

## Extraordinary and Compelling: a Re-examination of the Justifications for Compassionate Release

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**EXTRAORDINARY AND COMPELLING:  
A RE-EXAMINATION OF THE JUSTIFICATIONS FOR  
COMPASSIONATE RELEASE**

WILLIAM W. BERRY III\*

*Federal law contains a rarely used provision that permits the immediate release of federal prisoners. This safety valve provision requires the Director of the Bureau of Prisons to make a motion on behalf of the prisoner in order to secure the prisoner's compassionate release. Far from being a veiled version of parole, this compassionate release provision is to be used only in circumstances deemed "extraordinary and compelling." While the Bureau of Prisons has read this language very narrowly for many years, considering only terminally ill inmates as candidates for compassionate release, the United States Sentencing Commission modified its Commentary to the Sentencing Guidelines in November 2007, defining for the first time criteria for determining what should be deemed "extraordinary and compelling." Specifically, the Commission's guideline commentary provides that extraordinary and compelling circumstances may include: (1) terminal illness, (2) debilitating physical conditions that prevent inmate self-care, and (3) death or incapacitation of the only family member able to care for a minor child.*

*This Article considers the theoretical justifications for compassionate release in an attempt to develop a framework to evaluate what circumstances rise to the level of "extraordinary and compelling." As explained herein, there is a need for such a framework given the Bureau of Prisons' general unwillingness to consider compassionate release unless it is for "medical parole." First, this Article argues that the state's purposes for punishment, whether retributive or utilitarian, do not by themselves justify the compassionate release of inmates. As a result, this Article proposes that the basis for compassionate release should lie in the broader interests of the state. Thus, this Article contends 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.*

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## I. INTRODUCTION

*“Justice is the tolerable accommodation of the conflicting interests of society, and I don’t believe there is any royal road to attain such accommodation concretely.”—Judge Learned Hand<sup>1</sup>*

Conflicting interests lie at the heart of the sentencing process. Not limited to the obvious competing interests of the state and the offender, the state’s broader punishment interests can often conflict. The state’s interest in giving an offender his just deserts, for instance, competes with its interests in deterring others from committing the same crime, incapacitating the offender to protect society, and rehabilitating the offender.<sup>2</sup> The battle for supremacy between such interests often occurs when a judge considers whether certain evidence is grounds for mitigating a sentence.<sup>3</sup>

Although parole was abolished with the passage of the Sentencing Reform Act of 1984,<sup>4</sup> the potential for mitigating a federal sentence does not end with the sentencing decision of the federal trial judge. Rule 35(b) of the Federal Rules of Criminal Procedure authorizes the court, upon motion by the government, to reduce the sentence to reflect substantial assistance provided to the government by the defendant after the sentence became final.<sup>5</sup> In addition, where

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1. Philip Hamburger, *The Great Judge*, LIFE, Nov. 4, 1946, at 117 (quoting Judge Hand).

2. See ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 67–92 (4th ed., Cambridge Univ. Press 2005) (1992) (discussing these competing purposes and their theoretical bases).

3. In fact, federal judges are required to weigh these competing purposes of punishment in sentencing pursuant to 18 U.S.C. § 3553(a). See 18 U.S.C. § 3553(a) (2006) (listing factors federal courts should consider in determining a sentence that is “sufficient, but not greater than necessary”). For a discussion of the conflicting nature of these purposes as applied in the context of federal sentencing, see William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After Booker and its Progeny*, 40 CONN. L. REV. 631 (2008).

4. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.). The Sentencing Reform Act of 1984 is one component of the larger Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

5. FED. R. CRIM. P. 35(b). Rule 35(b) states:

(b) Reducing a Sentence for Substantial Assistance.

(1) *In General*. Upon the government’s motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission’s guidelines and policy statements.

(2) *Later Motion*. Upon the government’s motion made more than one year after sentencing, the court may reduce a sentence if the defendant’s substantial assistance involved:

the United States Sentencing Commission has subsequently reduced the guideline range used to sentence the defendant, the court may reduce the sentence upon a motion by the defendant or the Director of the Bureau of Prisons.<sup>6</sup>

Federal law, unbeknownst to many, includes another stipulation that authorizes the immediate release of federal prisoners. This safety valve provision demands that the Director move on behalf of the prisoner to secure the prisoner's compassionate release.<sup>7</sup> Not a veiled version of parole, this compassionate release provision is only to be used in circumstances deemed "extraordinary and compelling."<sup>8</sup> The Bureau of Prisons has read this language very narrowly for many years, considering only terminally ill inmates as candidates for compassion-

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(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

*Id.* Significantly, this provision allows for the reduction of a sentence below the mandatory minimum. *Id.* 35(b)(4).

6. *See* 18 U.S.C. § 3582(c)(2) (2006) ("[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. [§] 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in [§] 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.").

7. *Id.* § 3582(c)(1)(A).

8. *Id.* § 3582(c)(1)(A)(i). In its entirety, § 3582(c)(1)(A) provides that:

The court may not modify a term of imprisonment once it has been imposed except that:

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in § 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under § 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under § 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

*Id.*

ate release.<sup>9</sup> In November 2007, however, the Sentencing Commission modified its Commentary to the Sentencing Guidelines, defining for the first time criteria for determining circumstances that should be deemed “extraordinary and compelling.” Specifically, the Commission’s new Commentary provides that extraordinary and compelling circumstances can include: (1) terminal illness, (2) debilitating physical conditions that prevent inmate self-care, and (3) death or incapacitation of the only family member able to care for a minor child.<sup>10</sup> In addition, the Commentary provides that compassionate release may be granted where, “[a]s determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the [three] reasons described [previously].”<sup>11</sup>

As explained below, the Bureau of Prisons has ignored, in many ways, the broader statutory language as well as its own regulations in its decision to limit the application of “compassionate release” to prisoners who are terminally ill. By limiting the use of the safety valve to cases of “medical parole,” the Bureau eschews the more difficult categories of prisoners who, for one of the reasons discussed below, may be considered for release given the facts of their particular situation. 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.

This Article will consider the theoretical justifications for compassionate release in an attempt to develop a framework to evaluate what circumstances rise to the level of “extraordinary and compelling.” First, the Article will argue that the state’s purposes for punishment, whether retributive or utilitarian, do not by themselves justify the compassionate release of inmates. As a result, this Article will propose that the basis for compassionate release should lie in the broader interests of the state. Thus, the Article will argue 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

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9. See FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, CHANGE NOTICE NO. 5050.46, PROGRAM STATEMENT CONCERNING COMPASSIONATE RELEASE; PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. 3582(c)(1)(A) & 4205(g) (1998), [http://www.bop.gov/policy/progstat/5050\\_046.pdf](http://www.bop.gov/policy/progstat/5050_046.pdf) [hereinafter BOP PROGRAM STATEMENT] (indicating that prisoners only can receive compassionate release for extraordinary or extremely grave medical circumstances).

10. U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. (2008).

11. *Id.*

the inmate serving the entire sentence before compassionate release may be justified.

Part II of this Article will explain the significance of the compassionate release provision in light of the large number of inmates in federal prison, and will provide a vignette of one prisoner's alleged "extraordinary and compelling" circumstance that was rejected by the Bureau of Prisons Director. Part III will outline the statutory and administrative landscape surrounding the compassionate release provision and describe the Sentencing Commission's adoption of the guideline commentary. Part IV of the Article will argue that the traditional purposes of punishment—just deserts, deterrence, incapacitation, and rehabilitation—cannot alone serve as the basis for awarding compassionate release to prisoners. Part V will argue that the basis for compassionate release should lie in the broader, non-penal interests of the state, and that circumstances should be considered extraordinary and compelling only when such interests greatly outweigh the state's penological interests as applied to the prisoner at issue.

## II. THE CASE FOR RECONSIDERING COMPASSIONATE RELEASE

*"When we are at the end of life, to die means to go away; when we are at the beginning, to go away means to die."*—Victor Hugo<sup>12</sup>

### A. A Penological Crisis?

The United States of America has "five percent of the world's population and twenty-five percent of the world's known prison population."<sup>13</sup> As of September 2008, 2.3 million Americans were in prison, meaning that almost one out of every one hundred Americans are imprisoned.<sup>14</sup> From 2000 to 2006, the average annual growth rate

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12. VICTOR HUGO, *LES MISÉRABLES* 112 (Charles E. Wilbour trans., Carleton 1862) (1862).

13. See *Illegal Drugs: Economic Impact, Societal Costs, Policy Responses: Hearings Before the J. Economic Comm.*, 110th Cong. (2008) (statement of Sen. Jim Webb, Member, Joint Economic Comm.), available at [http://jec.senate.gov/index.cfm?FuseAction=Hearings.HearingsCalendar&ContentRecord\\_id=9d0729b4-eefe-2b3e-7931-fb353bebe2a8](http://jec.senate.gov/index.cfm?FuseAction=Hearings.HearingsCalendar&ContentRecord_id=9d0729b4-eefe-2b3e-7931-fb353bebe2a8) (providing an online video clip of the committee hearing in which Senator Webb made his remarks about prison populations). Senator Webb added, "Either we have the most evil people in the world, or we are doing something wrong with the way that we handle our criminal justice system. And I choose to believe the latter." *Id.*

14. Neal Peirce, *Real Commander Needed for the War on Drugs*, SEATTLE TIMES, Sept. 7, 2008; Carol S. Steiker, *Passing the Buck on Mercy*, WASH. POST, Sept. 8, 2008, at B7. Amazingly, this criminal justice reality is not part of the political debate, even in an election year. See generally *Sentencing Law and Policy*, <http://sentencing.typepad.com/> (Aug. 25, 2008, 5:17 EST) (displaying numerous posts that bemoan the failure of politicians to address and debate criminal justice issues, including the size of the prison population).

of incarceration was 2.6%.<sup>15</sup> This continues the trend of a more than fivefold (over 500%) increase in prison population in the United States between 1972 and 2003.<sup>16</sup> Commentators have increasingly questioned the size of the prison population and the continued move toward mass incarceration, suggesting that such widespread imprisonment is counterproductive in the fight against crime.<sup>17</sup> This is particularly true given that almost half of the current state prison population committed non-violent crimes.<sup>18</sup>

In federal prisons, the number of inmates exceeds 200,000.<sup>19</sup> Unlike the various state jurisdictions, many of which have parole, the federal government has not had any parole system since abolishing it under the Sentencing Reform Act of 1984.<sup>20</sup> As a result, the safety valve addressed in this Article magnifies in importance because it remains one of the few ways in which a federal prison sentence can be reduced.<sup>21</sup>

The size of the prison population and its continuing increase, however, only tells a part of the broader story. As the general population grows older as the baby boomers age, so does the prison population. Over the last two decades, the number of older prisoners has increased by 750% nationwide.<sup>22</sup> As a result, the provision of medical care in prison has become an increasing burden on state governments. While the average cost of housing an inmate ranges from

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15. Bureau of Justice Statistics, U.S. Dep't of Justice, Prison Statistics, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last visited May 11, 2009) [hereinafter BOJ Prison Statistics]. Including those on probation and parole, the United States currently has over seven million people under some form of criminal supervision. Howard Silver, *The Costs of Mass Incarceration Examined by Congressional Panel*, 36 ASA FOOTNOTES (2008), available at [http://www.asanet.org/footnotes/feb08\\_R/fn3.html](http://www.asanet.org/footnotes/feb08_R/fn3.html).

16. MARC MAUER, RACE TO INCARCERATE 10 (2006).

17. See, e.g., Erik Luna, *The Overcriminalization Phenomena*, 54 AM. U. L. REV. 703, 719, 725–29 (2005) (discussing lawmakers' incentives to add new offenses and enhance penalties and the unfortunate consequences that result); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) (discussing criminal law's push toward more liability).

18. BOJ Prison Statistics, *supra* note 15.

19. Fed. Bureau of Prisons, Weekly Population Report, [http://www.bop.gov/news/weekly\\_report.jsp](http://www.bop.gov/news/weekly_report.jsp) (last visited May 11, 2009).

20. Berry, *supra* note 3, at 638–40.

21. See, e.g., Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 FED. SENT'G REP. 188, 188 (2001) (discussing three potential methods under the Sentencing Reform Act for reducing an otherwise final sentence).

22. Tia Gubler, *Elderly Prisoners Are Literally Dying for Reform 2* (Stanford Criminal Justice Ctr., Cal. Sentencing & Corr. Policy Series Working Papers, 2006), available at <http://ssrn.com/abstract=977249>. Justice Department statistics indicate that between 2000 and 2005, the number of inmates in federal and state prisons who are fifty-five and older increased by thirty-three percent. *Health Woes Rising in Graying Prisons*, NEWSDAY (N.Y.), Oct. 3, 2007, at A26 [hereinafter *Health Woes*].

\$18,000 to \$31,000 per year, the cost of caring for elderly inmates is “significantly higher.”<sup>23</sup> The increasing costs and financial burden of sustaining such prisoners raise serious questions about the efficacy of keeping all elderly inmates in penal institutions. As put aptly by an elderly prisoner, “‘What can an 80-year-old man in a wheelchair do? Run?’”<sup>24</sup>

*B. Jason and Jayci Yaeger*

The context of the compassionate release story does not end with the growing concern about mass incarceration and the health care needs of the aging prison population. There are situations in which individual circumstances of prisoners and their families are so extenuating and compelling that compassionate release is, at the very least, worthy of serious consideration. The story of the Yaeger family is perhaps emblematic of such situations.

Jason Yaeger was convicted of possession and distribution of methamphetamines in 2003 and sentenced to five and one-half years in a federal prison camp in Yankton, South Dakota.<sup>25</sup> In October 2007, doctors diagnosed Jayci, Yaeger’s ten-year-old daughter, with terminal brain cancer. The doctors informed Jayci’s mother that Jayci’s condition had become untreatable and that all they could do was keep her comfortable during her final days.<sup>26</sup>

Jayci’s last wish was to spend what time she had left with her father, who remained in a minimum security federal prison camp three hours away from Jayci’s hospice bed in Lincoln, Nebraska.<sup>27</sup> As her mother Vonda Yaeger explained, “I think she understands [her disease]. She knows what the outcome is going to be. She’s very scared, and I think she’s holding on for her father.”<sup>28</sup> Her mother added, “She expressed many times that she misses him, and he talks to her on the phone now and she cries. That’s the only time I see her cry.”<sup>29</sup>

When doctors determined that Jayci’s death was imminent, Jason Yaeger had only one year remaining on his sentence. Federal officials, however, were planning to release him to a halfway house in

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23. *Health Woes*, *supra* note 22.

24. *Id.*

25. Kendra Waltke, *Prison Keeps Father from Dying Daughter*, LINCOLN J. STAR (Neb.), Mar. 22, 2008, at B1 [hereinafter Waltke, *Prison Keeps Father*].

26. David Jespersen, *Jayci Yaeger: A Dying Wish*, KOLN/KGIN, Mar. 24, 2008, <http://www.kolnkgin.com/home/headlines/16762906.html>.

27. Waltke, *Prison Keeps Father*, *supra* note 25.

28. Jespersen, *supra* note 26.

29. *Id.*

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August 2008 to serve the final seven months of his sentence.<sup>30</sup> Given his daughter's rapidly deteriorating condition, Yaeger petitioned for compassionate release from prison in order to spend the last few weeks and months of his daughter's life with her.<sup>31</sup>

In an interview with ABC News, Jason Yaeger explained his sentiments:

I am sorry for what I have done . . . I'm not asking to get out of my sentence—just to go from one place of imprisonment to another so I can be with my family. Jayci is sitting in a hospice fighting for her life and [her mother] thinks she is holding on for me to get there. She wants me and needs me and I want to be there with her on her last day.<sup>32</sup>

The prison warden, J.D. Whitehead, denied Yaeger's request for compassionate release and his request to be released to the halfway house five months earlier than planned.<sup>33</sup> Additionally, Whitehead even denied Yaeger's requests for a furlough to spend time with his daughter.<sup>34</sup> The Bureau of Prisons explained its denial as follows:

Bureau of Prisons officials have reviewed Inmate Yaeger's request for a compassionate release and have determined his situation does not meet the criteria . . . [.] Our agency's mission is to protect society by confining offenders in controlled environments of prisons and community based facilities which are safe, humane, and appropriately secure.<sup>35</sup>

During the winter, the prison allowed Yaeger daily phone contact with his daughter, but her condition eventually rendered her too weak to talk.<sup>36</sup> According to Vonda Yaeger, by March 2008, "her daughter's voice ha[d] been replaced with tears that roll[ed] down her face whenever she hear[d] her father's voice."<sup>37</sup>

In part as a result of media and political pressure, Jason Yaeger was permitted to visit his daughter briefly on four occasions between October 2007 and March 2008.<sup>38</sup> The last of these visits came on

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30. Kendra Waltke, *Dad Gets Another Visit with Dying Girl*, LINCOLN J. STAR (Neb.), Mar. 28, 2008, at A1 [hereinafter Waltke, *Dad Gets Another Visit*].

31. *Id.*

32. The Criminal Report Daily: Investigation Discovery, <http://investigation.discovery.com/blogs/criminal-report/mar24/mar24.html> (Mar. 24, 2008, 10:23 EST) [hereinafter Criminal Report Daily] (internal quotation marks omitted).

33. *Id.*

34. Waltke, *Prison Keeps Father*, *supra* note 25.

35. Criminal Report Daily, *supra* note 32 (internal quotation marks omitted).

36. *Id.*

37. *Id.*

38. Waltke, *Dad Gets Another Visit*, *supra* note 30.

March 26, 2008, under the supervision of prison officials and lasted a mere twenty minutes.<sup>39</sup> Two days later, Jayci Yaeger succumbed to brain cancer and died.<sup>40</sup>

At the time of her death, the Yaegers remained upset with prison officials because Jason Yaeger was not by his daughter's side when she died.<sup>41</sup> As expressed by Lori Yaeger, Jayci's aunt, "He was denied the proper good-bye."<sup>42</sup>

### III. COMPASSIONATE RELEASE IN THE FEDERAL SYSTEM

The Yaeger family's heartbreaking story raises questions as to what circumstances are so "extraordinary and compelling" that they rise to the level of "compassionate release," and perhaps more importantly, how to conceptualize the question in order to grant compassionate release in truly "extraordinary and compelling" circumstances while avoiding ad hoc and arbitrary applications of the "extraordinary and compelling" standard. Before addressing these questions, however, it is instructive to review the provisions and framework that govern the exercise of compassionate release.

#### A. Adoption of Sentencing Guidelines

In 1984, Congress passed the Sentencing Reform Act of 1984 ("SRA").<sup>43</sup> The SRA called for the creation and adoption of a federal sentencing commission charged with creating mandatory sentencing guidelines for federal judges to use in the sentencing of violators of federal law. Importantly, the SRA abolished parole for all federal prisoners who committed crimes on or after November 1, 1987.<sup>44</sup> As a result, when defendants received a federal prison sentence, the full sentence would be served in most cases.<sup>45</sup> Recognizing the certainty

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39. Christopher Francescani & Scott Michels, *Girl Succumbs to Cancer After Visit From Inmate Dad*, ABC News, Mar. 28, 2008, <http://abcnews.go.com/TheLaw/story?id=4543459>.

40. *Id.*

41. *Id.*

42. *Id.*

43. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

44. Act of June 25, 1948, ch. 645, 62 Stat. 854, 855, *repealed by* Sentencing Reform Act of 1984, ch. 2, § 218(a)(5), 98 Stat. 1987, 2027.

45. There are, of course, slight reductions available for good behavior, but these typically only shave off a small part of the sentence. *See* 18 U.S.C. § 3624(b)(1) (2006) (stating that a prisoner may reduce his sentence by up to fifty-four days per year served by displaying "exemplary compliance with institutional disciplinary regulations").

of such sentences, Congress adopted several “safety valve” provisions to allow for courts to avoid injustice in certain circumstances.<sup>46</sup>

Specifically, 18 U.S.C. § 3582(c) defines the circumstances under which a federal court may modify an imposed term of imprisonment.<sup>47</sup> One avenue of possible modification<sup>48</sup> allows a federal court “upon motion of the Director of the Bureau of Prisons” to reduce the term of a sentence if it finds that: (1) “extraordinary and compelling reasons warrant such a reduction,” or (2) “the defendant is at least 70 years of age, has served at least 30 years in prison,” and the Director determines that “[he] is not a danger to the safety of any other person or the community,”<sup>49</sup> and that “reduction is consistent

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46. As mentioned above, these included a modification of Rule 35 and a safety valve provision allowing for the modification of a sentence where the Sentencing Commission altered the guideline range after the sentence was imposed. *See supra* notes 5–7 and accompanying text. Interestingly, the federal statute did contain a “compassionate release” provision, 18 U.S.C. § 4205(g), which the Sentencing Reform Act repealed. *See supra* note 44 and accompanying text.

47. *See supra* note 8.

48. Note that § 3582(c) applies only to individuals currently serving a term of imprisonment. If the defendant was previously in prison and is now on supervised release, he or she may be able to ask for modification of the release term under 18 U.S.C. § 3583(e)(1), which states:

The court may, after considering the [§ 3553] factors . . .

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice.

18 U.S.C. § 3583(e)(1) (2006).

49. *Id.* § 3583(c)(1). Specifically, 18 U.S.C. § 3142(g) defines the criteria for determining when an offender is a threat to individual or community safety. It provides:

Factors To Be Considered—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person’s release. In considering the conditions of release . . . , the judicial officer may upon his own motion, or shall upon the motion

with [the] applicable policy statements issued by the Sentencing Commission.”<sup>50</sup>

The legislative history of 18 U.S.C. § 3582 provides additional insight into the congressional intent in establishing this safety valve. The Senate Judiciary Committee’s Report on the SRA identifies the compassionate release safety valve’s purpose. In particular, the Senate Report, the “most important” documentation of SRA’s legislative history,<sup>51</sup> states:

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 defend[ant] was convicted have been later amended to provide a shorter term of imprisonment . . . . The bill . . . provides . . . for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is a justification for reducing a term of imprisonment in situations such as those described.<sup>52</sup>

The Committee clearly envisioned, from this language, that extraordinary and compelling circumstances could result from severe illness. The language also contemplates, however, extraordinary and compelling circumstances that do not relate to the medical condition of the inmate.<sup>53</sup> The *Prosecutors Handbook on Sentencing Guidelines and Other Provisions of the Sentencing Reform Act of 1984* issued by the Department of Justice notes:

The value of the forms of “safety valves” contained in this section lies in the fact that they assure the availability of spe-

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of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

*Id.* § 3142(g).

50. *Id.* § 3582(c)(1).

51. CRIMINAL DIV., U.S. DEP’T OF JUSTICE, PROSECUTORS HANDBOOK ON SENTENCING GUIDELINES AND OTHER PROVISIONS OF THE SENTENCING REFORM ACT OF 1984, at 83 (1987) [hereinafter PROSECUTORS HANDBOOK], reprinted in THOMAS W. HUTCHINSON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE: SUPPLEMENTARY APPENDICES app. 11 (1989).

52. S. REP. NO. 98-225, at 55–56 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3238–39; see also Price, *supra* note 21, at 189.

53. See Price, *supra* note 21, at 189.

cific review and reduction of a term of imprisonment for “extraordinary and compelling” reasons and to respond to changes in the guidelines. The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.<sup>54</sup>

In addition to providing for compassionate release, Congress also mandated that the Sentencing Commission aid in determining what situations were “extraordinary and compelling” enough to warrant compassionate release. 28 U.S.C. § 994(t) requires the Sentencing Commission, in promulgating its policy statements dealing with the sentence modification provisions of Section 3582(c)(1)(A), to identify “what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples,” and specifies that “[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.”<sup>55</sup> The Sentencing Commission’s pre-2007 policy statement concerning “extraordinary and compelling” circumstances, Section 1B1.13 of the Sentencing Guidelines, simply recapitulates Section 3582(c).<sup>56</sup> Its pre-2007 Commentary<sup>57</sup> does not provide any specific examples or even broad criteria addressing what might be “extraordinary and compelling” in response to the admonition of Section 994(t).<sup>58</sup> The Commission, thus, prior to 2007, provided no

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54. PROSECUTORS HANDBOOK, *supra* note 51, at 121.

55. 28 U.S.C. § 994(t) (2000).

56. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 (2006).

57. The Commentary to the Sentencing Guidelines and its policy statements cannot be ignored. Section 1B1.7 of the pre-2007 Sentencing Guidelines explains the significance of the Commentary:

The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.

*Id.* § 1B1.7 (citation omitted).

58. The pre-2007 Commentary to Section 1B1.13 of the Sentencing Guidelines states:  
Application Notes:

1. Application of Subsection (1)(A)—

(A) Extraordinary and Compelling Reasons—A determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for

guidance to the Bureau of Prisons as to what it believed constituted an “extraordinary and compelling” circumstance.

*B. Bureau of Prisons Compassionate Release Regulations and Procedures*

In addition to the work of the Sentencing Commission, the Bureau of Prisons has promulgated its own regulation concerning the Director’s use of Section 3582(c).<sup>59</sup> This provision defines “extraordinary and compelling” circumstances as ones that “could not reasonably have been foreseen by the court at the time of sentencing.”<sup>60</sup> This provision has generally been interpreted to refer to situations where the inmate is terminally ill or close to death.<sup>61</sup>

In practice, the Director has used his authority under 18 U.S.C. § 3582(c) and Section 1B1.13 of the Sentencing Guidelines sparingly, particularly in light of the number of inmates in federal prison. The

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extraordinary and compelling reasons shall be considered as such for purposes of subdivision (1)(A).

(B) Rehabilitation of the Defendant.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of subdivision (1)(A).

2. Application of Subdivision (3).—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

Background: This policy statement is an initial step toward implementing 28 U.S.C. § 994(t). The Commission intends to develop further criteria to be applied and a list of specific examples of extraordinary and compelling reasons for sentence reduction pursuant to such statute.

*Id.* § 1B1.13.

59. *See* 28 C.F.R. § 571.60 (2008).

60. *Id.* In its entirety, 28 C.F.R. § 571.60 provides:

Under 18 U.S.C. [§] 4205(g), a sentencing court, on motion of the Bureau of Prisons, may make an inmate with a minimum term sentence immediately eligible for parole by reducing the minimum term of the sentence to time served. Under 18 U.S.C. [§] 3582(c)(1)(A), a sentencing court, on motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment of an inmate sentenced under the Comprehensive Crime Control Act of 1984. The Bureau uses [§] 4205(g) and [§] 3582(c)(1)(A) in particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing.

*Id.*

61. *See* Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to Be Merciful*, 27 *FORDHAM URB. L.J.* 1483, 1494 n.41 (2000) (noting that extraordinary and compelling circumstances are generally interpreted as terminal illnesses and dire situations close to death); Price, *supra* note 21, at 188 (noting that sentence reductions typically occur only when a prisoner nears death).

lack of a guiding standard may be part of the reason why the Director has decided to file relatively few motions.<sup>62</sup>

Before the Director of the Bureau of Prisons will make a motion on behalf of a prisoner for compassionate release, the prisoner must proceed through the Bureau of Prisons' administrative process and meet specific criteria. The procedures for the inmate and the Director to follow with regard to a motion for compassionate release are outlined in 28 C.F.R. §§ 571.60–.64, and the Bureau of Prisons has provided implementing information for those regulations in the Bureau of Prisons Program Statement 5050.46 (“BOP Program Statement”).<sup>63</sup>

The BOP Program Statement articulates the following objectives of the compassionate release program:

A motion for a modification of a sentence will be made to the sentencing court only in particularly extraordinary or compelling circumstances that could not reasonably have been foreseen by the court at the time of sentencing.

The public will be protected from undue risk by careful review of each compassionate release request.

Compassionate release motions will be filed with the sentencing judge in accordance with the statutory requirements of 18 U.S.C. § 3582(c)(1)(A) . . . .<sup>64</sup>

Under the federal regulations, a request for a compassionate release motion “shall be submitted to the Warden.”<sup>65</sup> The request “[o]rdinarily . . . shall be in writing, and submitted by the inmate,” but “[a]n inmate may initiate a request . . . only when there are particularly extraordinary and compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing.”<sup>66</sup> The inmate's request must contain, “at a minimum,” the following information:

- (1) The extraordinary or compelling circumstances that the inmate believes warrant consideration.
- (2) Proposed release plans, including where the inmate will reside, how the inmate will support himself/herself, and, if

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62. See, e.g., John R. Steer & Paula K. Biderman, *Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences*, 13 FED. SENT'G REP. 154, 157 (2000) (“Without the benefit of any codified standards, the Bureau [of Prisons], as turnkey, has understandably chosen to file very few motions under this section.”).

63. See 28 C.F.R. §§ 571.60–571.64 (2008); BOP PROGRAM STATEMENT, *supra* note 9.

64. BOP PROGRAM STATEMENT, *supra* note 9, at 2.

65. 28 C.F.R. § 571.61(a) (2008).

66. *Id.*

the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment.<sup>67</sup>

If another individual makes a "compassionate release" request on behalf of an inmate, the Bureau of Prisons processes it in the same manner, and all requests are sent to the warden of the institution where the inmate is held, even those originally received at a central or regional office.<sup>68</sup>

For an inmate's request to be granted and the Director to make a compassionate release motion on his or her behalf, the request must survive several levels of review.<sup>69</sup> The warden of the inmate's institution conducts the first review.<sup>70</sup> The warden investigates the inmate's request and decides whether to refer, via written recommendation, the request to the Regional Director.<sup>71</sup> If the Regional Director finds the request worthy of approval, he also prepares a written recommendation and refers the request to the General Counsel of the Bureau of Prisons.<sup>72</sup>

The General Counsel must then determine whether the request for compassionate release warrants approval.<sup>73</sup> If the General Counsel so finds, she then must seek the opinion of "either the Medical Director or the Assistant Director" of the Correctional Programs Divi-

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67. *Id.* Note that while the Bureau of Prisons has not granted requests for release unrelated to the health of the inmate, the language of this provision clearly contemplates petitions made on grounds unrelated to medical conditions.

68. *Id.* § 571.61(b).

69. *See id.* § 571.62(a).

70. *Id.* § 571.62(a)(1).

71. *Id.* To refer the request to the Regional Director, the warden must prepare a written recommendation. According to the *BOP Program Statement*, the warden additionally must compile a significant amount of information, including: (1) a complete copy of the inmate's Judgment and Commitment Order and sentence computation data; (2) a current progress report completed within the last thirty days; (3) all pertinent medical records if the inmate's request is based on poor health, which must include, "at a minimum, a comprehensive medical summary by the attending physician" providing a life expectancy estimate and "all relevant test results, consultations[,] and referral reports/opinions;" (4) several administrative documents related to the sentencing process, such as a copy of the Presentence Investigation; (5) where a period of supervised release follows the prison sentence, "confirmation that release plans have been approved by the appropriate U.S. Probation Office," and where no supervised release occurs after imprisonment, a statement of the inmate's post-release plans and; (6) a post-release plan statement that includes, "at a minimum, a place of residence and . . . method of financial support, and may require coordination with [organizations], such as hospices, the Department of Veterans Affairs or veterans groups, Social Security Administration, welfare agencies, local medical organizations, or the inmate's family." *BOP PROGRAM STATEMENT*, *supra* note 9, at 3-4.

72. 28 C.F.R. § 571.62(a)(2).

73. *Id.* § 571.62(a)(3).

sion, depending on the basis for the request.<sup>74</sup> After receiving that opinion, the General Counsel will then forward the request to the Bureau of Prisons Director for a final decision.<sup>75</sup>

If the Director of the Bureau of Prisons grants the request, the Director will contact the U.S. Attorney in the district where the inmate was sentenced regarding his plan to move the sentencing court to reduce the inmate's minimum sentence to time already served.<sup>76</sup> Upon receiving "notice that the sentencing court has entered an order granting the [compassionate release] motion," pursuant to 18 U.S.C. § 3582(c)(1)(A), "the [w]arden of the institution . . . shall release the inmate forthwith."<sup>77</sup> The federal regulations further provide that where "the basis of the request is the medical condition of the inmate, staff shall expedite the request [for compassionate release] at all levels."<sup>78</sup>

Most requests, however, are denied. In instances where the warden or Regional Director denies the inmate's request, the disapproving official must furnish the inmate with written notice and a statement listing the reasons for denial.<sup>79</sup> While "[t]he inmate may appeal the denial through the Administrative Remedy Procedure,"<sup>80</sup> the likelihood of success is quite low.<sup>81</sup>

When the General Counsel denies an inmate's request, the inmate is likewise provided with written notice and a statement of the reasons for the denial.<sup>82</sup> The General Counsel's denial, however, constitutes a final administrative decision and is not appealable through the Administrative Remedy Procedure.<sup>83</sup>

Similarly, a denial of an inmate's request by the Director of the Bureau of Prisons requires written notice and a statement explaining the denial.<sup>84</sup> The denial must be sent to the inmate within twenty workdays after the Director receives the referral of the compassionate release request from the Office of the General Counsel.<sup>85</sup> Again, the

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74. *Id.* Again, the procedure described *infra* notwithstanding, the regulations clearly indicate the possibility of compassionate release for non-medical reasons.

75. *Id.*

76. *Id.* § 571.62(a)(4).

77. *Id.* § 571.62(b).

78. *Id.* § 571.62(c).

79. *Id.* § 571.63(a).

80. *Id.*

81. *See* 28 C.F.R. § 542.15(b) (1999) (detailing the procedures for appealing an adverse decision under the Administrative Remedy Procedure).

82. 28 C.F.R. § 571.63(b) (2008).

83. *Id.* § 571.63(b), (d).

84. *Id.* § 571.63(c).

85. *Id.*

denial by the Director is a final administrative decision and thus cannot be appealed through the Administrative Remedy Procedure.<sup>86</sup>

Federal courts have uniformly rejected attempts to appeal the denial of a motion for compassionate release. In fact, there is no published case granting compassionate release reduction outside of a motion by the Director. Instead, the cases stand for the proposition that a district court does not have jurisdiction to address a sentence reduction motion under Section 3582(c)(1)(A) in the absence of a motion by the Director.<sup>87</sup>

In practice, the Bureau of Prisons has only made motions for compassionate release in rare circumstances, all of which were cases of terminally ill inmates.<sup>88</sup> As indicated above, however, there is no requirement in the Bureau of Prisons' procedures that its broad discretionary authority be exercised so narrowly.<sup>89</sup> After all, the Director can, virtually unilaterally, reduce the sentence of *any inmate* that it finds to have "extraordinary and compelling" circumstances.<sup>90</sup>

Since 1994, the Bureau of Prisons has modified its internal guidance, albeit slightly, to expand the scope of individuals it deems worthy of compassionate release.<sup>91</sup> Prior to 1994, the Bureau of Prisons only filed compassionate release motions on behalf of terminally ill inmates with less than six months to live.<sup>92</sup> In 1994, the Bureau of Prisons informed its staff that it was expanding the class of cases it would consider for early release to those in which the inmate's life expectancy was twelve months or less.<sup>93</sup> Thus, since 1994, terminally ill inmates with more than six but less than twelve months to live have been considered for compassionate release.<sup>94</sup>

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86. *Id.* § 571.63(c), (d).

87. *See, e.g.,* United States v. Powell, 69 F. App'x 368, 369 (9th Cir. 2003) (finding that a district court cannot consider a claim under § 3582(c)(1)(A) in the absence of a motion by the Director of the Bureau of Prisons); United States v. Smartt, 129 F.3d 539, 541 (10th Cir. 1997) (same).

88. *See* Price, *supra* note 21, at 188 (noting that the Bureau of Prisons generally has only sought sentence reductions for inmates near death); Steer & Biderman, *supra* note 62, at 157 (noting that the few motions filed each year are for terminally ill inmates).

89. *See* Price, *supra* note 21, at 189 (noting that the Bureau of Prisons' policies do not limit motions under § 3582(c)(1)(A) to instances where the inmate faces imminent death); *see also* 28 C.F.R. §§ 571.60–.64; BOP PROGRAM STATEMENT, *supra* note 9.

90. *See* 18 U.S.C. § 3582(c)(1)(A)(i) (2006).

91. *See* Price, *supra* note 21, at 189 (discussing an internal memorandum from then Bureau of Prisons' director Katherine M. Hawk).

92. *Id.*

93. *Id.*

94. *See id.* (stating that the estimated life expectancy adjustment was "a general guideline, not a requirement").

The 1994 policy also indicates that other medical illnesses, even if not estimated to be terminal within the year, could rise to the level of “extraordinary and compelling” circumstances.<sup>95</sup> It states, “As we have further reviewed this issue, it has come to our attention that there may be other cases that merit consideration for release. These cases still fall within the medical arena, but may not be terminal or lend themselves to a precise prediction of life expectancy.”<sup>96</sup> This policy, however, does not allow for non-medical requests, despite the statutory language, legislative history, Sentencing Commission’s policy, and Bureau of Prisons’ policy, all of which clearly contemplate non-medical compassionate release.<sup>97</sup>

The Director of the Bureau of Prisons retains complete discretion over the application of the “compassionate release” provision, although the Director must exercise this discretion in a manner consistent with the relevant statutory provisions and the dictates of the Sentencing Commission.<sup>98</sup> Although recently challenged, no court has held that the Director’s exercise of discretion to bring compas-

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95. This internal policy memorandum also enunciates other factors that the Bureau of Prisons should weigh when considering requests for compassionate release, including the “nature and circumstances of the crime, [the] inmate[’s personal] characteristics and propensity to reoffend, the inmate’s age, [and the inmate’s] risk to the public.” *Id.*

96. *Id.* In addition, the memorandum provides guidance as to the consideration of an inmate’s illness for purposes of compassionate release. The Bureau of Prisons memorandum sets out three examples of prisoners that may be apt to fall within this category of not terminal within a year but still worthy of consideration for compassionate release: (1) “prisoners with debilitating diseases that clearly limit daily activity” and for which traditional medical treatment is insufficient; (2) prisoners with terminal conditions but whose life expectancies are not calculable; and (3) prisoners in need of organ transplants. *Id.*

97. *See, e.g.*, 18 U.S.C. § 3582(c)(1)(A) (2006) (providing the possibility of compassionate release for those facing “extraordinary and compelling” circumstances); 18 C.F.R. §§ 571.60–.64 (2008) (setting the procedures for a request for compassionate release with no language limiting such requests to only medical reasons); U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. (2008) (noting that “extraordinary and compelling” circumstances may include such circumstances as the death of the only other family member capable of taking care of the inmate’s child); BOP PROGRAM STATEMENT, *supra* note 9 (setting the procedures for a request for compassionate release with no language limiting such requests to only medical reasons); Price, *supra* note 21, at 189–90 (arguing that a plain reading of the SRA and its legislative history indicates that Congress intended compassionate release under § 3582(c)(1)(A) to be available to inmates facing a variety of “extraordinary and compelling” circumstances and not just those with dire medical conditions).

98. *See* 18 U.S.C. § 3582(c)(1)(A) (noting that courts may only reduce prison terms under this Section upon a motion by the Director); U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 (2008) (same).

sionate release petitions, which receives *Chevron*-type deference,<sup>99</sup> has run afoul of the statutory language.<sup>100</sup>

The Bureau of Prisons' statistics on its use of compassionate release demonstrate that this safety valve is rarely used. Between 1990 and 2000, the Bureau of Prisons granted the following number of releases by year, respectively: 11, 10, 16, 28, 23, 22, 23, 13, 22, 27, and 31.<sup>101</sup> Meaning that the average number of inmates released per year for the decade of the 1990s was 21. With a federal prison population of approximately 200,000 inmates, roughly 0.01% of those prisoners received compassionate release annually. From 1990 to 1997, the group of inmates who received compassionate release were all "inmates with a life expectancy less than twelve months."<sup>102</sup> From 1998 to 2000, this group was expanded to include "inmates with life expectancy of less than twelve months" and inmates "with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life."<sup>103</sup> Individuals in the second category included total care stroke patients and inmates with significant mental impairment resulting from attempted suicide, advanced cirrhosis of the liver, Alzheimer's disease, and other causes of significant mental impairment.<sup>104</sup>

### C. *Changes to the Sentencing Commission's Guideline Notes*

The compassionate release amendment promulgated in May 2007 appears to be the first attempt by the Sentencing Commission to respond to the mandate of Section 994(t).<sup>105</sup> As stated above, the new

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99. See *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984) (setting the standard for deference accorded to actors in federal agencies when acting pursuant to authority delegated by Congress).

100. See, e.g., *Sims v. Norwood*, No. CV 08-0377-RGK (MLG), 2008 WL 1960127, at \*3 (C.D. Cal. May 2, 2008) (holding that the Bureau of Prisons' decision not to grant compassionate release to those individuals who committed crimes before November 1, 1987, and were given sentences without parole is consistent with congressional intent and an entirely permissible interpretation of the relevant statutes).

101. Price, *supra* note 20, at 191 exhibit II.

102. *Id.*

103. *Id.*

104. *Id.*

105. Prior to the Sentencing Commission's amendment of the guidelines commentary, the Bureau of Prisons promulgated new proposed rules in order to revise its regulations on procedures for reductions in sentence based upon compassionate release. See *Reduction in Sentence for Medical Reasons*, 71 Fed. Reg. 76,619 (Dec. 21, 2006) (to be codified at 28 C.F.R. pts. 571, 572). These provisions, which remain unadopted, attempt to clarify the Director of the Bureau of Prisons' view that compassionate release encompasses nothing more than medical parole. Despite the current Director's unwillingness to extend the compassionate release concept to inmates who are not ill, the Sentencing Commission clearly contemplates a broader application of the compassionate release provision. It re-

amendment provides three situations that are “extraordinary and compelling”: terminal illness of the offender, severe physical or mental impairment that prevents self-care by the offender and has little hope of improving, and death or incapacitation of the offender’s only family member capable of caring for the offender’s minor child.<sup>106</sup> The new amendment does not provide any additional criteria or examples for what situations are “extraordinary and compelling” for purposes of Section 1B1.13 and leaves the initial determination up to the Director.<sup>107</sup>

The new “compassionate release” amendment to the Commentary provides, for the first time, direction from the Commission as to the substance of this concept. Under this amendment, the Director of the Bureau of Prisons retains the authority to make a motion for a reduction of a prisoner’s sentence for “extraordinary and compelling circumstances,”<sup>108</sup> with the caveat that “rehabilitation . . . is not, by itself, an extraordinary and compelling reason.”<sup>109</sup> Promulgated on May 1, 2007 and to be effective November 1, 2007, the Sentencing Commission modified the Commentary to Section 1B1.13 to identify for the first time some of the circumstances that are “extraordinary and compelling.”<sup>110</sup> Specifically, the Commission provided that extraordinary and compelling circumstances include:

- (i) The defendant is suffering from a terminal illness.
- (ii) The defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.
- (iii) The death or incapacitation of the defendant’s only family member capable of caring for the defendant’s minor child or minor children.<sup>111</sup>

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mains to be seen whether the Bureau of Prisons will continue this unduly narrow reading of its statutory responsibilities.

106. U.S. SENTENCING COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY 1 (2007) [hereinafter 2007 AMENDMENTS TO THE SENTENCING GUIDELINES], *available at* <http://www.ussc.gov/2007gvid/finalamend07.pdf>.

107. *Id.*

108. U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 (2008).

109. *Id.* § 1B1.13 cmt. n.1.

110. 2007 AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 106.

111. *Id.*

In addition, the Commentary still preserves the discretion of the Director to determine when other circumstances may be “extraordinary and compelling.”<sup>112</sup> Thus, despite the current Director’s apparent unwillingness to give credence to the third circumstance adopted in the Commentary, the Bureau of Prisons still retains the authority to exercise its power to make a compassionate release motion for any of the reasons articulated above or reasons the Director otherwise deemed “extraordinary and compelling.”<sup>113</sup>

*D. The Case for a Broader Application of “Compassionate Release”*

From this overview, it is clear that “compassionate release” should be utilized more broadly than it has been by the Bureau of Prisons in the past two decades. Namely, the law makes it clear that “compassionate release” means more than medical parole. A brief review of the statutory language, the legislative intent, the Sentencing Commission’s guideline commentary, and the regulations of the Bureau of Prisons makes this clear.

The plain language of Section 3582(c) states:

The court may not modify a term of imprisonment once it has been imposed except that in any case the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment . . . after considering the factors set forth in [S]ection 3553(a) to the extent that they are applicable, if it finds that *extraordinary and compelling reasons warrant such a reduction*.<sup>114</sup>

Because this language does *not* state extraordinary and compelling *medical* reasons, it does not limit such release to medical situations. The statute simply provides for release where there are extraordinary and compelling reasons, whether medical or otherwise.

The applicable legislative history confirms that the statute be read broadly to include non-medical circumstances. In proposing this provision, the Senate Judiciary Committee noted that:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of im-

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112. *Id.*

113. *Cf.* Reduction in Sentence for Medical Reasons, 71 Fed. Reg. 76,619 (Dec. 21, 2006) (to be codified at 28 C.F.R. pts. 571, 572) (stating that the Bureau of Prisons “will only consider inmates with extraordinary and compelling medical conditions” for sentence reduction, not inmates with “other, non-medical situations . . . characterized as ‘hardships,’ such as a family member’s medical problems, economic difficulties, or the . . . claim of an unjust sentence”).

114. 18 U.S.C. § 3582(c)(1)(A)(i) (2006) (emphasis added).

prisonment is justified by changed circumstances. These would include cases of severe illness, [and] *cases in which other extraordinary and compelling circumstances* justify a reduction of an unusually long sentence . . . .<sup>115</sup>

The conjunctive language clearly indicates two categories of extraordinary and compelling circumstances, one medical and one for “other” non-medical circumstances. The Committee further explained that:

The value of the forms of “safety valves” contained in this subsection lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment for “extraordinary and compelling reasons” . . . . The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.<sup>116</sup>

Again, the language is not particularly compelling “medical” situations, but instead clearly contemplates “other” situations may rise to the level of “extraordinary and compelling.” Likewise, the new Commentary in the Sentencing Guideline is consistent with the idea that compassionate release encompasses more than just medical parole. The three categories provided are terminal illness, severe mental impairment, *and* leave to care for a child where no other family member can do so. The Sentencing Commission, like Congress, views this provision as going beyond medical situations, as indicated by the Commentary that clearly does not limit “compassionate release” to medical parole situations.

Finally, commentary from the Bureau of Prisons itself indicates that compassionate release should not be limited to medical parole. First, the Bureau’s guidelines state that in a compassionate release petition:

[t]he inmate’s request shall at a minimum contain the following information:

- (1) The extraordinary or compelling circumstances that the inmate believes warrant consideration.
- (2) Proposed release plans, including where the inmate will reside, how the inmate will support himself/herself, and, *if the basis for the request involves the inmate’s health*, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment.<sup>117</sup>

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115. S. REP. NO. 98-225, at 55 (1983) (emphasis added), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3238.

116. *Id.* at 121, *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3304.

117. BOP PROGRAM STATEMENT, *supra* note 9, at 3 (emphasis added).

This requirement, stating “if” the request involves the inmate’s health, presumes that it will consider requests that do not involve the inmate’s health. Similarly, at the General Counsel stage of consideration, the regulations provide for alternative actions depending on the basis, medical or non-medical, of the request:

If the General Counsel determines that the request warrants approval, the General Counsel shall solicit the opinion of either the Medical Director or the Assistant Director, [of the] Correctional Programs Division[,] *depending upon the nature of the basis for the request.* With this opinion, the General Counsel shall forward the entire matter to the Director, [of the] Bureau of Prisons, for final decision.<sup>118</sup>

Clearly, then, the Bureau of Prisons itself contemplates a process to consider compassionate release claims that are not medical in nature.

Given the clear mandate to consider non-medical situations for compassionate release, why has the Bureau of Prisons elected not to do so? One reason may be that “extraordinary and compelling” is narrow by definition, and the medical category provides an easy way to create a bright line rule. A corollary of this idea is the potential for endless petitions if non-medical petitions are considered.

The problem may also relate to the absence of any guidance on where to draw the line. Prior to the Sentencing Commission’s Commentary in 2007, there was no articulated basis for what falls in the non-medical category. Without a standard, the legitimacy of individual determinations could be undermined.

Nonetheless, given the foregoing, the Bureau of Prisons *should* consider non-medical situations for compassionate release to uphold the responsibility that Congress has delegated to it. What follows is a first attempt to consider how the Bureau of Prisons, whenever it becomes so inclined, may frame the issue of determining which cases warrant compassionate release.

#### IV. THE JUSTIFICATIONS FOR COMPASSIONATE RELEASE?

##### A. *The Purposes of Punishment*

The general justification for punishment—that is, why persons who have committed prohibited conduct should receive state-imposed criminal sanctions—has traditionally been either to prevent crime or to punish offenders.<sup>119</sup> The former, an instrumental justification,

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118. *Id.* at 5 (emphasis added).

119. ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 12 (2005).

views punishment as a means to achieve general deterrence (negative general prevention) or as a means to reinforce the internal norms of citizens against harmful conduct (positive general prevention).<sup>120</sup> The latter, a retributive justification, conceptualizes punishment as the appropriate moral response to repay the offender for the harm caused or as a means to offset an unfair advantage gained by the offender in committing the deviant act.<sup>121</sup> While these justifications alone can be problematic in many ways, they together inform the dual concepts of censure and deprivation that constitute the core of the criminal sanction.<sup>122</sup>

Censure, the blaming response to the proscribed conduct, is the moral communication to the offender that conveys the critical normative message that his or her conduct is unacceptable.<sup>123</sup> This message is crucial both in providing the offender an opportunity to respond as a moral agent capable of deliberation and in communicating to third parties the punishable nature of the conduct at issue.<sup>124</sup> The ensuing hard treatment, or deprivation, serves to show that the censure is meant seriously and to provide a future disincentive for offending.<sup>125</sup>

Given that appropriate criminal sanctions require elements of both censure and deprivation,<sup>126</sup> the state's interests in creating and operating the system that imposes penal sanctions are threefold. First, the state has an interest in crime prevention in order to encourage a peaceful environment in which its citizens can prosper.<sup>127</sup> The state also has an interest in providing a response to disapproved conduct and recognizing its wrongful character.<sup>128</sup> Finally, the state has an interest in providing a *public valuation* of such conduct—a response *on behalf of* its citizens.<sup>129</sup>

As H.L.A. Hart pointed out, these general justifications for state-imposed punishment fail to address the principles governing the allocation of criminal penalties.<sup>130</sup> Accordingly, a state's interest in imposing a criminal sentence of a particular severity or duration may rely more on the retributive or utilitarian sentencing objective that it

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120. *Id.* at 14–17.

121. *Id.* at 13.

122. *Id.* at 17, 31–32.

123. *Id.* at 17.

124. *See id.* at 17–18.

125. *Id.* at 92–93.

126. *Id.* at 17, 92.

127. *Id.* at 28.

128. *Id.* at 29–30.

129. *Id.* at 30.

130. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 8–9 (1968).

has adopted than on its broader interest in punishing criminal offenders generally. As a result, it is possible for the state to sacrifice its interest in achieving a particular sentencing objective without abdicating its broader interest in punishing wrongdoers generally. In other words, a state's interest in the punishment of criminal offenders is generally independent of its interest in the *quantity* of punishment for a given offender.

As explained below, Hart's view opens the door to consider other interests of the state when determining whether a particular prisoner warrants compassionate release. Because the state's penological interests can be served independently of the length of the sentence, consideration of external interests becomes appropriate in a way that it is not at sentencing. Congress and, by delegation, the Sentencing Commission, have dictated the parameters for sentencing, including the four primary purposes of punishment—just deserts, deterrence, rehabilitation, and incapacitation.<sup>131</sup>

The nature of these four purposes of punishment and their potential for serving as a justification for compassionate release are explored below. With each, the potential for mitigation under the particular purpose is first considered generally to provide a context for assessing whether such purpose can serve as a persuasive rationale upon which the compassionate release of an inmate can be predicated.

### *B. Compassionate Release and the Goal of Retribution*

The sentencing goal of retribution contemplates that the criminal sentence be proportional to the offense committed, with the punishment being the just deserts of the offender.<sup>132</sup> The offender's culpability and the harm the offender caused or risked determine the degree of the offender's blameworthiness and the magnitude of the proportional punishment.<sup>133</sup> The determination of culpability includes consideration of the offender's motives for committing the crime, intent to commit harm, capacity to obey the law, and role in the offense.<sup>134</sup>

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131. See 18 U.S.C. § 3553(a)(2) (2006) (laying out the factors to be considered during sentencing and the four purposes a sentence should serve); Berry, *supra* note 3, at 631 (arguing that effective and consistent sentencing of defendants requires determining the substantive meaning of the sentencing provisions in § 3553).

132. See 18 U.S.C. § 3553(a)(2)(A) (requiring the sentence "to reflect the seriousness of the offense").

133. ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 29–30 (1993).

134. See *id.* (stating that culpability may be gauged by the offender's conduct and doctrines of excuse).

By definition, then, this approach limits its consideration of mitigating circumstances (and thus compassionate release) to situations that bear directly upon the culpability of the offender or the harm caused or risked by the offender's conduct.<sup>135</sup> Characteristics of the offender may serve as a basis for mitigation under this model, but only as they relate to the culpability of the offender.<sup>136</sup> For instance, a retributive objective allows for mitigation based on the age of the offender<sup>137</sup> or the social deprivation of the offender, but only to the extent that such characteristics have the effect of reducing the culpability of the offender.<sup>138</sup> Likewise, a proportional sentencing framework accepts a first-time offender discount, conceptualized as progressive loss of mitigation, only because of the presumption that first-time offenders are in some way less culpable.<sup>139</sup> Other forms of mitigation, such as mitigation based on the social contribution of the offender prior to the crime or the effect of a punishment on the family of the offender, cannot serve as a basis for mitigation under a retributive sentencing approach because they do not bear on the culpability of the offender or the harm risked or caused by the commission of the crime.<sup>140</sup>

The post-offense conduct of an offender can also serve as a basis for mitigation consistent with a retributive sentencing goal, but only when bearing directly on the culpability of the offender or the harm caused or risked. For example, a retributive sentencing approach might consider the immediate response of an offender in aiding a victim at a crime scene as a basis for mitigation, but only to the extent that it is a measure of diminished culpability of the offender.<sup>141</sup> By contrast, the remorse of an offender, as it does not reflect the culpability of the offender, will have no mitigating effect on a retributive sentence.

The one possible exception to the principle that a retributive sentencing objective precludes mitigation unrelated to culpability or

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135. VON HIRSCH & ASHWORTH, *supra* note 119, at 63.

136. *See id.* (explaining that an offender's sentence should be reduced based on both the degree of inflicted harm and the offender's level of culpability, whereas the offender's characteristics effect only the latter).

137. *See id.* at 36–39 (arguing that juveniles are less culpable due to their limited cognitive capacity and volitional control).

138. *Id.* at 66.

139. *Id.* at 149.

140. *See id.* at 63 (noting that a sentence should be reduced if circumstances, such as degree of harm or offender's culpability, have rendered the offense less serious).

141. The immediate reaction of an offender to a crime can reflect his state of mind at the time and provide evidence of whether his conduct was intentional or merely reckless, bearing directly on his relative culpability.

harm arises when a criminal sanction is likely to have an unusually disparate impact on a particular offender.<sup>142</sup> Only indirectly related to culpability, the justification for such mitigation then rests on the concept of proportionality—that a sentence should be proportional to the seriousness of the offense.<sup>143</sup> In cases where disparate impact is likely, the retributive model supports mitigation because the offender's individualized sentence is no longer proportional to the seriousness of the offense and thus can be mitigated to remedy the unintended disparity.

As for the three “compassionate release” amendment categories, the only retributive justification for such release is under the equal impact principle just articulated, and even so, that principle is rarely applicable in such situations. For instance, when a prisoner contracts a terminal illness, it is usually not true, albeit possible, that the terminal illness compromises the sentence in such a way as to make it disproportionate. The applicability of the equal impact principle is even less plausible with a permanent physical or medical condition, as the presence of such a condition will rarely alter the definition of a proportionate sentence. Finally, the death or incapacitation of the only family member capable of caring for a minor child will not typically change the calculus of proportionality in determining the sentence duration.

### C. *Mitigation and Utilitarian Goals*

Utilitarian sentencing principles—rehabilitation, incapacitation, and deterrence<sup>144</sup>—focus on using criminal sanctions to prevent or reduce the seriousness of future acts by the offender and/or other potential offenders.<sup>145</sup> A rationale of rehabilitation determines the length and type of penal sanction based on the treatment required to prevent the offender from committing future crime.<sup>146</sup> Incapacitation seeks to prevent crime by imprisoning potentially dangerous or

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142. This exception may simply be a matter of semantics as the concepts of culpability and proportionality are closely linked. Nonetheless, mitigation resulting from the equal impact principle does not result from a change in offender culpability—it results from the potential impact of the punishment on the offender.

143. Cf. Andrew Ashworth & Elaine Player, *Sentencing, Equal Treatment and the Impact of Sanctions*, in *FUNDAMENTALS OF SENTENCING THEORY* 251, 254–61 (Andrew Ashworth & Martin Wasik eds., 1998) (discussing the principle of equal impact in sentencing).

144. See 18 U.S.C. § 3553(a)(2)(B)–(D) (2006) (listing factors to be considered in imposing a sentence).

145. ASHWORTH, *supra* note 2, at 75.

146. *Id.* at 82.

persistent offenders.<sup>147</sup> As advocated by Jeremy Bentham in 1843, deterrence<sup>148</sup> aims to prevent potential offenders, as rational beings, from committing crime based on the pain of the potential penalty for the crime.<sup>149</sup>

All three of the utilitarian sentencing principles rely on certain assumptions to be effective.<sup>150</sup> Each one of these rationales presumes “that certain [individuals] have an elevated risk of [ ]offending” that “can be identified in advance.”<sup>151</sup> In addition, rehabilitation assumes that the offender has problems that can be pinpointed and remedied through the criminal sentence.<sup>152</sup> Incapacitation correspondingly assumes both that the prison sentence will not make the offender more likely to commit crime and that the offender will not be replaced by other offenders in light of potential opportunities for crime.<sup>153</sup> Deterrence relies on the assumption that offenders can actually be deterred by the threat of criminal sanctions.<sup>154</sup>

As demonstrated below, the utilitarian sentencing principles can *in theory* justify some forms of mitigation unrelated to offender culpability or the harm caused by the crime. This makes sense, as the utilitarian sentencing principles often relate directly to characteristics of offenders unrelated to the criminal act. Likewise, post-offense conduct can provide evidence of the propensity of the offender to commit another criminal act. The use of the utilitarian principles as a basis for compassionate release has limited persuasiveness, however, because such mitigation appears to be no more than the embodiment

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147. *Id.* at 80.

148. Deterrence can take two forms—general or specific—but as general deterrence is more often the focus of the utilitarian approach, it is the sole focus here. *See id.* at 75 (distinguishing between general and specific deterrence and explaining the greater significance of general deterrence).

149. Jeremy Bentham, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 365, 396 (John Bowring ed., 1843). General deterrence can depend on a number of factors including:

[T]he severity of the penalty; the swiftness with which it is imposed; the probability of being caught and punished; the target group’s perceptions of the severity, swiftness, and certainty of punishment; the extent to which members of the target group suffer from addiction, mental illness, or other conditions which significantly diminish their capacity to obey the law; and the extent to which these would-be offenders face competing pressures or incentives to commit crime.

Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 71 (2005).

150. Frase, *supra* note 149, at 70.

151. *Id.*

152. *Id.*

153. *Id.* (citing JAMES Q. WILSON, THINKING ABOUT CRIME 146 (rev. ed. 1983)).

154. It is certainly true that some offenses and offenders are essentially not deterrable. *Id.* at 71–72.

of the assumptions needed to make these approaches viable in the first place.

1. *Can Rehabilitation Justify Compassionate Release?*

Rehabilitation can theoretically justify some forms of mitigation unrelated to harm and culpability, but in reality such justifications are quite speculative. In the category of offender characteristics, criteria such as contributions to society, past acts of heroism,<sup>155</sup> and employment history can in theory serve as a barometer for an offender's need for rehabilitation and the likelihood that a custodial sentence will serve to rehabilitate the offender.<sup>156</sup> Using this information as a basis to mitigate a sentence, however, is audacious because it requires the judge to speculate that such indicia adequately demonstrate that the offender will not need to be rehabilitated to the same degree as other offenders.

Even less convincing is the use of rehabilitation as a justification to mitigate a sentence based on its impact on the offender. The potential for disparate impact of a sentence on an offender may have some relationship to the need for rehabilitation and the likelihood of rehabilitation occurring, but in no way insinuates that rehabilitation can be a plausible justification for such mitigation. Similarly, neither mitigation based on the impact of a sentence on third parties nor on the collateral consequences of crime on the offender has any direct relationship to rehabilitation.

Post-offense conduct is the most promising avenue for rehabilitation to justify mitigation. Remorse, restitution, apology, and acceptance of responsibility all bear directly on whether an offender has "learned his lesson" and correspondingly, the potential for rehabilitation within a shorter time frame. The practical reality, however, still leaves much to be desired as such offender behavior may merely be an attempt to minimize his punishment and have no bearing on the issue of rehabilitation. It is presumptuous to claim that the remorse demonstrated by an offender can provide a concrete basis to determine in any meaningful way a decrease in the future risk an offender poses to society, a decrease in the problems of the offender that must

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155. Restorative theory similarly contemplates that courts should credit positive social contributions and should balance them with the criminal conduct as part of a social accounting that aids in the determination of whether to mitigate a sentence. See ASHWORTH, *supra* note 2, at 88–89 (discussing the theory of restorative criminal justice in addressing sentencing).

156. The English Court of Appeal has considered such factors as indicia of the need for rehabilitation. See *id.* at 173 (discussing various opinions where offenders' "good deeds" were considered as mitigating factors in sentencing).

be remedied, or a decrease in the length and type of punishment that could best rehabilitate the offender. Finally, rehabilitation cannot serve as a justification for mitigation based on a guilty plea or providing assistance to the government as such actions do not address or provide evidence of the offender's need for rehabilitation.

The justification for the "compassionate release" amendment forms of mitigation cannot be rehabilitation.<sup>157</sup> The diagnosis of a terminal illness is in no way a measure of rehabilitation. A debilitating medical condition similarly in no way connotes that a prisoner has achieved a level of rehabilitation warranting release from prison. The death or incapacitation of a third party caretaker of a prisoner's child also has nothing to do with rehabilitation.

## 2. *Can Incapacitation Justify Compassionate Release?*

As with rehabilitation, incapacitation can be used to justify mitigation unrelated to culpability or harm, but usually not in a way that can withstand scrutiny. A showing that an offender's criminal conduct is aberrant, and as a result the offender is less dangerous to society, has superficial appeal as a basis for mitigating a sentence based on a goal of incapacitation. The difficulty, however, is determining first whether the conduct was indeed aberrant, and if so, whether the aberrant nature of the conduct can truly establish a reduction in dangerousness warranting a mitigated sentence.<sup>158</sup> The imprecise nature of such determinations cautions against justifying mitigation based on incapacitation in this context.<sup>159</sup>

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157. In fact, federal statutory language states that rehabilitation *alone* is insufficient to establish "extraordinary and compelling" circumstances. See 28 U.S.C. § 994(t) (2000).

158. Acts of heroism can similarly be problematic as possible evidence of a reduced need for incapacitation. Military service, for instance, represents a significant contribution to society, but it also could indicate a propensity for violent behavior in some individuals, and thus is unreliable as a measure of the need for incapacitation. See generally Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors*, 88 B.U. L. REV. 1109 (2008) (discussing how few jurisdictions use good acts such as military service as mitigating factors in determining an offender's sentence).

159. Other offender characteristics, such as the impact on the offender, collateral consequences of the crime, and impact on third parties generally cannot be relied on as a justification for mitigation. Cf. Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 401 (2007) (discussing the incapacitation principle as related to offenders who commit crimes against strangers and those who commit crimes against non-strangers). The one exception would be an injury that occurs during the commission of a crime which results in paralysis or some similar awful injury that physically incapacitates the offender permanently. In such a case, the "impact" of the crime on the offender would result in mitigation of a sentence based on an incapacitation rationale because the offender would, in fact, be incapacitated.

Incapacitation provides a much less persuasive basis than rehabilitation for mitigating post-offense conduct. An offender's acceptance of responsibility and apology to the victim bear no more than a tangential relationship to the goal of incapacitation. A guilty plea or a decision to provide otherwise unascertainable information to police also does not impact the need to incapacitate an offender.

Of the three "compassionate release" amendments, the permanent physical impairment basis for release can best rely on the reduced need for incapacitation as a justification for the mitigation of a sentence and release from prison.<sup>160</sup> This justification rests on the idea that the physical impairment removes the ability of the prisoner to commit additional crime, which may be more true for a violent criminal than a drug offender.<sup>161</sup> The presence of a terminal illness could also signal a serious reduction in the capacity of a prisoner to commit crime upon release, although it may not always be the case.<sup>162</sup> Unlike the first two provisions in which incapacitation could arguably be reduced by the prisoner's physical condition, the death or incapacitation of the only family member of the prisoner capable of taking care of the prisoner's minor child does not bear on the dangerousness of the prisoner to society, and thus, it cannot serve as a justification for the mitigation of a criminal sentence.<sup>163</sup>

Despite the ability of incapacitation to justify the use of the first two "compassionate release" provisions to mitigate prisoners' sentences, this justification acting alone may prove unsatisfying in its application by the Bureau of Prisons Director.<sup>164</sup> If reduced dangerousness resulting from physical impairment is the only reason for allowing mitigation under the first two compassionate release provisions, fairness may require the Director to broaden the mitigation motions pursuant to his or her discretion to include any physical injury that appears permanent and sufficiently reduces the dangerousness of a prisoner.<sup>165</sup> The result of such expansion would be a series of difficult decisions concerning the relative dangerousness of inmates

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160. See Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse than the Disease?*, 3 WIDENER J. PUB. L. 799, 805 (1994) (stating that when a prisoner is terminally ill the threat to the public is diminished).

161. *Cf. id.* (explaining that compassionate release becomes more "attractive" when public safety is not directly at risk).

162. See Hannah T.S. Long, *The "Inequability" of Incarceration*, 31 COLUM. J.L. & SOC. PROBS. 321, 344 n.109 (1998) (examining courts' consideration of an offender's life-threatening illness in the sentencing determination).

163. See 2007 AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 106.

164. See 18 U.S.C. § 3582(c)(1)–(2) (2006) (leaving discretion to the Director of the Bureau of Prisons in the modification of an offender's sentence).

165. *See id.*

based on a variety of physical conditions, an inquiry that would be quite speculative, particularly at the margins.

### 3. *Can Deterrence Justify Compassionate Release?*

General deterrence, even more so than rehabilitation and incapacitation, cannot substantiate mitigation unrelated to culpability or harm.<sup>166</sup> A rationale of general deterrence generally does not justify mitigation based on the characteristics of the individual offender.<sup>167</sup> It is unlikely that mitigating a criminal sentence based on acts of heroism could promote similar positive contributions from otherwise criminally minded individuals. Deterrence also cannot justify mitigation of a sentence based upon the potential impact of a sentence on the offender or third parties.

The objective of general deterrence also does not justify mitigation based on post-criminal act conduct. The effect of a guilty plea discount can be to undermine the goal of deterrence, not to further it. In addition, mitigation based on an offender's demonstration of remorse is in no way connected to the pursuit of general deterrence.

General deterrence cannot serve as a justification for the "compassionate release" amendments.<sup>168</sup> Allowing mitigation of a terminally ill inmate's sentence has no deterrent effect on potential criminals.<sup>169</sup> Likewise, mitigation of a sentence of a physically impaired inmate is irrelevant to the concept of deterrence. Finally, the mitigation of a criminal sentence based on the death or incapacitation of the sole family member capable of caring for the minor child of an inmate has nothing to do with the concept of deterrence.

## V. WHEN COMPASSIONATE RELEASE BENEFITS THE STATE

As demonstrated, in most situations, neither retributive nor utilitarian sentencing rationales can satisfactorily supply an independent theoretical basis for compassionate release. Accordingly, does that preclude such mercy? Judge Learned Hand's conception of justice as "the tolerable accommodation of the conflicting interests of society"

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166. In fact, general deterrence cannot serve as a basis for mitigation related to culpability or harm, as the very concept is antithetical to mitigation.

167. It is true that individual characteristics can inform an inquiry as to whether a sentence need be a particular length to deter a particular offender from committing the same crime again, but such inquiries are strongly linked to the broader concept of rehabilitation and are not at issue here.

168. See VON HIRSCH & ASHWORTH, *supra* note 119, at 132–33 (arguing against the appropriateness of the deterrence factor in affecting mitigation calculations).

169. *Cf. id.* at 132–33 & 132 n.a (discussing the general lack of empirical evidence regarding the deterrent effects of sentencing policy).

for which there is not “any royal road to attain such accommodation concretely”<sup>170</sup> suggests that state purposes independent of sentencing goals can serve as a basis for mitigation. In other words, justice may warrant departure from rigid theoretical sentencing constructs and the objectives they advance in certain exceptional situations because other benefits derived from mitigation are more important to the state, at least in a given situation, than the principles of proportionality, rehabilitation, incapacitation, and deterrence.<sup>171</sup>

Broadly speaking, however, without some guiding principles, the ad hoc use of mercy at the whim of the Bureau of Prisons Director would likely create arbitrariness and unfairness in the criminal system.<sup>172</sup> With the purposes of punishment demonstrably unhelpful, however, one must look elsewhere for a theoretical basis to justify the use of compassionate release. Given the state’s interest in punishment and protecting its citizens from harm, this Article proposes that the compassionate release question be considered in light of broader state interests.

Thus, to determine when a particular state interest justifies compassionate release in a certain situation, one must ascertain whether the benefit to the state in choosing to mitigate the sentence significantly outweighs the penological benefit sacrificed by the corresponding sentence reduction. This inquiry is one of both substance and degree, as a particular benefit may outweigh the relevant penological objective to justify mitigation in a certain context, but may only justify a small reduction in the sentence. An example of how this might work is the United Kingdom’s statutory mitigation of a criminal sentence based on a guilty plea discount that has a numerical limitation in the statute.<sup>173</sup> This discount decreases as the benefit to the state—expediting the criminal process and conserving state prosecutorial resources<sup>174</sup>—becomes diminished as a case moves closer to trial.<sup>175</sup>

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170. Hamburger, *supra* note 1.

171. An appropriate place for such mitigation will often be the decision of whether to give custody to an offender whose proportional sentence would be just “over the line,” but the effect of the custody would impact a state interest in such a way that losing a small degree of proportionality would be considered reasonable.

172. See Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1478–80 (2004) (summarizing the problems with using mercy as a basis for mitigating criminal sentences).

173. See Criminal Justice Act, 2003, c. 44, § 144 (Eng.).

174. The prohibition against allowing offenders that are “caught red-handed” from receiving the guilty plea discount at all, because they presumably have no legal defence, underscores the relationship between the benefit to the state and the magnitude of mitigation permitted.

175. See VON HIRSCH, *supra* note 133, at 58–59 (discussing the scaling of penalties according to policy-based justifications).

The extent to which state benefits in mitigation outweigh retributive and utilitarian sentencing objectives is thus considered to determine when such benefits can justify mitigation unrelated to culpability and harm.

A. *Mitigation Based Upon Offender Characteristics*

Mitigating a sentence based on offender characteristics such as contributions to society, acts of heroism, and a good employment record can be justified only when such actions are so significant, so profound, and so essential to the functioning of a community that the state's benefit in mitigating the offender's sentence outweighs the value to the state of achieving the applicable sentencing goal. A potential example of when such mitigation would be appropriate is one in which an essential contributor to an underprivileged community commits a minor offense, and the harm to the state of giving him a custodial sentence, because of the consequences of his corresponding absence, outweighs the small diminishment in achieving retributive or utilitarian sentencing goals that results from mitigation. These circumstances nonetheless will be extremely rare, as very few individuals can demonstrate this type of indispensability.<sup>176</sup> Further, even when this is the case, the state benefit in mitigation will generally not be so significant as to warrant a large decrease in sentence.

The state does not derive any benefit in mitigation based on the likely impact of a sentence on an offender and so mitigation on such grounds is generally unsupportable.<sup>177</sup> A broader state benefit may arise, however, in the case of third parties, particularly where a custodial sentence results in children being placed into the custody of the state. Avoiding an increase in the number of children who are under direct supervision of the state may thus serve as an important state benefit that justifies mitigation in certain situations. In such cases, then, the burden on the state resulting from the criminal sentence's impact on a third party outweighs to some degree the state benefit in punishment of the offender and justifies some degree of mitigation, to the extent that the mitigation can reduce the burden on the state.

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176. See William L. Wilkins Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 83–84 (1993) (noting the Sentencing Commission's belief that "prior good works" are generally irrelevant in determining a sentence).

177. Of course, the disparate impact of a sentence is the one occasion where retribution can justify mitigation unrelated to culpability or harm. See *supra* notes 142–143 and accompanying text.

Finally, there is no benefit to the state in providing mitigation based on collateral pains.

*B. Mitigation Based Upon Post-Offense Conduct*

Cooperation by an offender after an offense can result in significant benefits to the state. Offender cooperation can serve not only to minimize the expenditure of limited state resources in the investigation, preparation, and trial of the offender,<sup>178</sup> but also to assist in the prosecution of other offenders. As a result of the benefit to the state of allowing such mitigation, it is justified in a variety of circumstances because the overall benefit of such aid often outweighs the corresponding compromise of sentencing goals caused by a sentence reduction. The guilty plea discount is the most obvious example of this type of mitigation, with the amount of mitigation depending directly upon when a plea is entered.

The benefit to the state of mitigating post-offense conduct by the offender toward the victim is more marginal. Nonetheless, the state does have some interest in promoting the interests of the victim, one of which may be providing some incentive for offenders to accept responsibility, apologize, and/or show remorse. The extent to which the state interest in restoration between the victim and offender outweighs the state interest in punishing the offender is the extent to which such mitigation can be justified. Advocates of restorative justice would argue that a process of reconciliation results in significant benefits to the state,<sup>179</sup> but in reality, such benefits can be speculative and certainly are difficult to measure. As the genuineness of post-offense conduct can easily be questioned, the benefit to the state of mitigating a sentence based on post-offense conduct by the offender toward the victim will often not be apparent, and in any event, it will limit the degree of mitigation.<sup>180</sup>

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178. Without criminal pleas, the resources required to try every offender would be far beyond the capacity of the state. See Frase, *supra* note 149, at 77 (noting the compelling needs of states to obtain guilty pleas to preserve states' limited resources and powers); see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 29–30 (1988) (“Eighty-five percent of the sample of federal criminal sentences reviewed by the [Sentencing] Commission involved some form of plea bargaining, either with respect to charges, recommended sentences, or specific sentences . . .”).

179. See, e.g., John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 18–19 (1999).

180. The Sentencing Guidelines do provide for mitigation based on “acceptance of responsibility.” U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2008). Such mitigation, however, is based as much on providing help to the state by not contesting the charges as on expressing remorse to the victim. See Breyer, *supra* note 178, at 28–31 (discussing the ad-

C. “Compassionate Release” Mitigation

For each of the three “compassionate release” amendments, the state benefit almost always outweighs the corresponding sacrifice of its penological goals. First, the state benefits by saving both the cost of imprisonment and the cost of medical care by releasing a terminally ill inmate.<sup>181</sup> The penological goal of retribution suffers comparatively little as the terminal illness will not result in much less of a sentence being served.<sup>182</sup> Similarly, the early release of an inmate because of a terminal illness will not unduly compromise the utilitarian goals of incapacitation, deterrence, and rehabilitation.<sup>183</sup> The terminal illness will substantially reduce the risk of dangerousness, the need for rehabilitation, and will not impede any deterrent effect of the sentence.<sup>184</sup>

As with terminal illness mitigation, mitigation based on the permanent physical impairment of an inmate benefits the state economically while outweighing the corresponding sacrifice of state penological goals.<sup>185</sup> The sacrifice of state penological goals here is more significant than in the case of terminal illness, but the state benefit here is also more significant. With inmates who have a substantially diminished ability to provide self-care, the financial cost to the state of caring for such individuals can be quite significant and extend far beyond the cost of ordinary imprisonment.<sup>186</sup> To the extent that physically impaired individuals are more likely to live longer than terminally ill individuals, the sacrifice of the penological goal of retribution, in its demand for a sentence proportional to the criminal offense, may be more significant. The state’s interest in exacting a

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ministrative concerns leading to the Sentencing Guidelines’ treatment of acceptance of responsibility and plea bargaining).

181. See Russell, *supra* note 160, at 804–08 (discussing compassionate release due to terminal illness and its contributions to prison budget reductions).

182. See *supra* Part III.B.

183. See *supra* Part III.C.

184. See *supra* Part III.C.

185. See *supra* notes 22–24 and accompanying text.

186. Take, for example, the cost of caring for AIDS patients. In most states, the cost of caring for a prisoner who has contracted the AIDS virus is approximately \$80,000 to \$100,000 per year, as compared to \$20,000 for a healthy inmate. See Tracy Dell’Angela, *Edgar Wary of Granting Clemency to Inmates Dying of AIDS; Action Backfired on Him in the Past*, CHI. TRIB., Dec. 22, 1995, at N1; Kevin F. Sherry, *Prisoners Go Free to Die: A Special Program Lets Prison Inmates Who Have the AIDS Virus Spend Their Last Days at Home*, PRESS ENTERPRISE (Riverside, Cal.), Mar. 5, 1996, at B01. The cost of medical care escalates as the number of AIDS infections increases among prisoners and can create serious problems for state correctional facilities that are already financially overburdened. See Theodore M. Hammett et al., *AIDS in Prisons in the USA*, in *AIDS IN PRISON* 136, 144 (Philip A. Thomas & Martin Moerings eds., 1994) (detailing the complex problems posed by the growing incidence of HIV/AIDS in the United States prison population).

completely proportional sentence on an offender who has a substantially diminished quality of life will often not exceed the benefit it receives in alleviating itself of the fiscal responsibility of caring for that individual.

Likewise, the state benefit in mitigating the sentence of an inmate with a debilitating and permanent physical impairment typically prevails over the corresponding loss of utilitarian penological goals. The interest of incapacitation, as indicated above, can often be furthered by mitigation based on a permanent physical impairment that substantially inhibits recidivism, and in any event, will not be seriously undermined by the release of a severely physically impaired inmate. The state goal of rehabilitation will suffer at most in a marginal way by allowing an early release for an inmate who cannot care for himself, as the inmate's ability to participate fully in society will certainly almost not be realized, notwithstanding the limitations that the inmate's physical condition would in many cases place on his ability to participate in penal rehabilitation programs. Finally, the release of a permanently debilitated inmate would not unduly compromise the state's interest in deterrence because the conditions of such a release would not be likely to undermine any deterrent value of the sentence by promoting the misconception that the full sentence would not typically be served.

As with terminal illnesses and permanent physical disabilities, the state benefit in mitigation based on the death or incapacitation of the only family member capable of caring for the inmate's minor child outweighs the corresponding abdication of the state's interest in its penological goals. Here, the state has both an economic and a social welfare interest in ensuring that a minor child has family supervision and does not become a ward of the state. The benefit to the state of such mitigation, arguably the most significant derived from any of the compassionate release amendments, provides the most persuasive grounds for mitigation because it concerns the welfare of a third party child.

The state interest in ensuring that an inmate receives his just deserts for his offense cannot, in almost all situations, exceed the need to ensure that a child receives adequate supervision and care. Similarly, the need to incapacitate an individual, which as described above can be a speculative proposition, will not typically supersede the state benefit received from providing for the supervision of a minor child by his or her parent. The impact on the goal of rehabilitation caused by allowing mitigation in this situation may be significant, but in most situations will not be more substantial than the benefit ob-

tained by ensuring the supervision of a minor. In some situations, allowing an offender to care for his or her child could supplement the rehabilitative process by providing the inmate with an important responsibility. The impact on deterrence will be negligible and, as a result, will not forbid mitigation in this context.

Finally, then, where does the compassionate release requested by Jason Yaeger<sup>187</sup> fit into this calculus? It is not the same situation as the third of the newly articulated Commentary to the Sentencing Guidelines illustrates, as Jayci Yaeger was never in jeopardy of becoming a responsibility of the state. There is, however, a state interest in, where possible, acting in the best interests of its citizens, particularly terminally ill children.

The state's interest in keeping Jason Yaeger in a minimum security prison for his full term seems on many levels negligible, given the Bureau of Prisons' decision to provide supervised release to a halfway house less than six months later. The additional rehabilitation that Yaeger could have received arguably would be more attributable to his time in the halfway house than in prison. Also, it is unlikely that Yaeger's marginal threat to society in the final six months of his sentence would be significant. Finally, the marginal deterrent effect of keeping him in prison was also insignificant.<sup>188</sup>

Thus, the adopted calculus would weigh the state's interest in addressing the needs of Jayci against the state's need for just deserts in requiring Yaeger to serve his full sentence. Here, the circumstances strongly suggest that the Yaeger's situation was "extraordinary and compelling."<sup>189</sup>

## VI. CONCLUSION

This Article has sought to achieve three purposes. First, it has sought to demonstrate the power of the compassionate release provision and outline the parameters for its current use. Second, it has attempted to derive theoretical justifications for its use. Third, upon finding the basic purposes of punishment insufficient to provide such a justification, it has articulated a theoretical framework by which to evaluate "extraordinary and compelling" circumstances—weighing

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187. *See supra* Part I.B.

188. Admittedly, one could argue that the media coverage of Yaeger's inability to be at his daughter's bedside could have had a greater deterrent effect than any length of prison sentence.

189. Even if not the case, one could hardly see the harm in allowing Mr. Yaeger a thirty-day furlough to spend the final moments of his daughter's life by her side.

the state's non-punitive interests in a particular case against its interests in punishing the inmate.