provisions. Part III presents a sample of several recent district court opinions that address the place of the change in guidelines in considering compassionate release requests and outlines some of the major definitions each court has ascribed to "extraordinary and compelling reasons." Part IV synthesizes these decisions and attempts to draw preliminary conclusions on the importance of the guidelines change and issues in applying it as a factor in compassionate release proceedings. Part V concludes by describing certain alternatives to using compassionate release. This part ultimately argues that the compassionate release statute would be a good second look provision, useful in correcting the harsh outcomes of the mandatory sentencing era, provided it is amended to include certain per se rules and rebuttable presumptions that make it both fair and easy to administer.

II. THE SENTENCING GUIDELINES AND COMPASSIONATE RELEASE

A. *Sentencing Before and After 1987*

Before 1987, sentencing was largely the domain of the judge.[28] In the years leading up to the creation of the Sentencing Commission, federal judges had largely unlimited discretion in imposing a sentence.[29] The sheer amount of discretion led some to condemn the sentencing system and its resulting disparities.[30] Over the years, demands for judicial accountability and uniformity in sentencing gained traction.[31] Due in part to the generally perceived need for uniformity in sentencing, as well as the "tough on crime" politics of the day, in 1984, Congress

[27] *See* Jones v. United States, 431 F. Supp. 3d 740, 743–44 (E.D. Va. 2020) ("With this newest legislation, Congress has indeed taken the first step to begin correcting the wrongs done to the lost generation of 1984 to 2005.").

[28] United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005).

[29] *Id.*

[30] Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 352–53 (2003).

[31] *Id.*

enacted the Comprehensive Crime Control Act.[32] One of its provisions, the Sentencing Reform Act, created the United States Sentencing Commission (the "Sentencing Commission"), an independent agency of the judicial branch tasked with creating sentencing guidelines for the federal courts.[33]

The Sentencing Commission's guidelines created a comprehensive set of rules which directed courts to impose certain minimum and maximum sentences based on the severity of the crime and the defendant's criminal history.[34] From 1987 until 2005, these "guidelines" were, in fact, mandatory.[35] Judges were required to sentence defendants based on a two-axis chart, considering the severity of the crime and criminal history. A dizzying array of aggravating and mitigating factors also influenced sentence length.[36] Moreover, the guidelines, betraying their advisory namesake, allowed departures only for certain specified reasons.[37]

While reactions to the guidelines varied, a few federal judges at the time lamented the changes brought about by the new regime. Some judges complained of their inability to adjust sentencing based on several issues not accounted for in the guidelines, essentially turning them into "robots" that could not account for the "human factor" inherent in sentencing.[38] The guidelines, for example, discouraged departures based on family matters, employment, and good works.[39] In many cases, judges openly indicated their begrudging adherence to the mandatory guidelines regime overall.[40] Beyond the judiciary, several scholars criticized the harsh outcomes of the Sentencing Reform Act, concluding overall that the scheme set out by the Sentencing Commission committed too many to rigidly harsh sentences.[41] Critics

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[32] *Id.*; *see also* Thomas A. Durkin, *Apocalyptic War Rhetoric: Drugs, Narco-Terrorism, and a Federal Court Nightmare from Here to Guantanamo*, 2 NOTRE DAME J. INT'L & COMP. L. 257, 264 (2012).

[33] Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 11 (2013).

[34] *Id.*

[35] *See id.*

[36] *Id.*

[37] *Id.*

[38] Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 664 (2012).

[39] *Id.*

[40] Conrad & Clements, *supra* note 23.

[41] Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 190–91 (1993).

also pointed to its social costs as evidenced by the rising prison population.[42] Supporters responded that such a model of sentencing was enabled by widely held views about the inefficacy of rehabilitation.[43] In light of the overall judicial reaction to the unfairness of the mandatory guidelines regime, however, it would be unsurprising to see federal judges leap upon the opportunity to provide retroactive relief to those sentenced under such an arguably "draconian" system through the use of compassionate release.[44]

B. United States v. Booker *and Relief From the Newly Unconstitutional Guidelines*

In 2006, the Supreme Court, in its remedial holding in *United States v. Booker*, "severed and excised" 18 U.S.C. § 3553(b)(1), the provision rendering the guidelines mandatory, and thus drastically reduced the power of the Sentencing Commission.[45] Although the Court still directed judges to consult the guidelines, *Booker* rendered them effectively advisory.[46] Thus, *Booker* bestowed upon judges power comparable to that which they enjoyed before the guidelines regime came about,[47] and discretion was once again a part of sentencing. That said, *Booker* did not completely emasculate the guidelines. Judges were still required to consult the guidelines and, in making a downward or upward departure from the range, were prompted to consult the § 3553(a) factors set out in the statute, which delineate a number of sentencing goals.[48] Moreover, *Booker* did not make its changes retroactive.[49]

The lack of retroactivity prompts a fundamental question: what, then, of those inmates sentenced between 1984 and 2006? Few tools exist to provide this class of inmates with a second look. Perhaps their only hope would have been the federal parole system. The parole

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[42] Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755, 1761 (1992).

[43] *Id.* at 1760.

[44] *See* United States v. Quinn, 467 F. Supp. 3d 824, 827 (N.D. Cal. 2020) (finding that the defendant was convicted under a "far more draconian federal sentencing regime" than exists today).

[45] United States v. Booker, 543 U.S. 220, 245 (2005).

[46] *Id.* at 264.

[47] Alan Vinegrad & Marc Falkoff, *'Booker': A Sea Change in Federal Sentencing?*, N.Y. L.J., Jan. 21, 2005, at 4 ("As a result [of *Booker*] . . . district judges have regained much of the sentencing discretion they enjoyed before the guidelines.").

[48] *Booker*, 543 U.S. at 245–46, 259.

[49] *In re* Zambrano, 433 F.3d 886, 888 (D.C. Cir. 2006) ("The Supreme Court has never expressly held *Booker* retroactive. *Booker* itself did not state that its rule was retroactive to cases on collateral review. Nor has the Court held *Booker* retroactive to any subsequent case.") (citations omitted).

system, abolished by the same act that brought about the sentencing guidelines, used to provide a second look that would allow the prison system to release and monitor eligible inmates subject to certain conditions.[50] The Parole Commission—the organization responsible for overseeing parole—was empowered to release inmates under the supervision of a parole officer, with conditions in place to protect public safety.[51] During the course of its life, the Parole Commission would issue anywhere between 10,000 and 20,000 decisions each year.[52] The Commission also provided inmates the opportunity to appeal its decision as of right.[53] Since its abolition, the number of annual decisions has plummeted.[54] The dearth of recent decisions is largely due to the fact that the Comprehensive Crime Control Act—the same act which brought about the Sentencing Commission—limited parole requests to those sentenced before November 1, 1987.[55] Thus, inmates between 2006 and 2018 had few avenues for relief from the now-defunct guidelines sentenced them under.

C. *New Forms of Relief in the First Step Act*

With the passage of the FSA in 2018, Congress introduced a number of provisions with the potential to incentivize and promote reductions in sentencing based on inmate behavior. Among other things, the FSA directed the Bureau of Prisons to incentivize inmates to participate in recidivism reduction programs through the use of "earned time credits," which allow a prisoner to reduce his or her sentence should they choose to participate in certain programs or should they engage in good behavior.[56] Yet, seventy separate crimes are exempt from the FSA's incentives.[57] Thus, many inmates sentenced between 1987 and 2006 remain ineligible for such rewards. Additionally, the FSA prompted the review and enhancement of a "risk and needs assessment system."[58] The resulting assessment tool, however, while meant to

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[50] *See* Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 101–02 (2019).

[51] *See How Parole Works*, DEP'T OF JUST. (Sept. 11, 2015), https://www.justice.gov/uspc/how-parole-works.

[52] PETER B. HOFFMAN, U.S. DEP'T OF JUST., HISTORY OF THE FEDERAL PAROLE SYSTEM 73–75 (2003), http://www.justice.gov/uspc/history.pdf.

[53] *How Parole Works*, *supra* note 51.

[54] HOFFMAN, *supra* note 52.

[55] *Id.* at 26.

[56] Brandon L. Garrett, *Federal Criminal Risk Assessment*, 41 CARDOZO L. REV. 121, 135, 137 (2019).

[57] 18 U.S.C. § 3632(d)(4)(D).

[58] 18 U.S.C. § 3632(a).

grant early release, was partially limited in scope to those who presented a "minimum" or "low" risk of recidivism.[59]

Beyond time credits, the FSA offered another avenue for reductions in sentencing through the expansion of federal compassionate release provisions. Prior to the FSA, an inmate could obtain compassionate release only upon a motion of the Bureau of Prisons, thereafter proving extraordinary and compelling reasons for granting such a request, which included medical reasons, age, family circumstances, and the all-ambiguous "other reasons."[60] In the prior regime, the Bureau of Prisons rarely granted these requests.[61] Under the new regime, inmates can petition the courts directly for compassionate release after exhausting all other administrative remedies.[62] The policy statement accompanying the compassionate release provision did not provide greater detail as to what exactly constitutes "other reasons" for release.[63] Thus, at present, courts possess wide latitude in interpretation.[64]

Overall, courts are now charged with orchestrating the compassionate release inquiry. In this inquiry, courts are first tasked with determining whether extraordinary and compelling reasons exist for release and, moreover, whether release comports with the broad sentencing goals set out in 18 U.S.C. § 3553(a).[65] Upon finding an inmate eligible for compassionate release, a court may either eliminate or modify the sentence as well as impose safeguards, such as supervised release.[66] In short, the compassionate release question, without much guidance beyond § 3553(a), is in the hands of the courts, allowing perhaps greater access to the provision than before. Indeed, with the final decision to grant release based on extraordinary and compelling

[59] 18 U.S.C. § 3632(d)(4)(A)(ii).

[60] Hopwood, *supra* note 50, at 100, 103–04.

[61] *Id.* at 103–04; William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 866 (2009).

[62] 18 U.S.C. § 3582(c)(1)(A).

[63] *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.13, cmt. n.1 (U.S. SENTENCING COMM'N 2018).

[64] United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020) ("[T]he First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release.").

[65] 18 U.S.C. § 3582(c)(1)(A).

[66] *Id.*

reasons now resting with the courts, the number of successful compassionate release petitions has nearly quintupled.[67]

III. THE SCOPE OF COMPASSIONATE RELEASE: DISTRICT COURT INTERPRETATIONS OF "EXTRAORDINARY AND COMPELLING"

As a preliminary matter, it should be noted that neither Congress nor the Sentencing Commission has provided any more guidance on what constitutes an extraordinary and compelling reason for release.[68] Although some courts have divined a narrow congressional intent through legislative history,[69] many have ultimately found that the term itself is broad and open for judicial interpretation.[70] The only policy statement suggesting a more concrete definition of "extraordinary and compelling" is, as many courts have found, defunct.[71] The vestigial statement appears to conflict with the FSA insofar as it still grants the Director of the Bureau of Prisons exclusive authority to petition courts for review, whereas the FSA clearly allows inmates to petiton courts directly.[72] The Sentencing Commission has been unable to promulgate additional guidelines due to the lack of a quorum.[73] Thus, judges have largely been left to themselves to determine the scope of the "extraordinary and compelling" term, resulting in a number of diverse and conflicting solutions from district courts struggling to implement it, as will be discussed below.

In granting compassionate release, courts are not merely tasked with determining whether extraordinary and compelling reasons exist to justify release. Additionally, if the inmate is above seventy years old, the Director of the Bureau of Prisons must determine that the petitioner is not a danger to society.[74] For both classes of inmates, courts must also

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[67] U.S. SENT'G COMM'N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 47 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf.

[68] *See* United States v. Willingham, No. CR 113-010, 2019 U.S. Dist. LEXIS 212401, at *4 (S.D. Ga. Dec. 10, 2019).

[69] *Id.*

[70] United States v. Cisneros, No. 99-00107 SOM, 2020 U.S. Dist. LEXIS 101027, at *5 (D. Haw. June 9, 2020) (finding that "courts may exercise broad discretion in finding extraordinary and compelling circumstances").

[71] United States v. Hood, No. H-99-259, 2020 U.S. Dist. LEXIS 168451, at *21 (S.D. Tex. Sept. 15, 2020).

[72] *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 (U.S. SENTENCING COMM'N 2018); 18 U.S.C. § 3582(c)(1)(A).

[73] U.S. SENT'G COMM'N, OFFICE OF EDUC. & SENT'G PRAC., FIRST STEP ACT 5 (Feb. 2019), https://www.ussc.gov/sites/default/files/pdf/training/newsletters/2019-special_FIRST-STEP-Act.pdf.

[74] 18 U.S.C. § 3582(c)(1)(A)(ii).

decide that a departure from the original sentence is warranted by the § 3553(a) factors—factors that delineate broad goals identified by Congress to be achieved by sentencing.[75] Such factors take into account some of the broader theoretical goals of sentencing such as deterrence.[76] Thus, extraordinary and compelling reasons for release will not suffice—those reasons must comport with several of these broad goals for an inmate to succeed on a compassionate release claim.[77] The question, then, is how courts are interpreting "extraordinary and compelling" in conjunction with the § 3553(a) factors to either grant or deny compassionate release, particularly with respect to the idea that a change in the sentencing regime might be extraordinary in itself.

A. *District Courts Incorporating the Change in Sentencing as Relevant to Compassionate Release*

In one line of cases, federal courts have responded positively to arguments that a change in the sentencing regime may carry weight in the "extraordinary and compelling" inquiry. In *United States v. Parker*, for instance, the U.S. District Court for the Central District of California included, through its own "independent assessment" of the extraordinary and compelling term, an analysis of whether the change from a mandatory to advisory regime carried weight in the compassionate release analysis.[78] There, the underlying defendant, Richard Wayne Parker, was sentenced to life in prison and five years of supervised release for cocaine-related charges.[79] The court found that the change in sentencing, especially in light of the defendant's co-conspirator having successfully reduced his sentence after *Booker*, constituted an extraordinary and compelling reason for release, alongside health complications amidst COVID-19.[80] Having satisfied the broad sentencing goals of § 3553(a) as evidenced by, inter alia, his achievement of educational degrees, his lack of disciplinary issues, the guarantees of support from family, and the safeguards of his supervised release, the judge granted the defendant compassionate release.[81]

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75 Hopwood, *supra* note 50, at 107.

76 *Id.* at 97 n.66.

77 Such reasons include, inter alia, the nature of the offense, characteristics of the defendant and their criminal history, and the need for the sentence in order to reflect its seriousness, deter criminal conduct, protect the public from the defendant, and provide vocational and educational training to the defendant. 18 U.S.C. § 3553(a).

78 United States v. Parker, 461 F. Supp. 3d 966, 980–81 (C.D. Cal. 2020).

79 *Id.* at 972.

80 *Id.* at 981.

81 *Id.* at 982–83.

While *Parker* provided scant reasoning for the court's sua sponte determination that a change in the guidelines might constitute an extraordinary and compelling reason for release, other courts have provided a richer analysis of the issue. In *United States v. Quinn*, the U.S. District Court for the Northern District of California similarly found that a change in sentencing constituted an extraordinary and compelling reason for release based on its views about the harshness of the prior sentencing regime.[82] In finding that extraordinary and compelling reasons existed to justify release, the court began its reasoning by noting that the defendant was "sentenced under a far more draconian sentencing regime than exists today."[83] The underlying defendant, designated as a "career offender," was sentenced to 562 months in prison, followed by a five-year supervised release for committing two armed bank robberies in the Bay Area of San Francisco.[84] The court noted that the defendant "likely would have been released 12 [sic] years ago . . . if sentenced under today's regime."[85] This was so, the court reasoned, provided that "[the defendant] still would have received a sentence at the low end of the guidelines range, as he did in 1992."[86] With respect to the argument that it is not the court's job to decide whether certain updates in sentencing are retroactive, the court noted that while Congress did not make such changes categorically retroactive, it still may have contemplated case-by-case judicial exemptions.[87] The court imported some of this reasoning into the § 3553(a) inquiry, noting both that supervised release mitigated safety concerns and that the defendant's sentence was sufficient under today's standards.[88]

Similarly, the Northern District of California found in favor of a defendant on comparable grounds in *United States v. Jones*, noting both the harshness of the prior regime and that the likelihood of a downward departure was the guidelines advisory.[89] There, the court found extraordinary and compelling reasons for release for a defendant sentenced to over 240 months for counts relating to bank robbery.[90] The court reasoned that "[the sentencing judge] accepted the Government's recommendation of a sentence at the low end of the

82 United States v. Quinn, 467 F. Supp. 3d 824, 827 (N.D. Cal. 2020).
83 *Id.*
84 *Id.* at 826.
85 *Id.* at 827.
86 *Id.* at n.3.
87 *Id.* at 829.
88 *See Quinn*, 467 F. Supp. 3d at 831.
89 *See* United States v. Jones, 482 F. Supp. 3d 969, 979 (N.D. Cal. 2020).
90 *Id.* at 972–73.

guideline range applicable to the bank robbery offenses," which likely indicated that "a downward departure may well have been appropriate."[91] It also noted, however, that "*Booker* did not automatically provide relief to defendants like Mr. Jones who were sentenced before the decision issued."[92] Despite this, the court indeed found that the change in guidelines, and the likely lower sentence, constituted extraordinary and compelling reasons for release.[93]

Other courts have found that a change in the sentencing regime constitutes an extraordinary and compelling reason for release even where there was no indication that the sentencing judge erred on the lower end of the sentencing range.[94] For example, in *United States v. Vigneau*, the U.S. District Court for the District of Rhode Island found that the change in the sentencing regime was extraordinary and compelling even where the defendant was sentenced to 365 months for marijuana-related crimes despite an available guidelines range of 292 to 365 months coupled with a mandatory minimum of twenty years for a related conviction.[95] The court noted merely that the sentencing guidelines were now advisory and that the sentencing judge would be free to sentence below the range under the current regime.[96] The court further reasoned that Congress intended for compassionate release to act as a safety valve, comparable to the parole system, which aimed to remedy harsh sentences.[97] Given the defendant's "unusually long sentence" as evidenced by modern average sentences for marijuana-related crimes, there were extraordinary and compelling reasons for release.[98]

B. *District Courts Rejecting the Change in Sentencing as Relevant to Compassionate Release*

In another line of cases, courts express skepticism regarding the propriety and feasibility of including a change in the sentencing regime in the extraordinary and compelling inquiry. Some courts conclude that a change in the sentencing regime cannot hold weight, as it would be difficult to accord the sentencing judge due deference and to predict whether or not they would presently find the sentence unfair. For

91 *Id.* at 979 (internal quotation marks omitted).
92 *Id.*
93 *Id.*
94 *See* United States v. Vigneau, 473 F. Supp. 3d 31, 39–40 (D.R.I. 2020).
95 *Id.* at 32–33.
96 *Id.* at 38.
97 *Id.* at 36.
98 *Id.* at 37–38.

example, the U.S. District Court for the Western District of Tennessee denied compassionate release to Curtis McDonald, Alice Marie Johnson's co-conspirator, in part because of a lack of trial record evidence of the trial judge's likelihood of guidelines departure.[99] In *United States v. McDonald*, the court refused to incorporate a change in sentencing in the compassionate release inquiry.[100] The court found that although a change in the sentencing regime may constitute extraordinary and compelling reasons for release, it could not say with finality that McDonald's sentence was the result of the mandatory sentencing framework.[101] This was so, the court reasoned, because there was no evidence that the sentencing judge viewed the mandatory life sentence as "unfair and utterly disproportionate to the crimes."[102] It noted that other courts could do so given the clear trial record evidencing the sentencing judge's displeasure with the regime.[103]

Courts on this side of the argument have also noted separation of powers concerns. Elaborating on the reasoning in *McDonald*, the U.S. District Court for the Eastern District of Pennsylvania similarly found that a change in sentencing does not constitute an extraordinary and compelling reason for release due to deference and separation of powers issues.[104] In *United States v. Andrews*, the court found the underlying defendant guilty of several crimes relating to his armed robberies and sentenced him to 312 years in prison.[105] The defendant, in his motion for compassionate release, pointed to several grounds for a finding of extraordinary and compelling reasons for release, including his age, rehabilitation, susceptibility to COVID-19, the length of his sentence, the change in the sentencing regime, and the amendment to § 924(c).[106] The court found that while the defendant's first three reasons could constitute extraordinary and compelling reasons for release, it held that the final three "implicate[d] separation of powers concerns."[107] With respect to the argument that the change in sentencing may be an extraordinary and compelling reason, the court found that "[i]f Congress wanted [changes] to be retroactive on a case-by-case basis, it would

99 United States v. McDonald, No. 94-cr-20256-1, 2020 U.S. Dist. LEXIS 106051, at *1, *18 (W.D. Tenn. June 8, 2020).

100 *Id.* at *17–18.

101 *Id.*

102 *Id.* at *18.

103 *Id.* at *15.

104 United States v. Andrews, 480 F. Supp. 3d 669, 677–78 (E.D. Pa. 2020).

105 *Id.* at 673.

106 *Id.* at 677.

107 *Id.*

have said so in the text of the statute."[108] It noted, however, that other courts have reached the contrary conclusion and allowed the change in sentencing to hold weight so long as other circumstances accompany it.[109] Moreover, the court noted that considering sentence length would conflict with the "rule of finality" in sentencing.[110]

United States v. Nasirun presents another issue involved in the compassionate release inquiry—that is, the lack of statutory guidance in construing the phrase "extraordinary and compelling."[111] In *Nasirun*, the court sentenced the underlying defendant to four life sentences after being convicted for several cocaine-related charges.[112] The defendant argued that there were extraordinary and compelling reasons for his release "because if sentenced today, he would receive a substantially lower sentence than what the mandatory guidelines called for."[113] The court found that such reasons were not extraordinary and compelling because they "are [not] encompassed within the 'extraordinary and compelling' circumstances in the policy statement of § 1B1.13."[114] Thus, given the lack of proactive clarification by Congress, the inmate failed to demonstrate extraordinary and compelling reasons for release.[115]

IV. COMPASSIONATE RELEASE IS AN INCOMPLETE TOOL FOR REMEDYING PRE-*BOOKER* SENTENCING

Some courts have heralded the FSA as the dawn of a period of revision and restitution.[116] They envision an era in which courts will look back on that unenlightened sentencing period between 1984 and 2005 and correct its more egregious results.[117] Others point specifically to the "safety valve" of compassionate release and its function as a de facto parole system.[118] Yet, the FSA fails to address many classes of

[108] *Id.* at 681.

[109] *Id.* at 680–81.

[110] *Andrews*, 480 F. Supp. 3d at 679.

[111] United States v. Nasirun, No. 8:99-CR-367-T-27TBM, 2020 U.S. Dist. LEXIS 23686, at *5 (M.D. Fla. Feb. 11, 2020).

[112] *Id.* at *1.

[113] *Id.* at *2.

[114] *Id.* at *5.

[115] *See id.*

[116] *See* Jones v. United States, 431 F. Supp. 3d 740, 743–44 (E.D. Va. 2020).

[117] *Id.* ("The undercutting of *Booker*'s core remedial measure has created a lost generation . . . where individual citizens pay penance for the constitutional errors of the sovereign. For twenty years of this nation's history . . . harsh sentences . . . were imposed based on unconstitutionally high guideline ranges . . . . With this newest legislation, Congress has indeed taken the first step to begin correcting the wrongs done to the lost generation of 1984 to 2005.").

[118] United States v. Vigneau, 473 F. Supp. 3d 31, 36 (D.R.I. 2020).

inmates whose sole mechanism for relief from the wrongs of the prior regime is compassionate release. Absent a particularized and guiding policy statement from the Sentencing Commission, compassionate release is not an effective tool to remedy pre-*Booker* sentencing. It is a shallow solution in a world that requires extensive and well-thought-out second look provisions.

There are several reasons why compassionate release, as it exists now, is a cumbersome tool for remedying pre-*Booker* sentences. The difficulties are roughly divisible into two categories: practicality and fairness. In the way of practical application of the guidelines, courts encounter three main difficulties: (i) divining whether the original sentence truly is egregious and thus "extraordinary," (ii) encroaching on the power of the sentencing judge and acting as de facto appellate courts by frustrating finality in sentencing, and (iii) impeding on the role of Congress in making changes in sentencing retroactive.

A. *Practical Problems in Looking at Changes in Sentencing: Speculation, Deference, and Separation of Powers*

First, granting compassionate release in part based on a change in guidelines presents a problem of both speculation and encroachment for judges. In terms of speculation, basing compassionate release on a change in the sentencing regime puts judges in the fraught position of speculating whether they should substitute their judgment for that of the trial judge. As a practical matter, this is not easy, though it may be easier in some cases than in others. For example, in a case where the pre-*Booker* sentencing judge gave the mandatory minimum, the court is not forced to substitute its judgment for that of the sentencing judge.[119] When a judge sentenced at the bare end of the sentencing range, and where modern views of sentencing would encourage a lower sentence, it is likely that the judge of today and the judge of yesterday would agree that a lower sentence is warranted.[120] The limited evidence available suggests that courts tend to assume that a defendant's time served, after

[119] *See* United States v. Jones, 482 F. Supp. 3d 969, 972–73 (N.D. Cal. 2020) (granting compassionate release where defendant was given the "lowest possible range" under the then-mandatory guidelines); United States v. Quinn, 467 F. Supp. 3d 824, 826 (N.D. Cal. 2020) (granting compassionate release where defendant was given the lowest available sentence of 562 months under the then-mandatory guidelines).

[120] *See Jones*, 482 F. Supp. 3d at 973, 979 (finding both that the sentencing judge accepted a sentence at the low end of the applicable guideline range and a "gross disparity" between defendant's sentence and current sentences); *Quinn*, 467 F. Supp. 3d at 827–28 (finding both that defendant would likely have received a sentence at the low end of the applicable guidelines range and that certain terms of imprisonment "dwarf" modern median sentences for more heinous crimes).

the change in the guidelines, is sufficient because a lower sentence likely would have occurred were it available at the time of sentencing.[121]

In some cases, there are clear and unequivocal statements by the sentencing judge available for review.[122] In several cases, the underlying sentencing judges clarified their disagreement with the mandatory sentencing regime and the outcome forced by the sentencing guidelines.[123] When this blatant frustration coincides with a current judge's view that changes in public sentiment on the severity of certain crimes (i.e., marijuana-related offenses) warrant reduction, there is little conflict. In such cases, judges on review for compassionate release will have little trouble finding that the sentence is wholly unnecessary.

In more difficult cases, it is not clear whether the guidelines hindered the judge's discretion.[124] In such cases, it is not so black and white. Courts have been and will continue to be put in the awkward position of speculating on whether the sentencing judge was justified, why they strayed from the mandatory minimum, and whether the inmate, accounting for modern thought on just and proportional sentences, would still have been given the same sentence.[125] Simply put, if the judge exercised at least some discretion—that is, did not opt for the minimum sentence—or was forced to institute the mandatory maximum, and there is little change in modern views about certain offenses, it is difficult for a court to say with certainty that the sentencing judge would still not impose the same sentence or that the sentence is patently unfair or unnecessary.

Second, issues of encroachment on the traditional role of the sentencing judge are at play. Indeed, some judges have been willing to grant compassionate release even in cases where it was not clear whether the sentencing judge was exercising the absolute maximum of

121 *See Jones*, 482 F. Supp. 3d at 978–79; *Quinn*, 467 F. Supp. 3d at 827–28.

122 *See* United States v. Cuesta, No. 1-374-1, 2020 U.S. Dist. LEXIS 167112, at *10 (E.D. Pa. Sep. 11, 2020) ("[T]he sentencing judge expressed an opinion that this sentencing range was too harsh given the facts and circumstances of Defendant's involvement.").

123 *See, e.g.*, United States v. Young, 458 F. Supp. 3d 838, 840 (M.D. Tenn. 2020) ("The court retains a clear recollection of the sentencing and its strong belief at the time that the mandatory sentences on the § 924(c) convictions were unfair and utterly disproportionate to the crimes."); United States v. Brown, 411 F. Supp. 3d 446, 453 (S.D. Iowa 2019) ("[T]he judge who sentenced Defendant concluded the [sentence] was far greater than was necessary to achieve the ends of justice.") (internal quotation marks omitted).

124 *See* United States v. McDonald, No. 94-cr-20256-1, 2020 U.S. Dist. LEXIS 106051, at *17–18 (W.D. Tenn. June 8, 2020).

125 *Id.*

their discretion under the mandatory guidelines.[126] Thus, some courts seem justifiably concerned about encroaching on the sentencing judge's power and questioning their sagacity.[127] This sort of second-guessing can fly in the face of basic principles underlying the appellate system of law. The judicial system contemplates that trial judges are, in most cases, the ultimate arbiters of fact and, thus, in the best position to determine sentencing given their proximity to the parties and the evidence.[128] Federal courts have stated that maxim verbatim.[129] Such principles are reflected in the appellate review of a sentence, where an appellate court "will only overturn a sentence that is 'arbitrary, capricious, whimsical, or manifestly unreasonable.'"[130]

Fixing compassionate release upon an inquiry of whether the sentence is unfair given a change in the sentencing regime can easily frustrate the power and deference given to sentencing judges. For one, the question of whether the sentence is patently unfair given a change in sentencing would allow courts to overturn the sentence simply because they presently find it unfair or aberrational,[131] thus stepping on the sentencing judge's toes merely because they disagree with the outcome. Relatedly, such a loose standard is not nearly as high a bar as "arbitrary and capricious"; trial courts, then, would be afforded immense power that even appellate courts on review do not have. These problems are evident in cases where judges seem to be willing to disregard the sentence even where it is unclear whether the sentencing judge exercised maximum discretion under the pre-*Booker* guidelines.[132]

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126 *See* United States v. Vigneau, 473 F. Supp. 3d 31, 32–33, 40 (D.R.I. 2020) (granting compassionate release where defendant was originally sentenced to 365 months based on a guidelines range of 292 to 365 months and a twenty-year mandatory minimum).

127 *See* United States v. Andrews, 480 F. Supp. 3d 669, 679–80 (E.D. Pa. 2020) ("[I]f the Court were permitted under the guise of compassionate release to reduce a sentence based on the Court's idiosyncratic belief that the previously imposed sentence is too long, compassionate release would . . . swallow[] the general rule of finality.").

128 *See* United States v. Cooper, 437 F.3d 324, 330 (3d Cir. 2006).

129 United States v. Alexander, 489 F. App'x 572, 578 (3d Cir. 2012) ("Mindful that the trial court [is] in the best position to determine the appropriate sentence in light of the particular circumstances of the case, we find no abuse of discretion.") (alteration in original) (internal quotation marks omitted).

130 United States v. Peña, 963 F.3d 1016, 1024 (10th Cir. 2020) (quoting United States v. Sayad, 589 F.3d 1110, 1116 (10th Cir. 2009)).

131 *See Vigneau*, 473 F. Supp. 3d at 38 (noting that the Sentencing Guidelines are now advisory and the defendant likely would not have faced the same sentence today as in 1998).

132 *Id.* at 32–33 (noting that defendant was sentenced to 365 months based on an available guidelines range of 292 to 365 months with a twenty-year mandatory minimum).

Third, relying on a change in the sentencing regime as the gateway into the rest of the compassionate release inquiry essentially makes changes in sentencing retroactive—a decision often reserved to Congress. The power rests with the legislature, through the Sentencing Commission, to determine whether certain changes in sentencing are retroactive.[133] The Sentencing Commission's unique and unusual power has been upheld by the Supreme Court.[134] As some courts have noted, however, *Booker* did not make the sentencing change retroactive, and Congress did not alter that default presumption.[135] Allowing the judiciary to essentially resentence all those sentenced under a mandatory scheme because of *Booker* thus implicates separation of powers concerns.[136] If a change in the sentencing regime itself holds weight, courts risk opening the door to compassionate release to nearly every inmate sentenced before *Booker* rendered the guidelines advisory. Some courts have countered, however, that Congress did indeed contemplate retroactivity insofar as the mechanism is fundamentally a quasi-parole system that should allow review of all viable cases.[137]

One other, though perhaps less serious concern, is the prospect that granting release based merely on a change in sentencing does not account for a risk of recidivism. As previously mentioned, judges must look to the § 3553(a) factors that set out certain broad sentencing goals.[138] Among these goals is "the need for the sentence imposed . . . to protect the public from further crimes of the defendant."[139] Although some prisoners were granted release in the above cases based partly on a change in sentencing, this occurred in light of a § 3553(a) analysis evidencing extremely low risks of recidivism, whether through the inmate's personal growth or the reassurances of family.[140] Perhaps most importantly, many of the sentences in the above cases came complete with a five-year supervised release.[141] Thus, judges were

133 28 U.S.C. § 994(u).

134 Braxton v. United States, 500 U.S. 344, 348 (1991).

135 Guzman v. United States, 404 F.3d 139, 140 (2d Cir. 2005).

136 United States v. Logan, No. 97-CR-0099(3) (PJS/RLE), 2021 U.S. Dist. LEXIS 64988, at *26 (D. Minn. Apr. 1, 2021) (stating that "[t]he Eighth Circuit has held that *Apprendi* and *Booker* are not retroactively applicable. . . . The Court does not believe that [the defendant] should be able to use a compassionate-release request to make an 'end-run around' the Eighth Circuit's holdings.").

137 *See* United States v. Vigneau, 473 F. Supp. 3d 31, 36 (D.R.I. 2020).

138 Hopwood, *supra* note 50, at 107.

139 18 U.S.C. § 3553(a)(2)(C).

140 *See* United States v. Jones, 482 F. Supp. 3d 969, 985 (N.D. Cal. 2020); United States v. Quinn, 467 F. Supp. 3d 824, 831 (N.D. Cal. 2020).

141 *Id.*

given procedural assurances that this full release would be monitored and were free to speak about the loftier elements of the injustice of the original sentence while, in effect, only granting parole rather than full relief. Although a judge may, under the compassionate release provisions, impose supervised release or merely adjust the sentence,[142] sentencing judges may still be discernibly anxious about second guessing the trial court's determinations about the defendant's long-term risk.

B. *Lack of Fairness in Relying Strictly on Compassionate Release to Provide Clemency*

Relying on compassionate release, as it exists now, as a major tool for granting clemency to those sentenced in the harsh pre-*Booker* world also runs against notions of fairness. Even if every pre-*Booker* inmate were given the opportunity to seek compassionate release based largely on the simple fact that they are pre-*Booker* inmates, they often must prove other extraordinary and compelling reasons for release, such as exemplary behavior, and must also satisfy the § 3553(a) factors. Yet, if the judicial consensus is that many thousands of inmates were sentenced unfairly under a dark and "draconian" mandatory regime, setting the bar for total clemency as high as "extraordinary and compelling" is patently unfair.

One reason is that pre-*Booker* inmates had little reason to aspire to such exemplary status. If such perfect rehabilitation remains a goal at all, and that is indeed a question that has long occupied much of the legal discourse,[143] incentives and punishment are the key tools to achieving it. Scholars and jurists have long recognized the necessity of incentives to the overall goal of recidivism reduction and rehabilitation.[144] The FSA itself admits as much by providing time credit hours and requiring the development of a recidivism reduction system with credits in its framework.[145] Unfortunately, pre-FSA, there were few incentives to engage in good behavior. First, as noted above, the federal parole system, which would grant partial clemency and monitoring, was exterminated by the Comprehensive Crime Control Act of 1984.[146] Such

142 18 U.S.C. § 3582(c)(1)(A).

143 Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1014 (1991).

144 *See*, *e.g.*, People v. Kolzow, 746 N.E.2d 27, 28 (Ill. App. Ct. 2001) (quoting People v. Burton, 427 N.E.2d 625, 628 (Ill. App. Ct. 1981)) ("[F]elons [sentenced to the penitentiary] are in greater need of rehabilitation and need a greater incentive . . . to get them to conform their behavior to what society will accept.") (second alteration in original).

145 Garrett, *supra* note 56, at 135–137.

146 Hoffman, *supra* note 52, at 1–2.

a program was perhaps the largest beacon for inmates, offering tens of thousands of decisions a year.[147] Pre-FSA compassionate release petitions, moreover, were routinely denied by the Bureau of Prisons.[148] Courts have routinely noted that motions for compassionate release were rarely even filed by the bureau.[149] Thus, prisoners sentenced before 2006 had little hope for relief even in the face of their good work or personal growth.

If these sentences are truly unjust—or at least now considered sufficient to accomplish the goals of sentencing under Congress' modern view[150]—then employing such a system is unfair. Prisoners were given no incentive to demonstrate the sort of extraordinary and compelling traits that would grant release. Only those who, by their own circumstances, managed to demonstrate a clean record would be eligible for this extraordinary remedy. And because it is an extraordinary remedy, many will not be able to attain it. Compassionate release thus attempts to sort among angels and demons. There is no comparable relief for those who may be substantially capable of rehabilitation and reintroduction to society with more proactive measures, as the parole system of yore provided.

In short, relying solely on compassionate release is misplaced. It is marred by practical difficulties, and it can likely only grant relief to those who saw the light in what some may now see as an unenlightened time. Even taking into account the injustice of sentences now deemed too harsh, it cannot provide relief on those grounds unless the petitioner in question somehow managed to be exemplary, even in a time when there was little hope for relief. Nor is it a response to say that other provisions will provide the sort of complete relief that compassionate release cannot. Even the other provisions of the FSA that use "time credits" to motivate participation in recidivism reduction programs exempt nearly seventy crimes.[151]

V. SECOND LOOK PROVISIONS MOVING FORWARD

As demonstrated above, courts are torn on the question of whether a change in sentencing will qualify as a gateway to obtaining the rest of the compassionate release inquiry. Any policy statement or update to the compassionate release provision moving forward should attempt to incorporate the concerns of the courts laid out above. In all likelihood,

147 *Id.* at 73–75.

148 Berry, *supra* note 61, at 217.

149 United States v. Marks, 455 F. Supp. 3d 17, 23 (W.D.N.Y. 2020).

150 *See, e.g.*, United States v. Quinn, 467 F. Supp. 3d 824, 828 (N.D. Cal. 2020).

151 18 U.S.C. § 3632(d)(4)(D).

any remedy to the provision itself will come from such a policy statement issued by the Sentencing Commission. There are other ways, however, in which the purposes and problems of compassionate release might be resolved and served by other means.

First, Congress might create the more comprehensive second look program that federal courts seem to imagine of compassionate release. One pending piece of legislation sponsored by Senator Cory Booker attempts to create such a system.[152] While still using the courts, the Second Look Act would allow courts to grant release and reduce sentences should an inmate demonstrate their readiness for reentry to society and that they do not pose a risk to the public.[153] The Act, in effect, could function as a quasi-parole system,[154] and indeed seems to hold itself out as such a replacement.[155] In the same way that compassionate release might provide review to every pre-*Booker* inmate, the Second Look Act goes further by proposing that all inmates sentenced for more than ten years be given the ability to seek review.[156] Such an act still fails to address many of the concerns of the lower courts mentioned above. Questions also abound as to the efficiency of this system. One wonders whether the judiciary is equipped to handle such a volume of cases when given such broad interpretive authority, and thus whether such a blanket provision—or total retroactivity of *Booker*—would be practical. A judicial parole system may not be efficient without additional resources.

Alternatively, compassionate release could become the main sword of the judiciary, and Congress by proxy, to remedy a vast period of harsh sentencing. The gateway to the compassionate release inquiry, at least in part, could be the extraordinary and compelling reason of a vast disparity between one's sentence under the mandatory sentencing regime and current sentencing practices. There is little question that there are tools built in to the compassionate release system that would allow courts to make it a de facto parole system, such as merely reducing sentences and imposing supervised release.[157] Were the gateway to compassionate release thus swung wide open, courts could review every pre-*Booker* sentence, balance the inmate's history and risk with the injustices of their sentence, and impose safeguards in the form of

152 Second Look Act of 2019, S. 2146, 116th Cong. (1st Sess. 2019).
153 *Id.* § 3
154 *Id.*
155 *Id.*
156 *Id.* § 3
157 18 U.S.C. § 3582(c)(1)(A).

supervised release in cases where there is a slight, albeit possible, risk of recidivism.

The main issue with instituting either a brand new second look scheme or allowing all pre-*Booker* inmates to seek compassionate release is administrative. Both systems would rely on the courts to execute them. In previous second look schemes, however, independent agencies and federal institutions were created to oversee the process.[158] This is not surprising, as second look schemes by their very name double the opportunities of inmates to seek relief and would thus double the docket load. At the same time, previous second look regimes suffered from competing problems—a high volume of cases on the one hand and virtual non-enforcement on the other.[159] In light of the volume of cases produced by second look schemes, prior regimes struggled to strike a balance between fairness and efficiency.

Courts are likely in the best position to oversee second chances, and compassionate release may be a proper tool for doing so. The compassionate release statute, however, requires certain per se rules or presumptions to make it both fair and easy to administer and to avoid the pitfalls of previous regimes. In deciding when and how pre-*Booker* inmates are granted compassionate release, Congress must provide clear, easily administrable rules to the judiciary while balancing the desire for a revisitation of draconian sentences with the risks of usurping the power of the trial judge. To do so, Congress should allow a change in the sentencing regime to carry weight, but condition that weight by doing three things. First, Congress should instruct courts to assume a strong rebuttable presumption *for* extraordinary and compelling reasons to anyone whose sentence is sufficiently close to the pre-*Booker* guidelines minimum. This would protect against undue usurpations of trial judge power, as it limits resentencing to situations where the sentencing judge likely would have sentenced lower had the guidelines been advisory. More importantly, it would allow those whose sentences are patently deemed "unfair" the opportunity to be released, irrespective of an unblemished record.

Second, Congress could instruct courts to presume a strong rebuttable presumption *against* extraordinary and compelling reasons to anyone sufficiently close to the mandatory maximum. This has the potential to balance concerns about overstepping sentencing judge power and disrupting basic principles underlying the appellate system with a desire for fair sentencing. Moreover, it would provide a

158 Hopwood, *supra* note 50, at 91, 100–05.

159 *See* Hoffman, *supra* note 52; Hopwood, *supra* note 50.

presumptive rule which would allow courts to more efficiently handle a bulk of petitions. A trial court would not review a sentence when it was clear the judge's discretion was not hindered by the old sentencing regime. Lastly, for any inmate outside of these discretionary thresholds, courts could provide that a change in the sentencing regime is not determinative, prompting courts to consider a number of additional factors—e.g., good works, rehabilitation, family matters, and so forth—in making a finding of extraordinary and compelling reasons.

In either case, the petitioner or the government would be empowered to rebut the presumption based on a number of factors to allow for individualized assessments that comport with fundamental notions of fairness or the goals of sentencing. That is, the rebuttable presumption would create an escape hatch in cases of clear unfairness, on the one hand, or clear risks of recidivism on the other. Obvious deviations in public sentiment or widely-held views of sentencing—in many cases of marijuana or other drug offenses—might very well rebut a presumption against release even where the sentencing judge gave the maximum. A maximum sentence that results from stacking or cumulative minimums might also rebut the presumption. Alternatively, an inmate's extreme disciplinary issues might rebut a grant of release, even where the sentencing judge gave the minimum.

In any event, compassionate release may be a strong tool for remedying pre-*Booker* sentences, provided guidance is given by Congress and the Commission in contemplating the various interests that must be balanced in its application: namely, separation of powers, workability, fairness, and efficiency. Until then, courts will continue to confront a variety of issues given the law's inherently open-ended nature.