SECOND LOOKS & SECOND CHANCES

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† Associate Professor of Law, Georgetown University Law Center. Thank you to the Editors of the *Cardozo Law Review* for inviting me to participate in this unique Collection of Essays about federal sentencing. I'd also like to thank Rachel Elise Barkow, Douglas Berman, Steven H. Goldblatt, Ann Marie Hopwood, Paul J. Larkin, Jr., Mary Price, and Kyle Singhal for their wonderful comments. I want to acknowledge my research assistant, Margaret Rusconi, for her tireless research and sage comments on this Essay and most everything else I have written for the past year. Finally, I want to recognize my friend and former client, Matthew Charles, for inspiring this Essay with his humble and genuine need to give back to those he left behind in federal prison.

INTRODUCTION

In early January of 2019, the improbable case of Matthew Charles ended with an NBC Nightly News team recording his release from federal custody, after Matthew had served two stints in federal prison totaling more than twenty-one years.[1] Matthew was in prison because, at the age of thirty, he was sentenced to thirty-five years in federal court for distributing 216 grams of crack cocaine and illegally possessing a firearm.[2] Matthew's sentence resulted, not from the quantity of crack cocaine he distributed, but from his ugly criminal history that included: "kidnapping a woman on two consecutive days for the purpose of terrorizing her; burglarizing a home; and fleeing from a police interrogation, shooting a man in the head, and attempting to run off in the victim's car."[3] When Matthew was sentenced, the sentencing judge explained that Matthew had "a particularly violent history" and "had "demonstrated by his actions that he's a danger to society and should simply be off the streets."[4]

But what the judge did not foresee was that Matthew would change. In the more than twenty-one years Matthew spent in prison, he never received a single disciplinary infraction.[5] Matthew studied the Bible during religious services and the law while working as a law clerk in the prison law library. He received an education through college courses.[6] And his focus wasn't just on himself: he drafted legal filings for illiterate prisoners and explained to them the court orders issued in their cases.[7] When he wasn't helping illiterate prisoners understand the law, he was

1 *See* Jon Schuppe, Kim Cornett & Michelle Cho, *'I refused to be bitter or angry': Matthew Charles, released from prison and sent back again, begins life as a free man*, NBC (Jan. 8, 2019, 4:06 PM), https://www.nbcnews.com/news/us-news/i-refuse-be-bitter-or-angry-matthew-charles-released-prison-n955796.

2 *See Matthew Charles: Saved by the First Step Act*, FAMM, https://famm.org/stories/matthew-charles-saved-by-the-first-step-act (last visited July 11, 2019).

3 United States v. Charles, 843 F.3d 1142, 1145 (6th Cir. 2016).

4 Transcript of Sentencing Hearing at 50, United States v. Charles, No. 3-96-00051 (M.D. Tenn. Dec. 13, 1996), ECF No. 96..

5 By contrast, I'm often held up as a model of rehabilitation, and I received two incident reports while serving nearly eleven years in federal prison. *See generally*, SHON HOPWOOD, LAW MAN: MEMOIR OF A JAILHOUSE LAWYER (2017) (describing my time in federal prison after having been convicted of five bank robberies and the use of a firearm during one of those robberies). I once saw a friend given an incident report because he glared at a correctional officer when that officer was having a bad day. Needless to say, it is quite exceptional to serve more than twenty-one years in the Federal Bureau of Prisons without a single incident report.

6 *See* FAMM, *supra* note 2.

7 *See id.*

teaching GED classes.[8] Matthew was determined to change his character, and he embarked on what the judge who resentenced him many years later called "exemplary rehabilitation."[9]

In 2016, District Court Judge Kevin Sharp resentenced Matthew under a retroactive U.S. Sentencing Guideline provision and reduced the sentence by nine years.[10] Matthew was released from federal custody after serving twenty-one years, and he did everything that we want from those coming out of prison. He quickly found a job and reestablished a connection with his family. He made community connections through his new church. And despite the fact that the first two years of release are typically chaotic for those reentering society after serving long prison sentences,[11] Matthew selflessly volunteered his weekend time at a soup kitchen for the homeless called the Little Pantry That Could.[12] Matthew was out of custody for nearly two years without incident, and in that time he continuously contributed to his Nashville community.

But those contributions were brought to a halt. The Department of Justice appealed Matthew's release, and the Court of Appeals for the Sixth Circuit reversed Judge Sharp's resentencing order.[13] By the time the court reversed, Judge Sharp had resigned because he couldn't, in good conscience, continue to impose draconian mandatory minimum sentences.[14] Matthew's case went to Judge Aleta Trauger, who was required to reimpose the additional nine years of imprisonment. Before doing so, Judge Trauger asked U.S. Attorney Donald Cochran to provide *Holloway* relief[15] and vacate the charges, thereby releasing Matthew from

8 Julieta Martinelli, *A Nashville Man Spent Two Decades Behind Bars. Now The Government Wants Him To Go Back*, NASHVILLE PUB. RADIO (Dec. 29, 2017), https://www.nashvillepublicradio.org/post/nashville-man-spent-two-decades-behind-bars-now-government-wants-him-go-back#stream/0.

9 *See* FAMM, *supra* note 2.

10 *See* Martinelli, *supra* note 8.

11 The first few years after release are the most difficult, as the formerly incarcerated try to obtain some stability in employment, housing, and community relationships, while adapting to societal changes that occurred during their imprisonment. Those first few years after release are also when people are most likely to recidivate. *See* U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 5 (2016) ("Of those offenders who recidivated, most did so within the first two years of the eight-year follow-up period.").

12 *See* Matthew Charles, *I was released under the First Step Act. Here's what Congress should do next*., WASH. POST (Feb. 1, 2019), https://www.washingtonpost.com/opinions/i-was-released-under-the-first-step-act-heres-what-congress-should-do-next/2019/02/01/1871f1f0-24bb-11e9-ad53-824486280311_story.html?noredirect=on&utm_term=.28ded77e5359.

13 *See* United States v. Charles, 843 F.3d 1142, 1143 (6th Cir. 2016).

14 *See* Debra Cassens Weiss, *Federal Judge Steps Down and Denounces Mandatory Minimum Sentences*, A.B.A. J. (Apr. 17, 2017).

15 Named after the case of *United States v. Holloway*, 68 F. Supp. 3d 310 (E.D.N.Y. 2014), a case in which U.S. Attorney Loretta Lynch dismissed charges against Mr. Holloway, leading to his resentencing. *Holloway* relief is discussed in Part IV.

having to serve over nine additional years in prison. But Mr. Cochran declined the invitation to exercise his discretion and vacate the charges. Citing Matthew's long and violent criminal history, he concluded that Matthew's case was not "unjust or unique in the way that Holloway's case arguably was."[16] Matthew returned to federal custody in May of 2018. While in custody, he lost his job and apartment, was separated from his girlfriend, and was uprooted from the community that he had built. Things seemed hopeless.[17]

Then in December of 2018, Congress passed, and President Donald J. Trump signed, the First Step Act.[18] Among other things, the Act created a mechanism for prisoners who had been sentenced to crack cocaine offenses to apply for resentencing, where changes to sentencing provisions created under the Fair Sentencing Act of 2010 would be retroactively applicable to their sentences.[19] Mariah Wooten and Michael Holley, the Federal Defenders representing Matthew, filed a motion for resentencing under Section 404 of the First Step Act. The U.S. Attorney's office agreed that Matthew was eligible for resentencing and that he should be resentenced to time served.[20] Judge Trauger also agreed.[21] Matthew was released and reunited with his Nashville community.

Matthew's case remained in the national consciousness after President Trump made him a guest of honor at the State of the Union address.[22] "Matthew is the very first person to be released from prison under the First Step Act," President Trump said.[23] "Thank you Matthew. Welcome home." Matthew now serves as a criminal justice fellow at

16 Government's Supplemental Response Regarding United States v. Holloway, United States v. Charles, No. 3-96-00051 (M.D. Tenn. Jan. 31, 2018), ECF No. 227-1'. *See Professor Shon Hopwood and Matthew Charles: On Sentences and Second Chances*, GEO. U.L. CTR. (Feb. 8, 2019), https://www.law.georgetown.edu/news/professor-shon-hopwood-and-matthew-charles-on-sentences-and-second-chances.

17 It was at this point that I began representing him in seeking a grant of clemency from President Trump.

18 *See* First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

19 *See id.* § 404.

20 *See* Response to Motion to Reduce Sentence, United States v. Charles, 96-cr-51, No. 3-96-00051 (M.D. Tenn. Jan. 2, 2019), ECF No. 252.

21 *See* Order, United States v. Charles, No. 3-96-00051 (M.D. Tenn. Jan. 27, 2019), ECF No. 252.

22 *See* Jeff Pegues, *Man Freed from Prison After Trump Signed Criminal Justice Bill to Attend State of the Union*, CBS NEWS (Feb. 5, 2019, 6:57 PM), https://www.cbsnews.com/news/matthew-charles-freed-from-prison-after-trump-signed-criminal-justice-bill-to-attend-state-of-the-union-2019-02-05/.

23 Mariah Timms, *President Trump: 'Welcome Home' to Matthew Charles, Man Released From Nashville Prison Under First Step Act*, TENNESSEAN (Feb. 5, 2019, 8:37 PM), https://www.tennessean.com/story/news/2019/02/05/donald-trump-state-of-the-union-matthew-charles-alice-johnson-first-step-act-free/2783545002.

FAMM,[24] and he has met with multiple members of Congress and state governors while advocating for justice reform. Matthew's case is one of the few that I've seen receive universal condemnation; many believed it was a travesty that Matthew had to be uprooted from his job and family to return to prison, after having been out of custody without incident for nearly two years.[25] Matthew proved that he had changed, but the law simply failed to recognize his transformation, and no amount of proof prevented Matthew from having to return to prison.

The only difference between Matthew and the thousands of federal prisoners who, through their own hard work and determination, have also been rehabilitated is that Matthew received the chance to prove his transformation for two years after Judge Sharp released him. Many others are not so fortunate. They are serving long federal sentences, even though they have been rehabilitated and would not be a threat to the public if released.

Our system asks too much of prosecutors, probation officers, and federal judges to determine at the front-end, during charging and sentencing decisions, which defendants will remain a danger and are unredeemable. The judge who sentenced Matthew certainly believed a thirty-five-year sentence was necessary to incapacitate him. It is hard to second guess that decision, given Matthew's violent criminal history and blatant disregard for the law at the time.[26]

What decision-makers can't measure at sentencing, however, is the capacity for people to change. The data tells us that many young men and

24 *See* FAMM, https://famm.org (last visited July 11, 2019).

25 *See, e.g.*, David Marcus, *Why President Trump Should Commute the Sentence of Matthew Charles*, FEDERALIST (May 28, 2018), https://thefederalist.com/2018/05/28/president-trump-should-commute-the-sentence-of-matthew-charles; Tom Rogan, *President Trump, Save Matthew Charles from Being Sent Back to Prison*, WASH. EXAMINER (May 29, 2018, 9:35 AM), https://www.washingtonexaminer.com/opinion/president-trump-save-matthew-charles-from-being-sent-back-to-prison; Katherine Timpf, *Mr. President, Pardon Matthew Charles*, NAT'L REV. (Jun. 1, 2018, 6:30AM), https://www.nationalreview.com/2018/06/matthew-charles-deserves-pardon-turned-his-life-around; Matt Walsh, *This Man Is Being Sent Back to Prison on a Technicality. President Trump Should Step In*, DAILY WIRE (May 29, 2018), https://www.dailywire.com/news/31174/walsh-matthew-charles-matt-walsh. *See also* Shon Hopwood, *Why Matthew Charles Should Be Granted Clemency*, PRISON PROFESSORS (June 7, 2018), https://prisonprofessors.com/why-matthew-charles-should-be-granted-clemency.

26 At my own sentencing, I told U.S. District Court Judge Richard G. Kopf that I would change my ways, and he wouldn't see me again. Judge Kopf noted years later that when I made those remarks at sentencing, he "would have bet the farm and all the animals that Hopwood would fail miserably as a productive citizen when he finally got out of prison." RGK, *Shon Hopwood and Kopf's Terrible Sentencing Instincts*, HERCULES & UMPIRE (Aug. 8, 2013), https://herculesandtheumpire.com/2013/08/08/shon-hopwood-and-kopfs-terrible-sentencing-instincts. What Judge Kopf later said was that my life after prison proved that his sentencing instincts (and these are his words, not mine) "suck." *Id.* We are now friends.

women age out of crime.[27] And stories like that of Alice Marie Johnson—who had her life without parole sentence commuted to time served by President Trump after compiling a remarkable record of rehabilitation—illustrate that people who commit serious crimes can change and be redeemed.[28] Because it is often difficult to conclude which defendants have the capacity for rehabilitation and redemption at the time of sentencing, we need avenues for decision-makers in the federal criminal justice system to take a second look in individual cases.

There are several avenues for decision-makers—whether courts, Congress, federal prosecutors, or the president—to identify people who are serving needlessly long sentences and are no longer a danger to society. With that in mind, I propose in this Essay how each decision-maker in the federal criminal justice system can find the people like Matthew Charles and Alice Marie Johnson and give them a second look for a second chance at a new life outside of prison.

Part I of this Essay explains why second looks have historically been available in the federal criminal justice and why reducing the sentences of those in federal prison who are no longer a danger to society is normatively desirable. The following sections address individual actors in the criminal justice system and the means by which they can provide a second look for those no longer needing to be incapacitated. Part II addresses federal judges who have the power to reduce sentences for extraordinary and compelling reasons under the compassionate release statute. Part III addresses Congress's role in legislating a second look provision that could apply in all cases, even those that don't present extraordinary and compelling reasons. Part IV addresses the role of federal prosecution in identifying injustices and explains how prosecutors

27 *See* Alex R. Piquero, *Taking Stock of Developmental Trajectories of Criminal Activity over the Life Course*, *in* THE LONG VIEW OF CRIME: SYNTHESIS OF LONGITUDINAL RESEARCH 23 (Akiva M. Liberman ed., 2008); *see also* U.S. SENTENCING COMM'N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 3 (2017) ("Older offenders were substantially less likely than younger offenders to recidivate following release . . . The pattern was consistent across age groupings, and recidivism measured by rearrest, reconviction, and reincarceration declined as age increased."); German Lopez, *The Case for Capping All Prison Sentences at 20 Years*, VOX (Feb. 12, 2019, 7:30 AM), https://www.vox.com/future-perfect/2019/2/12/18184070/maximum-prison-sentence-cap-mass-incarceration (quoting Law Professor John Pfaff on the reasons why people age out of crime: "Some of it is physical and hormonal: Testosterone levels go up, testosterone levels go down; violence goes up, violence goes down. Some of it is purely physical: Even if I was as aggressive now as I was 20 years ago, I'm 44 — things are slow, things ache a bit more," he explained. "But some of it is also social: Getting married is a pathway out of crime; finding a career is a pathway out of crime. So the longer we keep people in prison, the longer we tend to undermine the ways these people mature and age out of crime as they get older.").

28 *See* 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.

can remedy the injustice of punitive punishments through *Holloway* relief. Part V concludes with the role of the president in granting second looks through the commutations of sentences under the executive clemency powers.

I. SECOND LOOKS HAVE A LONG HISTORICAL PEDIGREE AND ARE A WORTHWHILE POLICY GOAL.

As will be explained below, a federal second look provision allows a federal court, prosecutor, or the president (i.e., a "decision-maker") to identify people like Matthew Charles or Alice Marie Johnson and then reduce their sentences, sometimes to time served.

A. *There is a Long History of Second Look Provisions in the Federal Justice System*

A second look at reducing the sentence of someone who violated the criminal law has deep roots in American law. English common law included the power to pardon people for their offenses.[29] That pardon practice was adopted by early American colonies, although its power varied among them.[30] The Founders adopted the pardon practice wholesale, enshrining it in Article II, Section 2, Clause 1 of the Constitution. In Federalist Nos. 69 and 74, Alexander Hamilton argued for a robust pardon power residing with the president.[31] Hamilton's arguments were successful, and there was little debate over the Clause during ratification.[32]

Those in federal government during the founding understood the importance of establishing an avenue for mercy within the federal criminal justice system. Hamilton argued that the pardon power constituted an act of "mercy"[33] that was a necessary check on the criminal justice system.[34] Chief Justice John Marshall echoed that the president's pardon power "is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts an individual, on whom it

29 *See* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 497 (1977).

30 *Id.* at 497.

31 ALEXANDER HAMILTON, THE FEDERALIST NO. 74, at 501 (Jacob E. Cooke ed., 1961).

32 *See* Paul F. Eckstein & Mikaela Colby, *President Pardon Power: Are There Limits and, if Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 80 (2019).

33 *See* HAMILTON, *supra* note 29, at 501.

34 *See Id.* ("[W]ithout an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.").

is bestowed, from the punishment the law inflicts for a crime he has committed."[35]

Parole also has a long history in federal law. In 1910, Congress passed the first federal parole law, which allowed any prisoner serving a term of one year or longer to move for parole after he or she had completed one-third of their sentence.[36] By 1930, Congress created a single Board of Parole with three full-time members who were appointed by the Attorney General.[37] Parole became such a popular fixture in American law that it was "in the criminal justice system of every state and the federal government for most of the twentieth century."[38]

Second look provisions were also codified into federal rules of practice and various statutes. In 1946, a second look provision was codified in the first version of Federal Rule of Criminal Procedure 35(b), which allowed a court to reduce a sentence for any reason within 60 days of its imposition.[39] In 1976, Congress enacted a compassionate release statute as part of the Parole Reorganization Act, and it provided that courts could reduce a sentence for various reasons.[40] And in 1984, Congress created the current compassionate release statute that provides for a sentence reduction if "extraordinary and compelling reasons" are present.[41]

These second look provisions were in use when the federal criminal justice system was relatively small, both in the number of federal statutes carrying criminal penalties and in the number of people confined in federal prisons. But the federal criminal justice is no longer small. In 1873, the federal criminal code was limited to just 183 separate offenses.[42] The criminal code now contains over 4,500 statutes and it's estimated that there are over 300,000 federal regulations containing criminal penalties.[43] The federal prison population has also increased

35 United States v. Wilson, 32 U.S. 150, 160 (1833).

36 Federal Parole Act of 1910, ch. 387, 36 Stat. 819 (1910).

37 *See* Peter B. Hoffman, *History of the Federal Parole System: Part 1 (1910-1972)*, 61 FED. PROBATION 23, 23 (1997).

38 Paul J. Larkin, Jr., *Parole: Corpse or Phoenix*, 50 AM. CRIM. L. REV. 303, 305 (2013); Morrissey v. Brewer, 408 U.S. 471, 477 (1972) ("Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals" and had become "an integral part of the penological system").

39 *See* FED. R. CRIM. P. 35(b) (1946).

40 *See* 18 U.S.C. § 4205(g).

41 *See* Pub. L. No. 98–473, § 212(a)(2) (1984).

42 *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514 (2001).

43 *See* John Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, HERITAGE FOUND. (Aug. 6, 2014), https://www.heritage.org/crime-and-justice/report/criminal-law-and-the-administrative-state-the-problem-criminal-regulations.

exponentially. For most if its history, the Federal Bureau of Prisons ("BOP") held few prisoners, and, as recently as 1980, the BOP held just 24,640 people in custody.[44] But by 2017, the federal prison population had bloated to 185,617 prisoners.[45]

If second looks were widespread and needed when our incarceration rates were low, they are needed even more now in the age of overcriminalization and mass incarceration.

B. *Providing a Second Chance to Those Who Are Deserving Comes With a Number of Benefits*[46]

When a decision-maker reduces the sentence of an individual who was overly sentenced and is rehabilitated, the decision-maker can lower the chance that person will recidivate upon release. Several studies have concluded that more prison time doesn't equal more success; longer terms of imprisonment does not reduce the likelihood of reoffending.[47] According to some criminologists, one reason for the outcome is that offenders are more present-oriented than the average person and therefore discount potential long-term adverse consequences of their actions.[48] Long sentences of incarceration can actually increase crime because incarceration is criminogenic, meaning that it increases the probability a person will engage in future crimes.[49] This criminogenic effect is not

44 *See Statistics: Past Inmate Population Totals,* FED. BUREAU PRISONS (Oct. 18, 2018), https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops.

45 *Id.*

46 For other reasons why judicial second look provisions are advantageous, *see* Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 515-20 (2010).

47 *See* Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders*, 48 CRIMINOLOGY 357, 357–58 (2010). Recently, the U.S. Sentencing Commission released a study explaining that those released early under the Fair Sentencing Act had the same recidivism rate as those who did not receive a reduction. *See* U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2011 FAIR SENTENCING ACT GUIDELINE AMENDMENT 1 (2018) ("The Commission finds no difference between the recidivism rates for offenders who were released early due to retroactive application of the FSA Guideline Amendment and offenders who had served their full sentences before the FSA Guideline Amendment reduction retroactively took effect.").

48 *See, e.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME 118-19 (rev. ed., 1983); JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 49-56, 416–21 (1985); John J. DiIulio, Jr., *Help Wanted: Economists, Crime and Public Policy*, 10 J. ECON. PERSP. 3, 16–17 (1996).

49 *See, e.g.,* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 23–40 (2009) (explaining why imprisonment can make society less safe because of desensitization and disruption of communities); Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime:*

surprising. Incarceration in federal prison confines people in horrific prison conditions away from their community and surrounds them by others who have committed serious crimes.[50] As a result, federal prison often incubates and encourages anti-social behavior. In addition, a person who serves a long sentence may be unable to adapt to a changing society, especially technological change, upon release.[51] And due to serving a long sentence, prisoners' ties to family and friends may be severed, leaving them vulnerable if they live paycheck-to-paycheck and should lose their job. If someone loses his or her employment and has no community to fall back on, the only choice might appear to be homelessness and crime. In my experience working with those who have reentered society after serving a long sentence, when people are put to the choice of homelessness or crime, that is often when people recidivate. Reducing the sentences of people who have received excessively punitive punishments and who have demonstrated rehabilitation can thus improve public safety.

Second looks can also be used to fix race-based sentencing disparities in federal sentencing. There is no question that racial disparities exist. Professors Sonja B. Starr and M. Marit Rehavi concluded that black men are 1.75 more likely to be charged by federal

Implications for Social Disorganization Theory, 36 CRIMINOLOGY 441, 442–78 (1998) (explaining criminogenic effect of prison); Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 125–26 (2009) ("Although intended to prevent crime, this unique experience in social segregation is argued to have the unintended consequence of increasing exposure to crime-inducing influences and of decreasing exposure to prosocial influences.").

50 Press Release, The White House, CEA Report: Economic Perspective on Incarceration and the Criminal Justice System 39 (Apr. 23, 2016) ("[A] growing body of work has found that incarceration increases recidivism"); Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329-58 (2002) (finding that individuals sentenced to prison had higher recidivism rates and recidivated more quickly than individuals sentenced to probation); Lynne M. Vieraitis et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974–2002*, 3 CRIMINOLOGY & PUB. POL'Y 6, 589, 622 (2007) (finding that increased prison releases are associated with higher crime rates and arguing that this is due to the criminogenic effects of prison); Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1183 (2004) ("By segregating such actors from mainstream America, the criminal law may reinforce a tendency towards criminal action. In economic terms, when an individual cannot get hired for lawful work because she was once an outlaw, the relative cost of illegal activity decreases. Moreover, from a psychological perspective, those branded outlaws may begin to internalize such labels and fulfill the expectation that they believe the criminal system and society have for them. Instead of reducing crime, stigmatization strategies may increase the criminal activity of particular actors.").

51 One of the first things I realized during my own reentry was that employers no longer advertise jobs in the classified sections of newspapers. I found my first couple of jobs on a workforce computer that I had little idea of how to operate because I had not previously used the Internet and the BOP provided no computer training.

prosecutors with crimes carrying mandatory minimum penalties.[52] The U.S. Sentencing Commission came to the same conclusion about racial disparities in federal sentencing, finding that black men received 19.1 percent longer sentences for the same federal crimes as white men between fiscal years 2012 and 2016.[53] Second look provisions would allow federal judges to consider whether a person received a disparate punishment on the basis of race and would give judges the ability to ameliorate the disparity through a sentence reduction.

Second looks provisions leading to sentencing reductions can also alleviate the suffering of prisoners' family members. "The families of incarcerated individuals suffer great economic hardships from incarceration, ranging from the incarcerated individual's lost wages to the costs of prison visits and calls, which can be crushing for families already living on the edge of subsistence."[54] The children of prisoners are particularly affected by having a parent incarcerated for a significant amount of time. Children of incarcerated parents run greater risks of health and psychological problems, and lower economic well-being and educational attainment.[55] One study estimated that children of incarcerated parents are, on average, six times more likely to become incarcerated themselves,[56] leading to vicious cycles of intergenerational incarceration. The longer a parent is incarcerated, the risk of that punishment being visited upon their children increases exponentially.

By reducing the sentences of those who are rehabilitated, decision-makers can also reduce the Federal Bureau of Prisons' population and, concomitantly, its budget. From 1980 to 2017, the federal prison population increased from 24,640 to 185,617—more than a 653%

52 M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

53 *See* U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2 (2017). The Commission came to this conclusion after accounting for multiple variables, including criminal history, age, education, citizenship, and whether someone pleaded guilty.

54 RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 47 (2019).

55 *See* Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT'L INST. JUST. J. 1 (2017); CREASIE FINNEY HAIRSTON, FOCUS ON CHILDREN WITH INCARCERATED PARENTS: AN OVERVIEW OF THE RESEARCH LITERATURE (Oct. 2007).

56 *See* Megan Cox, The Relationships Between Episodes of Parental Incarceration and Students' Psycho-Social and Educational Outcomes: An Analysis of Risk Factors 3 (May 2009) (unpublished Ph.D. dissertation, Temple University) (on file with author); *see also* CHARLES COLSON TASK FORCE ON FED. CONVICTIONS, TRANSFORMING PRISONS, RESTORING LIVES: FINAL RECOMMENDATIONS OF THE CHARLES COLSON TASK FORCE ON FEDERAL CONVICTIONS 15 (2016).

increase.[57] That enormous increase added to BOP's ever-growing budget.[58] That budget has expanded so much that it has begun "crowding out" other DOJ priorities,[59] such as hiring additional federal law enforcement officers to investigate and prosecute lawbreakers—an avenue for deterring crime that might be more effective than the threat of long sentences of which many Americans are unaware.[60]

Reducing a sentence for those who have already been sufficiently punished or who have demonstrated rehabilitation is also consistent with the goals of federal sentencing. The overarching goal of federal sentencing is to impose "a sentence sufficient, but not greater than necessary," to comply with the purposes of sentencing.[61] But finding this happy medium is far from a perfect science. If a person is rehabilitated or has been overly sentenced, their sentence is greater than necessary to "protect the public from further crimes of the defendant."[62] At the moment of sentencing, what can seem a sufficient but not greater than necessary sentence can, with hindsight and a record of the prisoner's rehabilitation, appear overly punitive and unnecessary.

Viable second look remedies would also improve the federal prison system.[63] If second looks became the norm, those in federal prison would

57 *Statistics: Past Inmate Population Totals*, FED. BUREAU PRISONS (Oct. 18, 2018), https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops.

58 The fiscal year 2019 budget request for BOP calls for $7,086.9 million dollars. *See* DEP'T OF JUSTICE, FEDERAL PRISON SYSTEM (2019).

59 Sally Q. Yates, Deputy Att'y Gen., U.S. Dep't of Justice, McNamara Memorial Lecture at Fordham University (Nov. 14, 2016) ("The Justice Department's prison and detention costs have increased by almost three billion dollars in the past decade alone and now account for roughly one third of the department's budget. This comes with significant public safety consequences because the growing [Bureau of Prisons] budget is crowding out everything else we do at the department.").

60 *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 55 (2009) (1764); FRANCIS T. CULLEN & CHERYL LERO JONSON, CORRECTIONAL THEORY 120–26 (2012); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201 (2013) ("[T]here is little evidence that increases in the length of already long prison sentences yield general deterrent effects that are sufficiently large to justify their social and economic costs . . . [T]here is substantial evidence that increasing the visibility of the police by hiring more officers and allocating existing officers in ways that materially heighten the perceived risk of apprehension can deter crimes."); *see also* Mark A. R. Kleiman & Kelsey R. Hollander, *Reducing Crime by Shrinking the Prison Headcount*, 9 OHIO ST. J. CRIM. L. 89, 89 (2011) (arguing that the five principles of effective punishment are the "Five C's": certainty, celerity, concentration, communication, and credibility).

61 18 U.S.C. § 3553(a) (2016).

62 18 U.S.C. § 3553(a)(2)(A), (C). Of course, the sentence may still reflect "just punishment for the offense." *See* 18 U.S.C. § 3553(a)(2)(C). In my experience, very few decision-makers (whether judges or prosecutors) understand how much punishment people receive by prison sentences or the punishment that occurs once someone finishes their prison sentence.

63 *See* Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 2 (2013) ("No prisoner has a constitutional right to demand an early release via any of those devices, but the federal and state

be incentivized to start compiling a record of rehabilitation, including compliance with BOP rules and norms. As a result, federal prison would become less violent for both prisoners and staff alike.[64] Consequently, the BOP might be able to assign fewer correctional officers to police prisoners, and provide more staffing for educational, behavioral health, and mental health programs that could work to rehabilitate those in prison, thereby helping to ensure a lower recidivism rate when people are released from prison and return to their community.

One objection is that reducing a sentence of someone whose conviction and sentence are final diminishes the "deterrence to criminal conduct."[65] General deterrence theory posits that sentencing someone to a long prison sentence will deter someone else from committing a similar, or any other, crime.[66] But does general deterrence work? And even if general deterrence is effective, would it have lessened utility if people knew there was a chance that a decision-maker could reduce a sentence under some form of a second look at some point during their incarceration?[67]

As to the first question, economists and scholars are increasingly clear that there is "little convincing evidence that at today's margins in the US, increasing the frequency or length of sentences deters aggregate crime."[68] The reasons are unsurprising. Most people are unaware of the vast scope of federal criminal law, including over 4,500 statutes and several hundred thousand federal regulations containing criminal

governments have found them to be useful tools for penological, fiscal, and humanitarian purposes.").

64 *See* Shon Hopwood, *Beyond First Steps: Reforming the Federal Bureau of Prisons*, 31 FED. SENT'G REP. 119, 119 (2018) (describing how incentives can improve the federal prison system).

65 18 U.S.C. § 3553(a)(2)(A)-(B) (noting deterrence is a goal of sentencing). *See* Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149, 156 (2015) ("The severity, certainty, and swiftness of punishment have been said to be central components of deterrence, so undermining the severity and certainty of punishment – or even maybe the certainty of the extent of punishment – could undermine the deterrence value of punishment.").

66 *See* Nagin, *supra* note 60, at 200 ("General deterrence refers to the crime prevention effects of the threat of punishment.").

67 For a good discussion of whether the criminal law deters crime, *see* PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 31–97 (2008).

68 David Roodman, *The Impacts of Incarceration on Crime*, OPEN PHILANTHROPY PROJ. (Sept. 2017), https://www.openphilanthropy.org/files/Focus_Areas/Criminal_Justice_Reform/The_impacts_of_incarceration_on_crime_10.pdf; *see also* Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 13 (2011); HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 92 (2012) ("Requiring people to remain in prison until the end of their sentence regardless of age and infirmity has no demonstrable general deterrent effect").

penalties.[69] Nor are most Americans aware of the punishments contained in the United States Code or U.S. Sentencing Guidelines generally, let alone the punishment for a particular crime. One cannot be deterred by a punishment of which they are unaware.[70] Even if people were aware, many people who commit crimes don't act rationally, especially if they are in the throes of substance abuse disorder or other mental health ailments.[71] So they might not respond in rational ways to a steep punishment, even if aware of it.

If general deterrence from long sentences is unlikely to work in its pristine state, then it is highly dubious that, when policymakers reduce a sentence through a second look provision, the reduction will have a meaningful impact in reducing the marginal deterrent effect. Put differently, assuming someone was deterred from witnessing a court impose a thirty-five-year sentence on Matthew Charles, would they be less deterred from committing a federal crime generally, or a crack cocaine offense specifically, knowing that Matthew's sentence was given a second look and he was freed after spending twenty-two years in prison? I have my doubts. General deterrence is not a sufficient reason to preclude second looks for those who were overly sentenced and rehabilitated.

Americans should value providing second chances to those who have been convicted of crimes. The great promise of the American dream is that with hard work, determination, and some good luck, people can reinvent themselves and find upward mobility. Second chances should not be denied to those who, through hard work and self-reflection, become rehabilitated and, if given a second chance, could become contributing and law-abiding citizens. As President George W. Bush noted during the 2004 State of the Union address, "America is the land of the second chance—and when the gates of the prison open, the path ahead should lead to a better life."[72] Second look avenues can open those

69 *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. (June 16, 2008), https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes; Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 729 (2013).

70 *See* Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 181 (2008) ("[T]he effectiveness of deterrence is premised on the actor's knowledge of the sanctions themselves and an ability to weigh not only the severity of the sanction with which he or she will be met, but also the likelihood of being met with that sanction.").

71 *See More Imprisonment Does Not Reduce State Drug Problems*, PEW (Mar. 8, 2018), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems.

72 *See* Editorial Board, *In Search of Second Chances*, N.Y. TIMES (May 31, 2014), *https://www.nytimes.com/2014/06/01/opinion/sunday/in-search-of-second-chances.html.*

prison gates, and remedy long sentences that are far greater than necessary to keep the public safe.

The next sections address how individual decision-makers can take a second look at sentences that are final.

II. FEDERAL JUDGES CAN REDUCE SENTENCES FOR PEOPLE WHOSE CASES PRESENT "EXTRAORDINARY OR COMPELLING REASONS" UNDER THE COMPASSIONATE RELEASE STATUTE IN 18 U.S.C. § 3582(C)(1)(A)(I).

Under current law, federal judges are limited in the ways that they can consider and reduce a sentence once a final judgment is imposed. One way that judges can modify a sentence is through the compassionate release statute under 18 U.S.C. § 3582(c), which is often used to resentence someone who is terminally ill.[73] But with the changes made to the compassionate release statute by the recently enacted First Step Act, courts can use the compassionate release statute as a second look provision in cases that present "extraordinary and compelling reasons."[74]

A. *The History of Second Look Compassionate Release and Its Expanding Development*

The compassionate release statute was originally enacted as part of the Parole Reorganization Act of 1976.[75] Codified at 18 U.S.C. § 4205(g), it read as follows:

> At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time and no hearing shall be required.

Importantly, the Section 4205(g) remedy of a sentence reduction was not limited in scope to mere medical issues. In *United States v. Diaco*, a district court reduced a sentence upon motion of the BOP and U.S. Attorney.[76] The court noted that Diaco had been "a model prisoner," and the court reduced his five-year sentence based on sentencing disparities between Diaco and his more culpable co-defendants, who had

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[73] William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 852–53 (2009) ("The Bureau of Prisons has read this language very narrowly for many years, considering only terminally ill inmates as candidates for compassionate release.").

[74] 18 U.S.C. § 3582(c)(1)(A)(i).

[75] *See* 18 U.S.C. § 4205(g).

[76] United States v. Diaco, 457 F. Supp. 371, 375 (D.N.J. 1978).

only served six months imprisonment.[77] In *United States v. Banks*, the BOP Director had filed a motion for a sentence reduction, arguing that Banks, who was serving time for armed robbery, had "outstanding institutional adjustment," and "[h]is conduct record is clear and his work uniformly competent."[78] The district court granted the motion in the face of the U.S. Attorney's office argument against the BOP's recommendation "because of the serious nature of Mr. Banks' offense."[79] Section 4205(g) was thus used to correct and reduce long sentences where a person in prison showed a demonstrated record of rehabilitation, and this was the compassionate release statute Congress was familiar with when it enacted the modern compassionate release statute.

Congress was no doubt aware that compassionate release could be used as a second look provision when, as part of the Comprehensive Crime Control Act of 1984, it enacted the modern form of the compassionate release statute contained in 18 U.S.C. § 3582.[80] When statutory language "is obviously transplanted from . . . other legislation," courts usually have reason to think "it brings the old soil with it."[81]

Enacted in 1984, Section 3582(c) states that a district court can modify even a final "term of imprisonment" in four situations, the broadest of which is directly relevant here. A sentencing court can reduce a sentence whenever "extraordinary and compelling reasons warrant such a reduction."[82] And just like the 1976 compassionate release provision, Congress in 1984 conditioned the reduction of sentences on the BOP Director filing an initial motion in the sentencing court; absent such a motion, sentencing courts had no authority to modify a prisoner's sentence for extraordinary and compelling reasons.

Congress never defined what constitutes an "extraordinary and compelling reason" for resentencing under Section 3582(c).[83] But the legislative history gives an indication of how Congress thought the statute should be employed by federal courts. One of Congress's initial goals in

77 *Id.*

78 United States v. Banks, 428 F. Supp. 1088, 1089 (E.D. Mich. 1977).

79 *Id.*

80 "We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." Ryan v. Gonzales, 568 U. S. 57, 66 (2013) (internal quotation marks omitted).

81 Sekhar v. United States, 570 U. S. 729, 733 (2013).

82 18 U.S.C. § 3582(c)(1)(A)(i).

83 There is nothing unusual about Congress legislating a broad and open standard and then delegating that particularized application of that standard to an executive agency or the federal judiciary. Congress has, for example, delegated to the judiciary to define what constitutes a "reasonable attorney's fee" under the various civil rights statutes. 42 U.S.C. § 2000a-3(b) (1964); *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.").

passing the Comprehensive Crime Control Act was to abolish federal parole and create a "completely restructured guidelines sentencing system."[84] Yet, recognizing that parole historically played a key role in responding to changed circumstances, the Senate Committee stressed how some individual cases may still warrant a second look at resentencing:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, *cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence*, and some cases in which the sentencing guidelines for the offense of which the defender was convicted have been later amended to provide a shorter term of imprisonment.[85]

Rather than having the Parole Commission review every federal sentence focused only on an offender's rehabilitation, Congress decided that § 3582(c) would enable courts to decide, in individual cases, if "there is a justification for reducing a term of imprisonment."[86]

Congress intended for Section 3582(c) to act as "safety valve[ ] for modification of sentences,"[87] enabling sentence reductions when justified by various factors that previously could be addressed through the (now abolished) parole system. The safety valve would "assure the availability of specific review and reduction to a term of imprisonment for 'extraordinary and compelling reasons' and [would allow courts] to respond to changes in the guidelines."[88] Noting that this approach would keep "the sentencing power in the judiciary where it belongs," rather than with a federal parole board, the statute permitted "later review of sentences in particularly *compelling situations*."[89]

Congress thus 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; if extraordinary and compelling

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

85 *Id.* at 55–56 (emphasis added).

86 *Id.* at 56.

87 *Id.* at 121.

88 *Id.*

89 *Id.* (emphasis added).

circumstances were present, it could be used to "justify a reduction of an unusually long sentence."[90]

The U.S. Sentencing Commission has also concluded that Section 3582(c)(1)(A)'s "extraordinary and compelling reasons" for compassionate release are not limited to medical, elderly, or family circumstances. Congress initially delegated the responsibility for determining what constitutes "extraordinary and compelling reasons" to the Commission.[91] Congress provided only one limitation to that delegation of authority: "[r]ehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason."[92] Congress no doubt limited the ability of rehabilitation *alone* to constitute extraordinary circumstances, so that sentencing courts could not use it as a full and direct substitute for the abolished parole system. Congress, however, contemplated that rehabilitation could be considered with other extraordinary and compelling reasons sufficient to resentence people in individual cases. Indeed, the use of the modifier "alone" signifies that rehabilitation could be used in tandem with other factors to justify a reduction.

The Commission initially neglected its duty, leaving the BOP to fill the void and create the standards for extraordinary and compelling reasons that warrant resentencing.[93] The Commission finally acted in 2007, promulgating a policy that extraordinary and compelling reasons includes medical conditions, age, family circumstances, and "other reasons."[94] After a negative DOJ Inspector General report[95] found that the BOP had rarely moved courts for compassionate release even under their own policies, the Commission amended its policy to encourage the BOP to file motions for compassionate release more often.[96]

The Commission created several categories of qualifying reasons: (A) "Medical Conditions of the Defendant," including terminal illness

90 *Id.* at 55–56.

91 *See* 28 U.S.C. § 994(t) (2011) ("The Commission . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.").

92 *Id.* (emphasis added).

93 BOP created policies governing compassionate release. The latest version prior to passage of the First Step Act was Program Statement 5050.49, Compassionate Release/Reduction in Sentences (Mar. 25, 2015). U.S. DEP'T OF JUSTICE, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582(C)(1)(A) AND 4205(G) (2015).

94 U.S.S.G. § 1B1.13, at Application Note 1(A) (2018).

95 *See* U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM (2013).

96 U.S.S.G. § 1B1.13, at Application Note 4; *see also* United States v. Dimasi, 220 F. Supp. 3d 173, 175 (D. Mass. 2016) (discussing the progression from the OIG report to new "encouraging" guidelines).

and other serious conditions and impairments; (B) "Age of the Defendant," for those 65 and older with serious deterioration related to aging who have completed at least 10 years or 75 percent of the term of imprisonment; (C) "Family Circumstances," where a child's caregiver or spouse dies or becomes incapacitated without an alternative caregiver; and (D) "Other Reasons," when the Director of the BOP determines there is "an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)."[97] The Commission also clarified that the extraordinary and compelling reasons "need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment."[98] So even if an "extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court, [that fact] does not preclude consideration for a [sentence] reduction."[99]

Consistent with the text and legislative history of § 3582(c), the Commission concluded that reasons beyond medical, age, and family circumstances could qualify as "extraordinary or compelling reasons" for resentencing, and that the extraordinary or compelling reasons need not be based on changed circumstances occurring after the initial sentencing of the defendant.

Although the Commission concluded that other reasons could exist for sentence reductions, the BOP set the criteria for when federal prisoners could seek resentencing. Prior to Congress passing the First Step Act, the process for compassionate relief under Section 3582(c)(1)(A) was set as follows: the Commission set the criteria for resentencing relief, and the BOP Director initiated and filed a motion in the sentencing court.[100] If such a motion was filed, the sentencing court could then decide if "the reduction was justified by 'extraordinary and compelling reasons' and was consistent with applicable policy statements issued by the Sentencing Commission."[101] Even 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, and the prisoner was unable to secure a sentence reduction. This process meant that, practically, the BOP Director both initiated the process and set the criteria

97 U.S.S.G. § 1B1.13, at Application Note 1(A).

98 *Id.* at Application Note 2.

99 *Id.*

100 *See* 18 U.S.C. § 3582(c)(1)(A).

101 *Id.*

for whatever federal prisoner's circumstances the Director decided to move upon.[102]

Leaving the BOP Director with ultimate authority to trigger and set the criteria for sentence reductions created several problems.[103] The Office of the Inspector General found that, among many other issues, BOP failed to provide adequate guidance to staff regarding the criteria for compassionate release, and that BOP had no timeliness standards for reviewing compassionate release requests.[104] As a result of these problems and others, the OIG concluded that: "BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered."[105]

Congress heard those complaints. In late 2018, Congress passed the First Step Act, part of which transformed the process for compassionate release. [106] Section 503 of the First Step Act changed the process by which compassionate release occurs so that, instead of depending upon the BOP Director to move for release, a court can now resentence "upon motion of the defendant," if the defendant has fully exhausted all administrative remedies, "or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier."[107] Once a defendant who has properly exhausted all administrative remedies files a motion, a court may, after considering the

102 The DOJ recognized that, prior to the passage of the First Step Act, BOP, and not the Commission, functionally had final say on what constituted an "extraordinary and compelling reason" for a sentence reduction, because only BOP could bring a motion under the terms of § 3582(c)(1)(A). *See* Dep't of Justice, Letter from Michael J. Elston to Hon. Ricardo H. Hinojosa, at 4 (July 14, 2006) (noting that because Congress gave BOP the power to control which particular cases will be brought to a court's attention, "it would be senseless [for the Commission] to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them" and that expanding compassionate release would be a "dead letter, because the Department will not file motions under 18 U.S.C. § 3582(c)(1)(A)(i) outside of the circumstances allowed by its policies").

103 "This is because the Bureau of Prisons has chosen to usurp court power, and only grant compassionate release in the most narrow of circumstances." Jalila Jefferson-Bullock, *Are You (Still) My Great and Worthy Opponent?: Compassionate Release of Terminally Ill Offenders*, 83 UMKC L. REV. 521, 523 (2015); *see also* Berry III, *supra* note 73, at 853 ("The Bureau of Prisons, in limiting its need to review compassionate release petitions to medical cases, thus abandons the flexibility to consider truly compelling cases, perhaps in part for a lack of method by which to separate the meritorious cases from the many that do not rise to the level of extraordinary and compelling.").

104 *See* THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM, *supra* note 95, at i–iv.

105 *Id.* at 11; *see generally* 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 (2009).

106 *See* First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, at § 603 (Dec. 21, 2018).

107 18 U.S.C. § 3582(c)(1)(A).

18 U.S.C. § 3553(a) sentencing factors, resentence a defendant, if the court finds that extraordinary and compelling reasons warrant a reduction.[108] Any reduction of a sentence that a court orders must also be "consistent with applicable policy statements issued by the Sentencing Commission."[109] The effects of these new changes are to allow federal judges the ability to move on a prisoner's compassionate release application even in the face of BOP opposition or its failure to respond to a prisoner's request for compassionate release in a timely manner.

Congress made these changes in an effort to expand the use of compassionate release sentence reductions. Congress labeled these changes, "Increasing the Use and Transparency of Compassionate Release."[110] Senator Cardin noted in the congressional record that the First Step made several reforms to the federal prison system, including that: "The bill *expands compassionate release* under the Second Chance Act and expedites compassionate release applications."[111] In the House, Representative Nadler noted that the First Step Act included "a number of very positive changes, such as . . . *improving application of compassionate release*, and providing other measures to improve the welfare of Federal inmates.[112]

Federal judges now have the power to order reductions of sentences. Both the statutory text, context, and legislative history from 1984 make plain that Congress intended compassionate release to act as a second look provision to replace the abolishment of federal parole. Under the First Step Act, Congress intended the judiciary not only to take on the role that BOP once held under the pre-First Step Act compassionate release statute 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 set forth in the applicable statute and guidelines policy statements.

The statutory text defines sentence reduction authority around "extraordinary and compelling reasons," and the Commission's policy statements under Section 1B1.13 do not preclude federal courts from resentencing defendants. Once a prisoner has properly pursued their remedies and filed a motion for compassionate release, a federal court possesses authority to reduce a sentence. A court must then consider the Section 3553(a) sentencing factors in reducing any sentence.[113] And any reduction of a sentence that a court orders must also be "consistent with

108 *Id.*

109 *Id.*

110 164 CONG. REC. H10358 (daily ed. Dec. 20, 2018).

111 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (emphasis added).

112 164 CONG. REC. H10346, H10362 (Dec. 20, 2018) (emphasis added).

113 18 U.S.C. § 3582(c)(1)(A).

applicable policy statements issued by the Sentencing Commission."[114] As noted above, the Sentencing Commission created a catch-all provision for compassionate release under U.S.S.G. § 1B1.13, Application Note (1)(D), which states:

> Other Reasons.—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, the reasons described in subdivisions (A) through (C).

The Commission also stated the process by which compassionate release reductions should be decided:

> Motion by the Director of the Bureau of Prisons.—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A).[115]

The dependence on the BOP in these policy statements is a relic of the prior procedure that is now inconsistent with the First Step Act's amendment of Section 3582(c)(1)(A). Application Note 1(D) can no longer limit judicial authority to cases with an initial determination by the BOP Director that a prisoner's case presents extraordinary or compelling reasons for a reduction, because the First Step Act has expressly changed the statutory text to allow courts to consider and grant sentence reductions even in the face of an adverse or unresolved BOP determinations concerning whether a prisoner's case is extraordinary or compelling.[116] And the Commission's now-outdated statement indicating that the BOP must file a motion in order for a court to consider a compassionate release sentence reduction no longer controls in the face of the changes enacted explicitly to allow a court to consider a reduction even in the absence of a BOP triggering motion.[117] With the First Step Act, 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 guideline application notes requiring a BOP determination or motion are not binding on courts.[118] Put differently, now that the First

114 *Id.*

115 U.S.S.G. § 1B1.13, at Application Note 4.

116 *See* 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act.

117 *Id.*

118 *See* Stinson v. United States, 508 U.S. 36, 38 (1993) ("We decide that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the

Step Act has recast the procedural requirements for a sentence reduction, even if a court finds there exists an extraordinary and compelling reason for a sentence reduction without the BOP Director's initial determination, then the sentence reduction is not inconsistent "with the applicable policy statements issued by the Sentencing Commission."[119]

C. *Circumstances Presenting "Extraordinary and Compelling Reasons" for a Sentence Reduction*

What constitutes an extraordinary and compelling reason for a sentence reduction?[120] Although neither the statute nor the guideline commentary requires it, as a practical matter, a person in federal prison will likely need to convince a judge that they are no longer a danger to society if released early. If the person filing a request for resentencing has multiple or recent incident reports for violent acts inside a federal prison, or actions that would constitute the commission of a new offense, a judge might hesitate to reduce a sentence no matter how many other extraordinary and compelling circumstances arise. But as the statute explicitly prohibits, rehabilitation *alone* is not a ground for relief.[121] Thus, while evidence of rehabilitation might be necessary, it is not sufficient for a determination of extraordinary and compelling reasons.

One example of an extraordinary and compelling reason for a sentence reduction is when a person in prison was sentenced under a provision that Congress has since found too punitive and amended, although not made retroactively applicable. In the First Step Act, Congress expressly considered retroactive application of all the sentencing reform provisions contained in the act. But Congress ultimately made only the changes from the Fair Sentencing Act of 2010 available to cases already final.[122] One could look at that move in two ways. One the one hand, Congress's decision to change, for example, the stacking provisions of 18 U.S.C. § 924(c) meant that Congress viewed those punishments as too punitive and unfair. On the other hand,

Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.").

119 18 U.S.C. § 3582(c)(1)(A).

120 Few scholars have attempted to answer this question, but see Berry III, *supra* note 73, at 853–54 (arguing that "the non-penal interests of the state (in light of the 'extraordinary and compelling' factual circumstance must clearly outweigh the state's penological interest in the inmate serving the entire sentence before compassionate release may be justified."). *See also* Lindsey E. Wylie et al., *Extraordinary and Compelling: The Use of Compassionate Release Laws in the United States*, 24 PSYCHOL. PUB. POL''Y & L. 216 (2018).

121 *See* 28 U.S.C. § 994(t).

122 *See* First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, at § 404 (2018).

Congress's failure to make its changes to Section 924(c) retroactively available could be viewed as intending for those already sentenced under the stacking provisions to never receive a reduction in sentence.[123] Yet Congress appeared to taken a middle ground. Had Congress made the changes retroactively applicable to all, every defendant sentenced to stacked Section 924(c) offenses would have been *categorically* eligible for sentencing relief. By contrast, those sentenced under the Section 924(c) stacking provisions and seeking relief under the compassionate release provision (as amended by First Step) must establish extraordinary and compelling reasons *individually* in order to be eligible for relief. That Congress chose to foreclose one avenue for relief does not mean it chose to foreclose all means of redressing draconian sentences imposed under Section 924(c). And, as a textual matter, nothing about Congress's decision to pass prospective-only changes to Section 924(c) prevents a judge from resentencing under the compassionate release statute on the basis of extraordinary and compelling reasons.

Other examples of people presenting extraordinary and compelling reasons could be those receiving a long sentence for offenses that society no longer considers dangerous. Those serving long or life without parole sentences for marijuana trafficking offenses are the first to come to mind.[124] Another group of people presenting extraordinary and compelling reasons might be those sentenced to harsh mandatory minimum sentences, even though the facts of their crimes made them far less culpable than someone committing a run-of-the-mill offense. An example would be if a previously convicted felon was sentenced to a fifteen-year mandatory minimum penalty under the Armed Career Criminal Act, when their crime involved the mere possession of a few rounds of ammunition and no evidence that he or she intended to use that ammunition in the commission of any crime.[125] These are just some examples of what could constitute extraordinary and compelling reasons for a judge to reduce a sentence under the compassionate release provision.

With the changes made by the First Step Act, federal courts now have the power and authority to reduce a sentence—even in the absence of a BOP motion—if the court finds "other reasons," in that "there exists in the defendant's case an extraordinary and compelling reason other

123 *See id.* at § 403(b) ("This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.").

124 *See* 21 U.S.C. § 841(b).

125 *See* 18 U.S.C. § 922(g) (making it unlawful for someone with a felony conviction to possess firearms or "ammunition"); 18 U.S.C. § 924(e)(1) (requiring a fifteen-year mandatory minimum for possession of firearms or ammunition by one possessing three requisite prior convictions).

than, or in combination with, the reasons described in subdivisions (A) through (C)."[126]

III. CONGRESS SHOULD CREATE A TRUE SECOND LOOK PROVISION, REQUIRING A FEDERAL JUDGE TO REEVALUATE A SENTENCE AFTER A PRISONER HAS SERVED TEN YEARS.

Even if federal judges began releasing people with extraordinary and compelling reasons under the compassionate release provision, Congress should still enact a true second look provision. The criteria for a true second look provision would not require extraordinary and compelling reasons, and it could condition the second look on a particular period of time, such as ten years, with additional reviews at five-year intervals. A true second look would also provide categorical eligibility, meaning everyone would receive an opportunity to be resentenced.

I won't wade into the thicket of what would constitute the ideal second look sentencing provision, as scholars and practitioners have provided normative proposals on what second look provisions should include.[127] I will only add that Congress should resist the urge to exclude, as it did from the earned-time provisions of the First Step Act,[128] violent and sex offenses from the second-look provision. Most people convicted of violent or sex offenses, which represents a sizable number of people in federal prison,[129] will one day be released.[130] It is thus incumbent on Congress to incentivize their participation in behavioral therapy and educational programs designed to reduce recidivism. And the best incentive to encourage participation in recidivism-reducing programs is the incentive of early release.[131]

126 U.S.S.G. § 1B1.13, at Application Note 1(D).

127 *See* Margaret Colgate Love & Cecelia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859 (2011); Richard S. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT'G' REP. 194, 195 (2009).

128 *See* First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, at § 101, § 3632(d)(4)(D) (2018).

129 *See* Jacob Sullum, *The Number of Men in Federal Prison for Viewing or Sharing Child Pornography Has Nearly Septupled Since 2004*, REASON (Jan. 2, 2019), https://reason.com/2019/01/02/the-number-of-men-in-federal-prison-for ("The number of child pornography offenders in federal prison has nearly septupled since 2004, and most are serving mandatory sentences of five years or more, generally for crimes that did not involve assault or sexual abuse.").

130 *See* NATHAN JAMES, CONG. RESEARCH SERV., RL34287, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 3 (Jan. 12, 2015) (noting that "95% of all inmates will eventually return to the community").

131 *See* Shon Hopwood, *Beyond First Steps: How to Reform the Federal Bureau of Prisons*, 31 FED. SENT'G' REP. 119 (2018).

Congress should also set the review period at less than the 15 years proposed by the Model Penal Code.[132] A longer 15-year review period might be required due to political pressures in state criminal justice systems, which are largely full of those who have committed violent offenses, including those involving loss of life and serious bodily injury.[133] But the four largest drivers of the federal prison system are non-violent offenses involving drugs, immigration, fraud, and firearms.[134] For nonviolent offenses, a sentence of ten years is sufficiently punitive. In fact, a ten-year review for a system mostly containing people who committed non-violent offenses may still be too long, if the goal of the second look provision is utilitarian, such as reducing recidivism, and allowing people a second chance at a successful and law-abiding life.[135] Ten years in an American prison is an extraordinary amount of punishment, especially given that the punishment doesn't end the day of release, due to the thousands of collateral consequences that accompany a felony conviction.[136]

IV. U.S. ATTORNEYS CAN DISMISS CHARGES UNDER *HOLLOWAY* RELIEF FOR DESERVING PRISONERS WHO WERE OVER-SENTENCED

Every actor in the justice system should be empowered to protect liberty, and that is especially true for federal prosecutors, who have a unique role in the justice system. Although federal prosecutors represent the victims of federal crimes along with the federal government, using second look provisions to move those who have been rehabilitated and no longer represent a danger to the public is not inconsistent with that role.[137] And some injustices, such as imposing a trial penalty for those defendants who exercise their constitutional right to a jury trial, are uniquely within the prosecutor's domain and discretion. Given that prosecutors' responsibility is to do justice,[138] "prosecutors should be

132 *See* MODEL PENAL CODE § 305.6 (advocating for a second look provision for prisoners who have served fifteen years of any sentence of imprisonment, with recurring third and additional looks set at ten years).

133 *See* Wendy Sawyer & Peter Wager, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html.

134 *See* U.S. SENT'G COMMISSION, QUICK FACTS ON FEDERAL OFFENDERS IN THE BUREAU OF PRISONS (2017).

135 *See supra* Section I.B)

136 *See* Shon Hopwood, *Improving Federal Sentencing*, 87 UMKC L. REV. 79, 80-83, 88-92.

137 *See supra* Section I.B.

138 *See* Michael Herz, *"Do Justice!": Variations on a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors*

given the power and a formal responsibility to engage in some type of formalized second-look sentencing decision-making."[139]

Under the *Holloway* doctrine, U.S. Attorneys can be second-look sentencers by dismissing charges, even after a conviction and sentence have long become final. In *Holloway*, Judge John Gleeson requested that U.S. Attorney Loretta Lynch exercise her discretion to vacate two of Mr. Holloway's 18 U.S.C. § 924(c) convictions that, along with his crimes for carjacking, resulted in a sentence of fifty-seven years and seven months. Representing Ms. Lynch at a hearing, Assistant United States Attorney Sam Nitze noted that the case was indeed unique because Mr. Holloway had exhibited "extraordinary" rehabilitation, because he had already served twenty years of imprisonment, and because "people deserve another chance."[140] Judge Gleason resentenced Mr. Holloway to time served.[141]

After then U.S. Attorney Loretta Lynch dismissed charges, allowing Mr. Holloway to be resentenced, Judge Gleason commented that:

> This is a significant case, and not just for Francois Holloway. It demonstrates the difference between a Department of Prosecutions and a Department of *Justice*. It shows how the Department of Justice, as the government's representative in every federal criminal case, has the power to walk into courtrooms and ask judges to remedy injustices.
>
> The use of this power poses no threat to the rule of finality, which serves important purposes in our system of justice. There are no floodgates to worry about; the authority exercised in this case will be used only as often as the Department of Justice itself chooses to exercise it, which will no doubt be sparingly. But the misuse of prosecutorial power over the past 25 years has resulted in a significant number of federal inmates who are serving grotesquely severe sentences, including many serving multiple decades and even life without parole for narcotics offenses that involved no physical injury to others. Even seasoned federal prosecutors will agree that many of those sentences were (and remain) unjustly severe.[142]

Do Justice?, 44 VAND. L. REV. 45 (1991); *see also* Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 4 (1940) ("Although the government technically loses its case, it has really won if justice has been done.").

139 Douglas Berman, *Afternoon Keynote Address: Encouraging (and Even Requiring) Prosecutors to be Second-Look Sentencers*, 19 TEMP. POL. & CIV. RTS. L. REV. 429, 435 (2010).

140 United States v. Holloway, 68 F. Supp. 3d 310, 315 (E.D.N.Y. 2014).

141 *See* Joe Palozzolo, *Persuasive Judges Win Reduced Sentences for Some Convicts*, WALL ST. J. (Nov. 23, 2015), https://www.wsj.com/articles/persuasive-judges-win-reduced-sentences-for-some-convicts-1448324596.

142 *Holloway*, 68 F. Supp. 3d at 316–17 (emphasis included in original).

There are several arguments against federal prosecutors providing *Holloway* relief. The first is that if prosecutors dismiss charges after a final sentence, they will undermine the rule of law. Yet every day federal prosecutors exercise their discretion to bring or not bring, to go forward with or dismiss, charges against individual defendants. Doing so after a conviction and sentence is final is no different. Federal prosecutors already perform a similar task in the context of Federal Rule of Criminal Procedure 35, where prosecutors may move for a reduction of sentence at any time if a defendant provides substantial assistance to the government.[143] The discretion to reduce a sentence on the basis of substantial assistance after someone is sentenced does not violate the finality of convictions or the rule of law. So too for a second look.

Nor is there any separation of powers problem when prosecutors provide *Holloway* relief. As Professor Zachary Price has explained, "Presidents may properly decline to enforce civil and criminal prohibitions in particular cases, notwithstanding their obligation under the Take Care Clause to ensure that 'the Laws be faithfully executed,'" if the nonenforcement authority does not extend to "policy-based nonenforcement of federal laws for entire categories of offenders."[144] If the decision to provide *Holloway* relief is made on an individualized basis, the U.S. Attorneys' duty, under the Constitution's Take Care Clause, to faithfully execute the laws is fulfilled.[145]

Federal prosecutors have a duty to ensure that prosecutions and punishments are consistent with the Sixth Amendment right to a jury trial. The penalty some defendants face is so great that they are forced to waive their right to a trial by jury as part of a plea agreement to avoid an even stiffer punishment. When Adam Clausen received a 213-year sentence as a trial penalty for multiple and stacked 18 U.S.C. § 924(c) charges,[146] the prosecutors had a duty to right that unjust sentence.[147] Doing so is not inconsistent with the rule of law, but in accordance with it.

Another argument against federal prosecutors issuing *Holloway* relief is that it could lead to sentencing disparities between people who committed similar offenses. But sentencing disparities exist long before

143 *See* FED. R. CRIM. P. 35(b)(1), (2).

144 *See* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 674–75 (2014).

145 *See* Price, *supra* note 149, at 674–75; Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1788 (2016) ("The early constitutional history also suggests that faithful execution encompasses a power not to pursue particular offenders, based on innocence or considerations of justice and equity in particular cases.").

146 *See* Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695 (2017).

147 NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 6 (2018) (describing the "trial penalty").

a prosecutor decides to give someone a second look after their sentence is final. Law enforcement can create disparities before someone is even charged by manipulating the quantity or type of drug that a defendant buys or sells through controlled sales.[148] The moment someone is charged in federal versus state court, a disparity is created because the defendant is likely to spend more time in prison for a federal charge than similarly situated individuals in state court.[149] And the competence of defense counsel and the probation office, and the varying prosecutorial practices during the federal sentencing proceedings, including the amount of departure a particular Assistant U.S. Attorney provides for cooperation, also create sentencing disparities. Given 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.

V. THE PRESIDENT SHOULD COMMUTE THE SENTENCES OF THOSE WHO WERE UNABLE TO SEEK RELIEF THROUGH THE JUDICIAL SYSTEM, BUT WHO HAVE A DEMONSTRATED RECORD OF REHABILITATION AND WHO HAVE BEEN SENTENCED TOO HARSHLY.

Clemency should function as a meaningful backstop for any second look judicial review of sentences. Even if courts and federal prosecutors possess the ability to provide second looks of sentences, a properly functioning and robust clemency system would still be needed. Because an unsympathetic judge or prosecutor can thwart relief even for those who have been sentenced too harshly and demonstrated their rehabilitation, overlapping and independent avenues for relief must be available.

The current clemency process is anything but functioning or robust. Currently, a clemency petition can be blocked anywhere along a lengthy line of decision points. Located in the DOJ, the Office of Pardon Attorney ("OPA") begins the process by gathering information and making a recommendation on each individual clemency petition. Staff at OPA conduct the first review and are required to seek the opinion of the local line prosecutor who pursued the case. Petitions often receive negative recommendations at that point if the line prosecutor who brought the case recommends a denial. The line prosecutor can recommend a denial, even though he or she might not have seen the clemency petitioner for decades

148 *See* Jon O. Newman, *The Commission's Opportunity*, 8 FED. SENT'G REP. 8, 8–9 (1995).

149 *See* Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 741–43 (2002) (explaining why federal-state disparities should be considered at sentencing).

while the petitioner was incarcerated in federal prison. The second step is the recommendation by the Pardon Attorney. Based on information gathered by OPA staff, the Pardon Attorney makes a recommendation. If the Pardon Attorney makes an unfavorable recommendation, the clemency petition will likely go no further. The third stop is the desk of a staffer for the Deputy Attorney General ("DAG"), who does yet another review. The fourth stop is the DAG, who essentially supervises all criminal prosecutions at the DOJ and is a liaison between main DOJ and line prosecutors. The DAG is probably the least likely person to second guess a local line prosecutor who recommends a denial because of the close working relationship between the DAG and line prosecutors in the federal districts. Under the current process, if the DAG and Pardon Attorney disagree on a clemency petition, only the DAG's views are sent to the White House. And by the time a recommended denial gets to staff of the White House Counsel, any hope for clemency is ended. The White House Counsel's office has many other responsibilities, and it does not have the resources to identify deserving candidates in the face of DOJ opposition. White House Counsel conducts the final review and passes only favorable recommendations on to the president.[150]

I'm not the first to illustrate the numerous problems with this process. Professors Rachel Barkow and Mark Osler have written extensively on the problems with the current process.[151] To begin with, the process allows the DOJ to thwart the president's clemency prerogatives. This is exactly what occurred under the Obama Administration. President Obama set criteria for his clemency power and his pardon attorney made numerous favorable recommendations. But his DAG overruled the Pardon Attorney's favorable recommendations in

150 For scholarship explaining the current clemency process, see Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1172–204 (2010).

151 *See, e.g.*, Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 388 (2017); Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 840 (2015); Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and A Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015); Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 153 (2009). They are not the only ones to address the problems of federal clemency. *See, e.g.*, Paul J. Larkin, Jr., *Essay: A Proposal to Restructure the Clemency Process—The Vice President as Head of a White House Clemency Office*, 40 HARV. J.L. & PUB. POL'Y 237 (2017); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 846–47 (2016); Margaret Colgate Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89 (2016); Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L.J. 730, 751–54 (2012).

many individual cases,[152] and "secretly kept from the White House the contrary opinions of the DOJ Pardon Office in the many cases in which [the DAG] overruled or refused to act on the Pardon Office's recommendation for clemency."[153] President Obama was not the only president to have his clemency power thwarted: President George W. Bush "explicitly complained that he was not being provided with [clemency] grant recommendations when he sought them and urged President Obama to focus on fixing the clemency process."[154]

The current process also poses an inherent conflict of interest because, as scholar Paul J. Larkin, Jr., has noted, "[t]he current system leaves too much authority over clemency petitions to the Justice Department, the very agency that prosecuted every federal clemency applicant."[155] On occasion, the president and DOJ have different policy perspectives as to criminal justice issues, and, under the Constitution, the president's views should prevail.

Even when the president's policy prerogatives are upheld by DOJ's review of clemency petitions, the process is needlessly bureaucratic, requiring many rounds of sequential review.[156] Multiple layers of sequential review are redundant and inefficient, especially given that five of the deciders do not even specialize in clemency and have countless other tasks. For a single clemency petition to be granted, essentially seven different decision-makers must agree that a petition is deserving. No wonder so few clemency petitions are granted.

As Professors Barkow and Osler have suggested, bringing the clemency process within the White House's domain is the only way to ensure that the president's prerogatives take precedence over those of the DOJ.[157] Per their recommendations, the White House should create an independent and bipartisan review commission that reports directly to the president and that includes input from the DOJ.[158] Presidents should make the use of clemency a routine part of the federal criminal justice system. Alice Marie Johnson was not the only person in federal prison who was rehabilitated yet stuck serving a draconian sentence. Clemency can help identify the Alice Marie Johnsons and then release them.

152 *See* Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. FORUM 791, 806–07 (2019).

153 Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About Criminal Justice Reform*, 128 YALE L.J. FORUM 848, 915 (2019).

154 Barkow, *Clemency and Presidential Administration of Criminal Law*, *supra* note 151, at 828.

155 Paul J. Larkin, Jr., *"A Day Late and a Dollar Short"—President Obama's Clemency Initiative 2014*, 16 GEO. J. L. & PUB. POL'Y 147, 161 (2018).

156 *See* Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and A Plan for Renewal*, 82 U. CHI. L. REV. 1, 5 (2015).

157 *Id.*

158 *Id.*

CONCLUSION

It is difficult, if not impossible, to determine who, after having been convicted of a serious crime, has the capacity to become rehabilitated and redeemed. Character is not static, people change, and the law must recognize this reality.

There is little reason to continue warehousing people who have been adequately punished by serving long sentences, and who are no longer a danger to society. The social costs to the families left behind, the loss of human capital and productivity, and the need to give people a second chance at redemption all favor identifying people like Matthew Charles and releasing them.

There is good news. Under the First Step Act and prosecutorial discretion, federal courts and prosecutors have second look tools at their disposal to identify the deserving and reduce their sentence or outright release them. Congress should provide similar remedies on a broader scale, and when those remedies don't always work as expected, the president can remedy any injustices by revamping the clemency process and then granting clemency petitions for the deserving. We all benefit when people are given a second look at an opportunity for a second chance.