

UNEQUAL TREATMENT: (IN)COMPASSIONATE RELEASE
FROM FEDERAL PRISON IN THE CONTEXT OF THE
COVID-19 PANDEMIC AND VACCINE

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In December 2019, the world was introduced to COVID-19—a severe acute respiratory disease that would ultimately wreak havoc in communities across the globe. In the United States, many federal prisons experienced outbreaks of the virus, leading to both severe illness and death. Estimates suggest that roughly 620,000 people contracted the disease while incarcerated, resulting in nearly 3,000 deaths. The actual toll is likely much greater. As the pandemic progressed, incarcerated individuals sought relief through the statutory mechanism known as compassionate release. They argued—to varying degrees of success—that the “extraordinary and compelling” nature of the pandemic, in combination with their individual circumstances, justified a sentence reduction or early release.

This Note examines how federal courts considered compassionate release requests as they navigated the unique legal landscape engineered by the pandemic. It focuses specifically on the disparate outcomes that resulted from the vast discretion granted to federal judges in adjudicating petitions. While the fact-intensive nature of compassionate release cases renders comparison challenging, this Note argues that the current system results in inequitable, geographic-based outcomes. In many cases, the prime indicator informing whether an incarcerated individual was released was the judge and courthouse before them. In response, this Note calls on the newly revitalized United States Sentencing Commission to offer uniform guidance to federal courts on the most effective ways to approach compassionate release petitions moving forward.

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INTRODUCTION

“Our social distancing took effect with the jury’s verdict,” wrote Derek Trumbo, who was incarcerated in Burgin, Kentucky during the height of the COVID-19 breakout in 2020.¹ While many of those incarcerated have felt *socially* distant from their loved ones since well before the coronavirus pandemic, their ability to *physically* distance themselves from others—namely, others incarcerated and corrections officers—substantially decreased once behind prison bars. Since the beginning of the pandemic,

1. Caitis Meissner, Works of Justice: Temperature Check, COVID-19 Behind Bars, Vol. One, PEN Am. (Apr. 1, 2020), <https://pen.org/temperature-check-1/#dispatch> [<https://perma.cc/725V-D9C3>].

there have been more than 613,433 cases of COVID-19 in U.S. prisons.² During that same period, more than 2,663 incarcerated persons have died from COVID-19.³ Also during that time period, approximately 31,000 individuals applied for compassionate release; only about thirty-six of those requests were granted directly by the Bureau of Prisons (BOP).⁴ Throughout the pandemic, dozens of articles on prison conditions were published, putting the horrors occurring behind bars on full display.⁵ These articles encouraged the American public to consider the pandemic from the perspective of those incarcerated and to ruminate on new questions: How does one practice safe handwashing protocols when soap is unavailable and hand sanitizer is banned?⁶ How does one practice social distancing, as recommended by the Centers for Disease Control and Prevention (CDC), when confined to a building that has more people incarcerated than it was designed to hold?⁷ The pandemic-era situation within American jails has been aptly described as “lethally *systemic*.”⁸ In the prison where Mr. Trumbo was incarcerated, an outbreak of coronavirus resulted in more than 65% of the population of 1,200 individuals testing

2. National COVID-19 Statistics, COVID Prison Project, <https://covidprisonproject.com/data/national-overview/> [<https://perma.cc/C25N-Z8Z4>] (last visited Aug. 26, 2022); A State-By-State Look at 15 Months of Coronavirus in Prisons, The Marshall Project (July 1, 2021), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> [<https://perma.cc/K87K-9R4H>].

3. The COVID Prison Project Tracks Data and Policy Across the Country to Monitor COVID-19 in Prisons, COVID Prison Project, <https://covidprisonproject.com/> [<https://perma.cc/A7UB-TP7E>] (last visited Dec. 30, 2021).

4. See Federal Prison Officials Granted Only 36 of 31,000 Compassionate Release Requests During Pandemic, Equal Just. Initiative (June 16, 2021), <https://eji.org/news/federal-prison-officials-granted-only-36-of-31000-compassionate-release-requests-during-pandemic/> [<https://perma.cc/Q3QP-5J2N>].

5. See, e.g., Eddie Burkhalter, Izzy Colón, Brendon Derr, Lazaro Gamio, Rebecca Griesbach, Ann Hinga Klein, Danya Issawi, K. B. Mensah, Derek M. Norman, Savannah Redl, Chloe Reynolds, Emily Schwing, Libby Seline, Rachel Sherman, Maura Turcotte & Timothy Williams, Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System, N.Y. Times (Apr. 10, 2021), <https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html> (on file with the *Columbia Law Review*); Conor Friedersdorf, Opinion, Can't We at Least Give Prisoners Soap?, Atlantic (Apr. 1, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/make-soap-free-prisons/609202/> (on file with the *Columbia Law Review*); John J. Lennon, I'm Incarcerated. This is My Covid Lockdown Story., N.Y. Times (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/magazine/prison-covid.html> (on file with the *Columbia Law Review*) (last updated May 6, 2021).

6. Lauren-Brooke Eisen & Jennifer Weiss-Wolf, No Soap. Broken Sinks. We Will All Pay for Coronavirus Ravaging Prisons., Brennan Ctr. for Just. (Apr. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/no-soap-broken-sinks-we-will-all-pay-coronavirus-ravaging-prisons> [<https://perma.cc/99C3-8YSR>].

7. Covid-19's Impact on People in Prison, Equal Just. Initiative (Apr. 16, 2021), <https://eji.org/news/covid-19s-impact-on-people-in-prison/> [<https://perma.cc/99JX-FQPF>].

8. Lee Kovarsky, Pandemics, Risks and Remedies, 106 Va. L. Rev. Online 71, 71 (2020).

positive at once.⁹ While options for protection from the coronavirus within prison walls were limited, those incarcerated turned to another strategy in attempting to avoid the virus: release from prison.

Compassionate release, also known as the BOP's reduction-in-sentence program, was born out of the Sentencing Reform Act of 1984 (SRA).¹⁰ It allowed the BOP to petition district courts to modify individuals' original sentences if certain "extraordinary and compelling" reasons existed.¹¹ Today, as a result of the FIRST STEP Act of 2018, judges play a larger role in reviewing and releasing individuals.¹² The Act revitalized the compassionate release program by enabling courts to directly grant a request for release after finding: (1) that the defendant has exhausted his or her administrative remedies or waited thirty days from the date of original request; (2) that extraordinary and compelling reasons exist to warrant reduction; (3) that the defendant is not a danger to the community; and (4) that the reduction is consistent with the sentencing factors found in 18 U.S.C. § 3553(a)—the statute on "[i]mposition of a sentence."¹³ Theoretically, this policy might seem like the perfect avenue for an individual in prison to find COVID-19 related relief, especially so for an individual with comorbidities, or preexisting conditions that make one more likely to become very ill with COVID-19.¹⁴ In practice, however, as of the summer of 2021, only 3,221 people had been released from prison

9. Steve Rogers, UPDATE: Coronavirus Outbreak Continues at Northpoint Prison, ABC 36 WTVQ (Dec. 29, 2020), <https://www.wtvq.com/northpoint-prison-leads-state-in-current-prison-covid-outbreak/> [<https://perma.cc/9LBH-E9KE>].

10. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.).

11. 18 U.S.C. § 3582(c)(1)(A) (2018) (codified as amended at 18 U.S.C. § 3582(c)(1)(A)(i)).

12. Nina J. Ginsberg, Compassionate Release: The Nuts and Bolts, *Champion*, Jan.–Feb. 2020, at 2.

13. 18 U.S.C. § 3553. After the passage of the FIRST STEP Act, some circuit courts have clarified which factors are outcome-determinative to a compassionate release request. For example, in 2021, the Sixth Circuit held that the fact that a defendant is a danger to the community is not, alone, enough to deny a request for compassionate release. See *United States v. Sherwood*, 986 F.3d 951, 953–54 (6th Cir. 2021) (holding that the "requirement that the defendant not be a danger to the community no longer provides an independent basis for denying compassionate release").

14. See *People With Certain Medical Conditions*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://perma.cc/MAF4-HWCT>] [hereinafter CDC, Medical Conditions] (last updated Oct. 19, 2022) (listing health conditions that make a person "more likely to get very sick from COVID-19"); Jamie Furia & Carly Coleman, *Pandemic Is Changing Compassionate Release Calculus*, *Law360* (Jan. 14, 2021), <https://www.law360.com/articles/1343757/pandemic-is-changing-compassionate-release-calculus> [<https://perma.cc/8GK2-L2L7>] ("Applicants seek to satisfy the extraordinary and compelling standard by demonstrating that they suffer from one or more of the many chronic medical conditions that would increase the likelihood of severe illness if they were to become infected.").

through compassionate release since the beginning of the pandemic.¹⁵ The advent of COVID-19 vaccines led to even fewer approvals of compassionate release requests, with courts often finding that the extraordinary and compelling prong of the aforementioned test could not be met.¹⁶

Courts' decisions are not uniform, however.¹⁷ Incarcerated persons continue to have vastly different outcomes depending on where they are located.¹⁸ For example, Evelyn Cecilia Bozon Pappa's life sentence—which began in 1997—was reduced to time served in 2021 after a grant of compassionate release.¹⁹ Despite Bozon Pappa's full vaccination against COVID-19, the court correctly recognized that her preexisting conditions—obesity and hypertension—meant that the vaccine may not be completely effective in protecting her.²⁰ The court cited a previous decision in the Western District of Washington, which held that “vaccination during the pendency of the Motion for Compassionate Release . . . should not, and does not, in some way trump the Court's consideration of the motion.”²¹ At the same time, other courts have reached the opposite conclusion, holding, for example, that “[a]lthough Defendant suffers from several chronic medical conditions, his vaccination significantly mitigates the risk that he will contract COVID-19.”²² And, as such, “Defendant has not met his burden to demonstrate ‘extraordinary and compelling reasons’ warranting compassionate release.”²³ The differences in the underlying circumstances between these two cases are important to consider.

15. Keri Blakinger & Joseph Neff, 31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36., The Marshall Project (June 11, 2021), <https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36> [https://perma.cc/PK79-C4LW] [hereinafter Blakinger & Neff, The Bureau of Prisons Approved 36].

16. See *United States v. Broadfield*, 5 F.4th 801, 803 (7th Cir. 2021) (stating that “for the vast majority of prisoners, the availability of a vaccine makes it impossible to conclude that the risk of COVID-19 is an ‘extraordinary and compelling’ reason for immediate release”); *United States v. Forman*, No. 4:15-CR-129(6), 2021 WL 1536491, at *7 (E.D. Tex. Apr. 16, 2021) (holding that “given Forman’s recovery from COVID-19 and his receipt of the vaccine, Forman has failed to establish that sufficient reasons exist regarding COVID-19 that would constitute extraordinary and compelling reasons to release him from prison”).

17. See Casey Tolan, Compassionate Release Became a Life-or-Death Lottery for Thousands of Federal Inmates During the Pandemic, CNN (Sept. 30, 2021), <https://www.cnn.com/2021/09/30/us/covid-prison-inmates-compassionate-release-invs/index.html> [https://perma.cc/C2JK-NBLQ] (noting that the compassionate release process “has given judges broad discretion to interpret which sentences should be reduced, leading to a national patchwork of jarringly different approval rates between federal courts”).

18. *Id.*

19. *United States v. Pappa*, No. 95-00084-CR-LENARD, 2021 WL 1439714, at *1, *5 (S.D. Fla. Apr. 1, 2021).

20. *Id.* at *4, *5 n.4.

21. *Id.* (citing *United States v. Manglona*, No. CR14-5393RJB, 2021 WL 808386, at *1 (W.D. Wash. Mar. 3, 2021)).

22. *United States v. Grummer*, 519 F. Supp. 3d 760, 763 (S.D. Cal. 2021).

23. *Id.*

A court might reasonably reach different conclusions on the two cases based on different factors. The issue that this Note raises, however, is that courts reach inconsistent conclusions on the same issue—vaccination status and preexisting conditions—regardless of other case-specific factors. This Note questions whether it is reasonable for federal courts to reach such different holdings and whether those outcomes are in line with the spirit of the compassionate release policy.

Part I of this Note explores the history of compassionate release, its intended purpose, and the ways in which the compassionate release doctrine has evolved over time. It also examines how compassionate release has served its purpose, albeit in a limited way, during the pandemic. Part II introduces the pandemic-specific compassionate release issues that have emerged: namely, the discrepancy among courts in “weighing” various factors, including preexisting conditions, vaccination status, and prior infection with COVID-19; and courts’ reliance on *both* positive and negative vaccination status as a factor weighing against the granting of compassionate release. Some circuits continue to maintain that an individual’s positive vaccination status is, in effect, a complete bar to an extraordinary and compelling showing; other courts choose to release vaccinated individuals based on the risk of exposure to COVID-19. In Part III, this Note argues that an individual in federal custody should be just as likely to be granted compassionate release in California or in Texas, in Montana or in Arizona. Having received the vaccination against COVID-19 should not be the reason that one individual is forced to stay in prison, while, at the same time, not having received the vaccine also keeps another individual behind bars. This Note concludes by examining the implications of the federal judiciary’s scattershot approach to compassionate release during the pandemic and offers a solution—a matrix to be promulgated by the United States Sentencing Commission (USSC)—to standardize the process moving forward.

I. CONTEXT AND HISTORY OF COMPASSIONATE RELEASE

This Part outlines the history of the compassionate release program since its inception in the SRA. Section I.A will discuss the enactment of the policy in 1984 and the role various governmental groups played in its rollout. Section I.B examines the passage of the FIRST STEP Act of 2018, which significantly shifted how compassionate release functions. Section I.C generally reviews how compassionate release functioned throughout the COVID-19 pandemic. This history is central to understanding how courts’ pandemic-era compassionate release decisions can, and should, be adjusted moving forward.

A. *The Origins of Compassionate Release*

1. *The Sentencing Reform Act.* — In 1984, Congress passed the SRA to increase uniformity and, thus, fairness in sentencing.²⁴ The SRA specifically sought to address and curb the large degree of discretion exercised by judges in sentencing—a discretion which resulted in disparate outcomes for impacted individuals.²⁵ The law created both the Sentencing Guidelines and the United States Sentencing Commission to help develop those guidelines for the federal system.²⁶ The guidelines set standards for sentencing, taking into account “gradations of offense seriousness, criminal record, and level of culpability.”²⁷ Some scholars laud the guidelines as an important tool in increasing predictability and decreasing disparity in sentencing outcomes.²⁸ Others are more critical, arguing that the move away from individualized sentencing is “a backwards step in the search for just criminal punishment.”²⁹

Whether the Sentencing Guidelines have been more harmful than helpful is discussed at length in other scholarship.³⁰ This Note, instead, focuses on another policy born out of the SRA: compassionate release.³¹

24. See William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. Davis L. Rev. 571, 572 (1992) (explaining Congress’s three main goals in enacting the SRA: honesty, reasonable uniformity, and proportionality).

25. See *id.* at 571.

26. See *id.* at 571–72.

27. *Id.* at 581.

28. See, e.g., *id.* at 583–84.

29. See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 4 Fed. Sent’g Rep. 161, 161–65 (1991).

30. See, e.g., *id.* at 161; Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 870 (1992) (proposing the idea that the Sentencing Guidelines go too far in producing “[u]ndue rigidity in the formal sentencing process”); Wilkins, *supra* note 24, at 572 (arguing that the guidelines have a positive impact on the criminal justice system).

31. There are approximately 1.8 million people currently incarcerated in the United States, with approximately 158,000 of those individuals incarcerated within the federal system. See *About Our Agency*, Fed. Bureau of Prisons, <https://www.bop.gov/about/agency/> [<https://perma.cc/LHZ7-39KR>] (last visited Aug. 7, 2022) (stating that the agency is “responsible for the custody and care of [157,775] federal inmates”); see also Jacob Kang-Brown, Chase Montagnet & Jasmine Heiss, *Vera Inst. of Just., People in Jail and Prison in Spring 2021*, at 1–3 (2021), <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-spring-2021.pdf> [<https://perma.cc/SBS8-249F>] (stating that there was a drop in incarceration in the first half of 2020, from 2.1 million individuals incarcerated to 1.8 million).

Compassionate release exists in various forms across the United States, with each state prison system implementing the process in different ways. See Nat’l Acad. of Scis., Eng’g & Med., *Decarcerating Correctional Facilities During COVID-19*, at 57–58 (Emily A. Wang, Bruce Western, Emily P. Backes & Julie Schuck eds., 2020), <https://nap.nationalacademies.org/read/25945/chapter/1> (on file with the *Columbia Law Review*) (explaining the differences between various states’ compassionate release programs and concluding that compassionate release “has not proved a meaningful channel for release from state prisons during the pandemic”). This Note focuses on only the federal

Once the USSC was established, it promulgated policies through the Sentencing Guidelines Manual. In relevant part, the Sentencing Guidelines Manual allows for courts to modify a sentence imposed “upon motion of the Director of the Bureau of Prisons . . . after considering the factors set forth in section 3553(a) . . . if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”³² This idea—that release may be granted after a showing of an “extraordinary and compelling” reason—is known as compassionate release.³³

Through the compassionate release program, incarcerated individuals can petition for early release only if they demonstrate extraordinary and compelling reasons for such relief, those “which could not reasonably have been foreseen by the court at the time of sentencing.”³⁴ The SRA delineated responsibility for the roles within the process to three groups: the USSC, the BOP, and the courts.³⁵ The USSC defined what “extraordinary and compelling” reasons are; the BOP identified which prisoners met those criteria; and the courts decided whether or not a particular sentence should be reduced.³⁶

2. *The United States Sentencing Commission’s Role.* — As previously mentioned, Congress created the USSC via the Sentencing Reform Act.³⁷ The USSC is an independent agency and has three main purposes: (1) to establish sentencing policies for the federal courts; (2) to advise Congress and the Executive in creating effective “crime policy”; and (3) to analyze and research information on “federal crime and sentencing issues.”³⁸ As relevant to compassionate release requests, the USSC releases

compassionate release system, as both the Sentencing Reform Act and the FIRST STEP Act are federal regulations and do not apply to state compassionate release programs. See *id.*; see also Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 3551(a), 98 Stat. 1987, 1988 (codified as amended in scattered sections of 18 U.S.C.).

32. 18 U.S.C. § 3582(c)(1)(A)(i) (2018).

33. Fed. Bureau of Prisons, DOJ, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g), at 1, 2 (2019), https://www.bop.gov/policy/progstat/5050_050_EN.pdf [<https://perma.cc/32KH-2A2L>] [hereinafter BOP, Compassionate Release Procedures for Implementation].

34. *Id.* at 3.

35. FAMM, Compassionate Release and the First Step Act: Then and Now 1, <https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf> [<https://perma.cc/VR4Y-NW3K>] [hereinafter FAMM, Compassionate Release] (last visited Aug. 7, 2021).

36. *Id.*

37. See Wilkins, *supra* note 24, at 571–72.

38. About, U.S. Sent’g Comm’n, <https://www.ussc.gov/about-page> [<https://perma.cc/865Z-DD5P>] (last visited Aug. 26, 2022).

compassionate release data reports and also determines the factors for courts to consider in deciding on motions for compassionate release.³⁹

In defining extraordinary and compelling reasons, the USSC has promulgated four factors that might lead to the conclusion that an individual should be released from prison.⁴⁰ Those factors are: (1) the medical condition of the defendant, including when “[t]he defendant is suffering from a terminal illness” or a serious physical or cognitive impairment; (2) the age of the defendant (limited to defendants over 65, who are experiencing a “serious deterioration” in physical or mental health and who have served “at least 10 years or 75 percent of his or her term of imprisonment, whichever is less”); (3) family circumstances, such as the death of the caregiver of a defendant’s minor child or the incapacitation of the defendant’s spouse; and (4) other extraordinary and compelling reasons, as determined by the BOP Director.⁴¹ The USSC further explains that the extraordinary and compelling reason for a compassionate release request “need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment.”⁴²

In addition to the extraordinary and compelling prong, the USSC directs courts to consider whether the factors in 18 U.S.C. § 3553(a) warrant a reduction in sentence.⁴³ Section 3553 outlines the statutory guidelines for general imposition of a sentence, including which factors a court must consider in imposing a sentence.⁴⁴ Those factors include, among others: (1) the nature of the offense and the circumstances of the defendant; (2) the need for the sentence to reflect the seriousness of the offense, provide just punishment and adequate deterrence, protect the public, and provide the defendant with needed training or medical care; (3) the kinds of sentences available and the sentencing range established in the guidelines for the particular offense; (4) the need to avoid “unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”; and (5) the need to provide restitution to any victims of the offense.⁴⁵

3. *The Bureau of Prisons’ Role in Compassionate Release.*

a. *The BOP’s Internal Procedures for Requests.* — To be considered for compassionate release, an incarcerated person must undergo a multi-step process that begins with submitting a motion for compassionate release to

39. See Compassionate Release Data Reports, U.S. Sent’g Comm’n, <https://www.ussc.gov/research/data-reports/compassionate-release-data-reports> [https://perma.cc/92H5-4XXF] (last visited Aug. 7, 2022).

40. U.S. Sent’g Guidelines Manual § 1B1.13 cmt. (U.S. Sent’g Comm’n 2018).

41. *Id.*

42. *Id.* The USSC guidance rejects the BOP’s proposition that the grounds for compassionate release must have been unforeseeable at the time of sentencing. See Ginsberg, *supra* note 12, at 5.

43. U.S. Sent’g Guidelines Manual § 1B1.13 cmt.

44. See 18 U.S.C. § 3553 (2018).

45. *Id.*

their prison's warden.⁴⁶ These requests are generally submitted in writing and must include the individual's proposed release plan (their plan for how they would live outside of prison).⁴⁷ Per the BOP's Program Statement, proposed release plans should include where the incarcerated individual would reside, earn a living, and receive medical treatment.⁴⁸ A third party can also submit the request on the incarcerated individual's behalf.⁴⁹

Requests based on medical circumstances are subdivided into two categories: terminal medical conditions and debilitated medical conditions.⁵⁰ The BOP defines a terminal medical condition as a terminal, incurable disease that leaves the individual with a life expectancy of eighteen months or less and/or has "an end-of-life trajectory under 18 USC § 3582(d)(1)."⁵¹ Once an incarcerated individual has been diagnosed with a terminal medical condition, the BOP must notify—within seventy-two hours—the individual's attorney, partner, and family members of the individual's condition and the fact that a request for compassionate release can be submitted.⁵² A debilitated medical condition is defined as an incurable, progressive illness or debilitating injury from which the individual will not recover; the BOP is directed to consider if the incarcerated individual is completely disabled or capable of only limited self-care.⁵³

The BOP guidance also recognizes requests based on three categories of non-medical circumstances: (1) elderly incarcerated individuals (defined as those over age 65) who have served a certain percentage, or number of years, of their imprisonment; (2) death or incapacitation of the family member caregiver of an incarcerated individual's child; and (3) incapacitation of an incarcerated individual's spouse or registered partner.⁵⁴ In the first instance, elderly incarcerated individuals are able to apply for compassionate release without medical conditions if they have served a certain percentage of their time; they are also able to apply if they meet certain medical criteria. The BOP Medical Director develops these medical criteria "to help evaluate the inmate's suitability for consideration."⁵⁵ In the second instance, after the BOP receives an initial request, the warden conducts the first and second stages of review.⁵⁶ During the first stage, the warden may "deny the inmate's request . . . if the Warden finds that

46. BOP, *Compassionate Procedures for Implementation*, *supra* note 33, at 3.

47. *Id.*

48. *Id.*

49. *Id.*

50. See *id.* at 4–5.

51. *Id.*

52. *Id.*

53. *Id.* at 5.

54. See *id.* at 6–9.

55. *Id.* at 6.

56. *Id.* at 7–8.

the inmate has not provided adequate information.”⁵⁷ Even if the incarcerated individual has provided adequate information, the warden is then directed to convene a committee composed of the individual’s “unit manager, correctional counselor, and any other relevant staff (social worker, physician, psychologist, etc.).”⁵⁸ That committee then gathers information, including documentation that indicates whether the deceased or incapacitated caregiver was, and still is, the only family member capable of caring for the incarcerated individual’s minor child.⁵⁹ The committee then relays their findings to the warden, for them to make a first-step determination on the incarcerated individual’s request.⁶⁰

The warden is directed to “promptly” review a request for compassionate release.⁶¹ If the warden approves the request, they then forward it to the Office of General Counsel (OGC); if the OGC approves of the request, it then requests the opinion of either the Medical Director or Assistant Director of the Correctional Programs Division “depending upon the nature of the basis for the request.”⁶² The OGC then forwards the request, along with the solicited opinion, to the BOP Director.⁶³ If the Director approves, they then contact the U.S. Attorney within the incarcerated individual’s sentencing district to submit a motion on behalf of the Director to reduce the individual’s sentence to time served.⁶⁴ Upon receiving the motion for compassionate release, the sentencing court can either grant or deny it. If granted, the warden must release the incarcerated individual immediately.⁶⁵ Since wardens reject most requests early in the process, however, this stage of the process is not routinely enacted.⁶⁶ If the request is denied at any stage, the denying party must send the incarcerated individual written notice and a statement of reasons for the denial.⁶⁷ When the BOP Director denies the request, the incarcerated

57. *Id.* at 8.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 13.

62. *Id.* at 14.

63. *Id.*

64. *Id.*

65. *See id.*

66. *See* Blakinger & Neff, *The Bureau of Prisons Approved 36*, *supra* note 15 (noting that federal prison wardens approved less than 1.5% of requests for compassionate release submitted by incarcerated individuals during the first three months of the COVID-19 pandemic).

67. If the warden denies the request, the incarcerated individual may appeal the decision through the Administrative Remedy Procedure (ARP). If the OGC or BOP Director deny the request, however, the denial is considered a “final administrative decision” and may not be appealed through the ARP. *See* BOP, *Compassionate Release Procedures for Implementation*, *supra* note 33, at 15.

individual must receive the written notice within twenty workdays after the Director receives the referral from the OGC.⁶⁸

b. *History of the BOP's Changing Approach to Requests.* — In 1994, the BOP Director released a memorandum outlining the BOP's approach to compassionate release.⁶⁹ The memorandum stated that the BOP took a conservative approach to compassionate release, only considering it for incarcerated individuals “with a terminal illness and a life expectancy of six months or less.”⁷⁰ The memorandum also noted that the BOP had recently extended the time limit for life expectancy from six months to one year.⁷¹ The BOP has since released new guidance on compassionate release, including a 2019 memorandum, which noted that the BOP had increased the life expectancy limit to eighteen months.⁷²

Since the adoption of compassionate release as an option, the BOP has been able to adjust the compassionate release standard at their will through various methods.⁷³ For example, the BOP unilaterally made the decision to limit its review of compassionate release cases to solely those requests made on medical grounds.⁷⁴ Limiting compassionate release review to medical cases excludes requests that are extraordinary and compelling for other reasons, such as familial circumstances, and is contrary to both the statutory language and legislative intent of the SRA.⁷⁵

c. *Criticism of the BOP's Approach to Requests.* — The BOP has been routinely criticized, both generally and specifically on compassionate release issues, by both criminal justice activists and government actors, such

68. See *id.*

69. DOJ, I-2013-006, The Federal Bureau of Prisons' Compassionate Release Program 8–9, 60 (2013), <https://oig.justice.gov/reports/2013/e1306.pdf> [<https://perma.cc/68XW-FH3Y>] (explaining the BOP's approach to compassionate release in 1994).

70. *Id.* at 60.

71. *Id.*

72. See BOP, Compassionate Release Procedures for Implementation, *supra* note 33, at 4.

73. See FMM, Compassionate Release, *supra* note 35, at 1 (noting how the BOP prevented courts from considering compassionate release requests that met the USSC criteria for extraordinary and compelling reasons by refusing to bring a motion to court based on additional criteria developed by the BOP or BOP evaluations of who was “deserv[ing]”); Ginsberg, *supra* note 12, at 5 (stating that “[f]or over three decades, the BOP retained unlimited and unreviewable discretion to refuse to file compassionate release motions, no matter how deserving the prisoner's case facially appeared”).

74. See William W. Berry III, Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release, 68 Md. L. Rev. 850, 852–53 (2009) (explaining that the BOP considers only “terminally ill inmates as candidates for compassionate release”).

75. See Mary Price, The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent'g Rep. 188, 188–89 (2001) (arguing on the basis of the Senate Judiciary Committee's Report on the Sentencing Report Act that the term “extraordinary and compelling” was meant to include a variety of circumstances, not only medical ones).

as the DOJ's Office of the Inspector General.⁷⁶ In 2013, that DOJ office produced a report, entitled *The Federal Bureau of Prisons' Compassionate Release Program*, in which the DOJ found that the compassionate release program had "been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided."⁷⁷ The DOJ went on to criticize the BOP's lack of clear standards for compassionate release, finding that BOP staff members had "varied and inconsistent" understandings of when a request should be granted.⁷⁸

Criticism of the BOP's pandemic-era compassionate release response has been even more robust than pre-pandemic.⁷⁹ Alarmingly, family members of those incarcerated have reported that individuals in prison received "no medical attention" while ill with COVID-19.⁸⁰ Pandemic-era BOP operations have been negligent beyond simply failing to control for

76. See *infra* note 79. At the end of 2021, the BOP was infamously criticized after a November Associated Press report found that the agency was a "hotbed of abuse, graft and corruption, and ha[d] turned a blind eye to employees accused of misconduct." See Michael Balsamo & Michael R. Sisak, *Workers at Federal Prisons Are Committing Some of the Crimes*, AP News (Nov. 14, 2021), <https://apnews.com/article/federal-prisons-5be574b4103a2f5420e0d9da2daf5c9c> [<https://perma.cc/3HTT-45GZ>]. Congressional leaders called for a change in leadership, stating that the BOP Director failed "to protect BOP staff and inmates from the COVID-19 pandemic" and that "there is much going on wrong in our federal prisons, and we urgently need to fix it." See Press Release, Comm. on the Judiciary, *Durbin Calls on AG Garland to Dismiss BOP Director Carvajal*, Comm. on the Judiciary (Nov. 16, 2021), <https://www.judiciary.senate.gov/press/dem/releases/durbin-calls-on-ag-garland-to-dismiss-bop-director-carvajal> [<https://perma.cc/FAD7-PP9Q>]. Others argue that a change in leadership is not enough to fix present-day BOP issues. See Hugh Hurwitz, *Opinion, To Fix Our Prison System, We Need Far More Than a Change in Leadership*, Hill (Dec. 23, 2021), <https://thehill.com/opinion/criminal-justice/586981-to-fix-our-prison-system-we-need-far-more-than-a-change-in/> [<https://perma.cc/E5J2-QJ5F>] (arguing that a change in leadership is not enough and reforms must go further). After mounting political pressure, Director Michael Carvajal announced his retirement in early 2022. *BOP Director Announces Plans to Retire*, Fed. Bureau of Prisons (Jan. 5, 2022), https://www.bop.gov/resources/news/20220105_director_to_retire.jsp [<https://perma.cc/72Y3-DLMD>].

77. See DOJ, *supra* note 69, at i.

78. *Id.*

79. The DOJ sent the BOP a highly critical memorandum regarding the BOP's lack of implementation of the FIRST STEP Act. See *infra* section I.B. This memorandum, published in November 2021, highlights the fact that the BOP has not engaged in formal negotiations with its national union of employees since the beginning of the pandemic, as the national union refuses to meet online and the BOP leadership refuses to meet in person. The DOJ memorandum states that the BOP's decision to not conduct negotiations with its union has resulted in a delay in implementation of FIRST STEP Act policies and a failure to address DOJ "recommendations on systemic correctional and safety issues." Management Advisory Memorandum from Michael E. Horowitz, Inspector Gen., Off. of the Inspector Gen., DOJ, to Michael Carvajal, Dir., Fed. Bureau of Prisons I (Nov. 15, 2021), <https://oig.justice.gov/sites/default/files/reports/22-007.pdf> [<https://perma.cc/FL3W-PVN>]. The BOP's response to this letter emphasized that the BOP "has issued FSA-related policies since the passage of the legislation" and has "issued 12 policies to implement the FSA's requirements." See *id.*

80. *Id.*

transmission of the virus, with reports of incarcerated individuals being forced to “urinate and defecate in garbage bags during a water outage” alongside reports of food being served with maggots or dead cockroaches.⁸¹ Members of Congress have been similarly critical. Representative Jerry Nadler, for example, commented that the DOJ has, at best, “slow-walked its response to COVID-19” and, at worst, “been derelict in their duty to prevent deaths in the facilities that they operate.”⁸² Extra-governmental organizations, like Families Against Mandatory Minimums (FAMM), have been critical of the BOP’s failure to implement the FIRST STEP Act as well, stating that the “BOP has fallen short in key areas of the law’s implementation” in that it has “missed reporting deadlines to Congress about the use of compassionate release and has proposed a rule that would harshly limit the use of a key reform from the First Step Act.”⁸³

Historically, compassionate release has not afforded many individuals the opportunity to be released from prison, largely because the BOP is not a compassionate gatekeeper. According to former Inspector General Michael Horowitz, on average “only 24 inmates were released each year through the compassionate release program” under the BOP’s direction between 2006 and 2011.⁸⁴ The subsequent years—from 2013 to 2017—were marginally better, with the BOP approving 6% of the 5,400 applications received (for approximately eighty-one approvals per year).⁸⁵ During that same time period, however, 266 individuals died in prison while awaiting decisions on their compassionate release requests.⁸⁶

4. *The Federal Courts’ Role in Compassionate Release.* — Prior to 2018, incarcerated persons had no other means of seeking relief outside of the

81. *Id.* In addition to unsanitary conditions, the BOP has been criticized for ignoring prisoners’ COVID-19 symptoms, pressuring staff to continue to work after being exposed to sick prisoners, and limiting testing in order to under report case numbers. See Keegan Hamilton & Keri Blakinger, ‘I Begged Them to Let Me Die’: How Federal Prisons Became Coronavirus Death Traps, *Vice* (June 18, 2020), <https://www.vice.com/en/article/pkyayb/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps> [https://perma.cc/PE87-Z336].

82. See Hamilton & Blakinger, *supra* note 81.

83. Press Release, FAMM, FAMM Submits Testimony in Advance of Senate Judiciary Committee Hearing on Oversight of the Federal Bureau of Prisons (Apr. 14, 2021), <https://famm.org/famm-submits-testimony-in-advance-of-senate-judiciary-committee-hearing-on-oversight-of-the-federal-bureau-of-prisons/> [https://perma.cc/LY6K-LQQA] [hereinafter FAMM, Press Release].

84. Compassionate Release: Views From the Executive Branch, U.S. Sentencing Commission’s Public Hearing on Compassionate Release and Conditions of Supervision 65–66 (Feb. 17, 2016) (testimony of Michael E. Horowitz, Inspector Gen., Off. of the Inspector Gen., DOJ), https://www.usc.gov/sites/default/files/Transcript_6.pdf [https://perma.cc/2LAH-8YTT] [hereinafter Horowitz, Testimony].

85. Christie Thompson, Frail, Old and Dying, but Their Only Way out of Prison Is a Coffin, *N.Y. Times* (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release.html> (on file with the *Columbia Law Review*).

86. *Id.*

BOP.⁸⁷ Once the Director of the BOP denied compassionate release the request was considered closed and the decision final.⁸⁸ This was done in the vast majority of cases.⁸⁹ Federal courts “uniformly rejected attempts to appeal the denial of a motion for compassionate release” and, as of 2009, there had never been a “published case granting compassionate release reduction outside of a motion by the Director.”⁹⁰ Between 1984 and 2018, very few individuals were successful in utilizing this mechanism to get out of prison as the BOP, the only means of recourse in making such a request, only allowed for compassionate release in very rare circumstances.⁹¹

B. *The FIRST STEP Act*

The Bureau of Prisons’ inadequacy in effectively determining incarcerated persons’ eligibility for compassionate release led Congress to act, passing the FIRST STEP Act in 2018.⁹² The Act empowered judges to overrule the BOP’s determination; in particular, it amended 18 U.S.C. § 3582, which sets out the federal criteria around imposition of a sentence of imprisonment.⁹³ The FIRST STEP Act adds the following language to Section 3582: “or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier.”⁹⁴ Practically, this language means that incarcerated persons have the ability to appeal directly to courts, regardless of whether the BOP supports their release. This addition is instrumental in that it allows those in prison to sidestep the BOP’s determination and appeal directly to a judge.⁹⁵ In 2019, the first year after the FIRST STEP Act was passed, there was a “five-fold increase” in the number of compassionate release requests granted.⁹⁶ Two-thirds of the requests granted in 2019 were requests filed directly by the incarcerated individual—requests that likely would not have been considered prior to the FIRST STEP Act’s passage.⁹⁷ While defendants can now take their cases to court, defendants

87. U.S. Sent’g Comm’n, *The First Step Act of 2018: One Year of Implementation* 46 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf [https://perma.cc/G2PM-RYQN] [hereinafter *First Step Act: One Year of Implementation*].

88. Berry, *supra* note 74, at 865.

89. *Id.*

90. *Id.* at 866.

91. *See id.*; see also Horowitz, *Testimony*, *supra* note 84, at 65–66.

92. FIRST STEP Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (codified in scattered sections of 18 U.S.C.).

93. *See id.*

94. *Id.*

95. *See* U.S. Sent’g Comm’n, *supra* note 87, at 47.

96. *Id.* at 6.

97. *Id.*

still cannot avoid the BOP's process altogether.⁹⁸ Even post-FIRST STEP Act, courts routinely continue to deny requests for compassionate release when individuals have not either “fully exhausted all administrative rights to appeal” or waited the requisite thirty days.⁹⁹

The FIRST STEP Act also requires the BOP to compile a report on compassionate release statistics, to include, among other things, “the number of prisoners granted and denied sentence reductions” and “the number of motions filed by defendants with the court after all administrative rights to appeal a denial of a sentence reduction had been exhausted” and “the outcome of each motion.”¹⁰⁰ The FIRST STEP Act is intended to both reduce “unnecessarily long federal sentences and improve conditions in federal prisons.”¹⁰¹ After the implementation of the FIRST STEP Act, courts became more involved in the process of compassionate release—still, there was a high barrier to release, with most requests still resulting in denial.¹⁰²

C. *Compassionate Release in the COVID-19 Era*

1. *COVID-19 as an Extraordinary and Compelling Reason for Compassionate Release.* — In 2020, the BOP continued to deny requests for compassionate release despite the ongoing pandemic, with just thirty-six requests approved during the first thirteen months of the pandemic.¹⁰³ In

98. Again, the FIRST STEP Act stipulates that petitioners must still file a request for compassionate release with the warden of the prison in which they are housed, but if the warden either denies the request or does not respond within thirty days, then the petitioner can apply directly to the courts. 18 U.S.C. § 3582(c)(1)(A)(i) (2018).

99. See *United States v. Alam*, 960 F.3d 831, 835 (E.D. Mich. 2020) (“Just one published decision of a federal court of appeals has faced a circumstance in which a prisoner failed to comply with the § 3582(c)(1)(A) administrative exhaustion requirement. That court found the omission a ‘glaring roadblock foreclosing compassionate release.’ . . . We agree.” (quoting *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020))).

100. See 18 U.S.C. § 3582(d)(3).

101. Ames Grawert, *What Is the First Step Act—And What’s Happening With It?*, Brennan Ctr. for Just. (June 23, 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it> [<https://perma.cc/XK5X-H6QY>].

102. See Blakinger & Neff, *The Bureau of Prisons Approved 36*, *supra* note 15 (“The central office rejected most of those[,] . . . ultimately approving just 0.1%. By the end of April . . . wardens had approved 1.2% of applications, and Carvajal again accepted just 0.1%. By comparison, federal judges approved 21% of compassionate release requests they considered in 2020 . . .”).

103. See *id.* At the same time, the BOP did use other mechanisms, such as home confinement, to try to reduce and control the spread of COVID-19 in prisons. Enabled by congressional passage of the CARES Act, since March 2020, the BOP has increased the use of home confinement by over 40%. See *Coronavirus Aid, Relief, and Economic Security (CARES) Act*, Pub. L. No. 116-136, 134 Stat. 281 (2020); Press Release, Bureau of Prisons, *Update on COVID-19 and Home Confinement* (Apr. 5, 2020), https://www.bop.gov/resources/news/20200405_covid19_home_confinement.jsp [<https://perma.cc/86DY-JSQJ>]. Since the increase in usage of home confinement under the CARES Act, advocates have wondered whether individuals sent home would be required to return to prison post-pandemic; in July 2021, the Biden Administration announced that individuals sent home

fact, when compared with the number approved in 2019—the year prior to the coronavirus outbreak—there was a downturn in the number of requests approved by the BOP.¹⁰⁴ To the average person, the fact that the BOP chose to release *fewer* people during a global pandemic than during a normal year might seem unjustifiable at best and unconscionable at worst.¹⁰⁵ The BOP itself has not offered any justification for its pandemic-era reduction in releases.¹⁰⁶ Some argue that this lack of justification is due to the fact that no justification exists for systemically denying compassionate release,¹⁰⁷ especially in the context of a pandemic that has killed over a million people in the United States alone.¹⁰⁸

under the CARES Act would be required to return to prison a month after the official state of emergency for the pandemic ends. Charlie Savage & Zolan Kanno-Youngs, *Biden Legal Team Decides Inmates Must Return to Prison After Covid Emergency*, N.Y. Times (July 19, 2021), <https://www.nytimes.com/2021/07/19/us/politics/biden-prisoners-covid.html> (on file with the *Columbia Law Review*) (last updated Aug. 30, 2021).

The DOJ later reversed course, with Attorney General Merrick Garland releasing a statement confirming that many individuals at home will be permitted to stay there post-pandemic. See Press Release, Merrick B. Garland, Att’y Gen., DOJ (Dec. 21, 2021), <https://www.justice.gov/opa/pr/statement-attorney-general-merrick-b-garland-0> [<https://perma.cc/J9NN-VHBA>] (“We will exercise our authority so that those who have made rehabilitative progress and complied with the conditions of home confinement, and who in the interests of justice should be given an opportunity to continue transitioning back to society, are not unnecessarily returned to prison.”).

104. Blakinger & Neff, *The Bureau of Prisons Approved 36*, supra note 15 (“While the BOP director greenlit 55 such requests in 2019, a new director who took over in early 2020 approved only 36 requests in the [first] 13 months . . . [of the pandemic]. The . . . number of people seeking compassionate release skyrocketed from 1,735 in 2019 to nearly 31,000 after the virus . . .”).

105. Lilyan Wong, *Comment, Human Rights Under Strain: An Unprecedented Crisis Brings COVID-19 Lawsuits Inside Correctional Facilities*, 8 St. Thomas J. Complex Litig. 1, 2 (2021) (“This issue has shined light upon the inherent injustices of our criminal legal system, including the unconscionable number of people held in jails and prisons in inhumane conditions.”).

106. See Blakinger & Neff, *The Bureau of Prisons Approved 36*, supra note 15 (quoting a BOP spokesperson, Scott Taylor, who said that the “agency would not answer any questions about the data, ‘out of respect and deference’ to lawmakers”).

107. News organizations have written at length about BOP’s inadequate response to the pandemic. See, e.g., *id.* (explaining “the bureau has offered little insight into its reasons for denying compassionate release”). Blakinger and Neff went on to quote Professor Alison Guernsey, who found that “prosecutors were fighting release and saying that this person doesn’t have a condition that makes them vulnerable—and then they would die, and the BOP would issue a press release saying that the person had underlying conditions” and stated that “[t]he two-faced position of the Department of Justice, which includes the BOP, is really quite shocking.” *Id.* (internal quotation marks omitted).

108. Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory, CDC, https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths_select_00 [<https://perma.cc/6HB5-BDLN>] (last visited Aug. 7, 2022) (reporting 1,028,062 cumulative COVID-19 related deaths in the United States as of August 5, 2022).

Due to the FIRST STEP Act, the BOP is no longer a barrier for courts to consider, grant, or deny compassionate release requests.¹⁰⁹ As of the summer of 2021, 99% of approved compassionate release requests were granted “by judges over the bureau’s objections.”¹¹⁰ During the COVID-19 pandemic, the number of compassionate release requests—both received and subsequently granted by courts—was substantially higher than the number of requests previously granted. In 2020, federal courts granted 2,549 compassionate release requests, compared with just 145 releases in 2019.¹¹¹ And, from February 2020 through April 2021, the federal courts released over 3,100 people, with “nearly every one of those motions” for release filed by a party other than the BOP.¹¹²

II. LACK OF STANDARDIZATION WITHIN THE FACTORS UNDER CONSIDERATION BY THE COURTS

While courts have been much more likely to grant compassionate release requests during the pandemic, the federal judiciary has not

109. See *supra* section II.B. Alongside court intervention, some state governments implemented new laws to help at-risk individuals get out of prison. The District of Columbia, for example, passed a law—“Motions for Compassionate Release for Individuals Convicted of Felony Offenses”—which specifically mentions COVID-19 comorbidities as a reason for an individual to be released. See 68 D.C. Reg. 001034, 001058–60 (Jan. 22, 2021). The law also allows for the court to modify a term of imprisonment “notwithstanding any other provision of law,” meaning that an individual could be released even if there were a mandatory minimum imposed, for example. See *id.* Other states, like California—in an effort to reduce overall populations at prisons that were identified as higher risk for coronavirus transmissions—decided to grant early release for some of those incarcerated with less than a year left to serve on their sentence. John Myers & Phil Willon, *California to Release 8,000 Prisoners in Hopes of Easing Coronavirus Crisis*, L.A. Times (July 10, 2020), <https://www.latimes.com/california/story/2020-07-10/california-release-8000-prisoners-coronavirus-crisis-newsom> [<https://perma.cc/LA5Y-H5RM>]. For a state-by-state timeline overview of COVID-19 prison policies, see generally *Reducing Jail and Prison Populations During the COVID-19 Pandemic*, Brennan Ctr. for Just. (Mar. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic> [<https://perma.cc/MD6V-8WKL>] (last updated Jan. 7, 2022). For a list of other measures taken across the country in order to release people from prison during the pandemic, see generally *The Most Significant Criminal Justice Policy Changes From the COVID-19 Pandemic*, Prison Pol’y Initiative, <https://www.prisonpolicy.org/virus/virusresponse.html> [<https://perma.cc/5ZD5-5BPF>] (last visited Aug. 7, 2022).

110. Blakinger & Neff, *The Bureau of Prisons Approved 36*, *supra* note 15.

111. U.S. Sent’g Comm’n, U.S. Sentencing Commission Compassionate Release Data Report: Calendar Year 2020 tbl.1 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210609-Compassionate-Release.pdf?utm_medium=email&utm_source=govdelivery [<https://perma.cc/A8N2-RRLM>]; Press Release, Kevin Ring, President, FADM, FADM Issues Statement Following Sentencing Commission Report on Compassionate Release (June 10, 2021), <https://fadm.org/fadm-issues-statement-following-sentencing-commission-report-on-compassionate-release/> [<https://perma.cc/CQ6D-7EGG>].

112. FADM, Press Release, *supra* note 83 (noting the BOP “grossly underutilized two major tools . . . to bring motions for prisoners to receive compassionate release”).

adopted a universal standard in adjudicating petitions.¹¹³ Courts continue to apply the extraordinary and compelling standard, as explained in section I.A.1, but they have not adopted a standardized test to weigh the various factors raised in pandemic-era compassionate release petitions.¹¹⁴ Two factors commonly considered by courts in current compassionate release jurisprudence are the various comorbidities for COVID-19 and vaccination status. These factors are considered dissimilarly, and with contrasting outcomes, by different courts.¹¹⁵ For example, one Texas court held that the obesity—a disorder recognized by the CDC as a comorbidity for COVID-19—of the defendant, Mr. Tyron Deshan Forman, was not extraordinary or compelling because obesity is a “commonplace malad[y]” in the United States.¹¹⁶ Just two weeks earlier—and a few states away—a Florida court held the opposite, finding that the obesity of the defendant, Ms. Evelyn Cecilia Bozon Pappa, was reason enough for her to be granted compassionate release.¹¹⁷ In the United States, individuals are constitutionally guaranteed equal protection under the law.¹¹⁸ In applying the same factors for compassionate release, however, these courts treated Mr. Forman’s and Ms. Bozon Pappa’s obesity unequally, leading to different outcomes for the two defendants despite their similar circumstances.¹¹⁹

113. See Tolan, *supra* note 17.

114. See *id.* (“Federal judges . . . are applying the same laws, which allow compassionate release in ‘extraordinary and compelling’ cases. But . . . wide disparities show that whether defendants get released early . . . has had almost as much to do with which courts are hearing their motion as it does with the facts of their cases . . .”).

115. See *id.* (describing varying treatments of preexisting conditions and judges treating both vaccination and lack of vaccination unfavorably in compassionate release hearings).

116. *United States v. Forman*, No. 4:15-CR-129(6), 2021 WL 1536491, at *5 (E.D. Tex. Apr. 16, 2021) (“[T]he CDC reports that 42.5% of the adult population in the United States is obese and 73.6% is overweight. Due to their prevalence, diabetes and obesity cannot be deemed ‘extraordinary’ in order to merit compassionate release.”); Underlying Medical Conditions Associated With Higher Risk for Severe COVID-19: Information for Healthcare Professionals, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/underlyingconditions.html> [<https://perma.cc/EDR5-3CX4>] (last updated June 15, 2022).

117. *United States v. Pappa*, No. 95-00084-CR, 2021 WL 1439714, at *4 (S.D. Fla. Apr. 1, 2021) (finding that, though the defendant was at least partially vaccinated at the time of holding, “extraordinary and compelling reasons exist for a reduction of Defendant’s sentence based on her underlying medical conditions (including obesity) in conjunction with the threat of contracting COVID-19 in prison”).

118. U.S. Const. amend. XIV, § 1.

119. As mentioned *supra* in section I.A.1, it is possible that the courts would have reached these contrasting decisions on other factors alone. However, in the case of Mrs. Bozon Pappa, the court specifically referenced and relied on the defendant’s obese status as the reason why she should be released from prison; for Mr. Forman, the same comorbidity was described as commonplace and not “extraordinary and compelling.” See *Forman*, 2021 WL 1536491, at *5; *Pappa*, 2021 WL 1439714, at *4.

The second factor that is commonly examined by courts in compassionate release decisions is defendants' vaccination status. This factor is similarly irregular in its application.¹²⁰ Many courts have summarily ruled that a defendant's vaccination against COVID-19 provides enough protection such that the defendant cannot make a COVID-19 based extraordinary and compelling showing.¹²¹ Ruling in the opposite direction, other courts have held that an individual's refusal to receive the inoculation results in the same conclusion, a denial of their compassionate release request.¹²² Still other courts have held that an individual's vaccination status does not change the overall analysis at all.¹²³

This Part examines the different holdings handed down by courts. Section II.A discusses the lack of standardization on comorbidity issues across court decisions. Section II.B discusses the lack of standardization across federal courts on the vaccination issue. Finally, section II.C argues that these different outcomes—across both comorbidities and vaccination status—are unfair and arbitrary. It also provides further statistics in support of the argument that this issue is a nationwide phenomenon, one not relegated to only a subset of the country.

A. *Lack of Standardization: Comorbidities*

Prison populations are at an increased risk of contracting COVID-19 given the congregate and enclosed nature of carceral institutions.¹²⁴ Perhaps less obviously, prison populations are also more likely to get sicker

120. See Tolan, *supra* note 17 (“The DOJ’s position now is either you’re vaccinated and you’re safe, or you should have gotten vaccinated and if not, you’re not deserving of compassionate release We’re seeing a near-blanket opposition to almost all of our cases.” (internal quotation marks omitted) (quoting Beth Blackwood, a lawyer at the National Association of Criminal Defense Lawyers)).

121. See *infra* section II.B.1.

122. See *infra* section II.B.2. Some state courts offer vaccination-based incentives to the incarcerated. For example, judges in Georgia offered (slight) sentence reductions if an incarcerated individual agreed to get vaccinated. Tony Thomas, *Some Local Judges Offering Sentence Reductions to Offenders Who Get Vaccinated*, WSBTV (May 20, 2021), <https://www.wsbtv.com/news/local/hall-county/some-judges-offering-sentence-reductions-offenders-who-get-vaccinated/6OCVPVEBXRCEM3XCNTJCKP4/> [<https://perma.cc/WTQ9-KA9U>]. Other vaccination-based incentives exist in various states, including Hawaii, where the Department of Public Safety offered incarcerated people \$50 to receive both vaccine doses. See Brennan Ctr. for Just., *supra* note 109 (“On October 16, Hawaii’s Department of Public Safety announced it would credit \$50 to the accounts of incarcerated people who become fully vaccinated against Covid-19.”). In New York State, barbecues, \$75 care packages, and conjugal visits were among the incentives available, should an incarcerated individual choose to get vaccinated. *Id.*

123. *United States v. Garza*, No. 2:12-418(S)-3, 2022 WL 103355, at *3 (S.D. Tex. Jan. 11, 2022).

124. See Brennan Ctr. for Just., *supra* note 109 (“[I]t’s no surprise that correctional facilities are uniquely vulnerable to diseases such as Covid-19.”).

after contracting the virus.¹²⁵ The U.S. prison population is getting older every year,¹²⁶ and an individual's history of incarceration is also positively correlated with significantly increased odds of developing "a number of chronic medical conditions."¹²⁷ Such chronic medical conditions include those that are listed as comorbidities for COVID-19 by the CDC, such as hypertension and HIV.¹²⁸ Additionally, prison populations are disproportionately people of color,¹²⁹ and there is a disproportionate number of COVID-19 deaths among racial and ethnic minorities.¹³⁰ This context is important in understanding courts' determinations as they relate to preexisting conditions.¹³¹

As previously noted, courts do not apply a standard test to determine the appropriate amount of weight to give preexisting conditions, both generally and in individual cases.¹³² For example, one court acknowledged

125. See David Cloud, Vera Inst. of Just., *On Life Support: Public Health in the Age of Mass Incarceration* 5 (2014), <https://www.vera.org/downloads/publications/on-life-support-public-health-mass-incarceration-report.pdf> [<https://perma.cc/Q8TL-LYPH>] (finding that incarcerated individuals experience chronic health conditions, infectious diseases, and mental illness at much higher rates than the general public and also that the conditions inside prisons exacerbate the physical and mental health problems of incarcerated individuals).

126. See Weihua Li & Nicole Lewis, *This Chart Shows Why the Prison Population Is So Vulnerable to COVID-19*, The Marshall Project (Mar. 19, 2020), <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19> [<https://perma.cc/MV2R-772N>] ("[T]he percentage of [incarcerated] people who are 55 or older has been consistently growing, reaching 12 percent in 2016. This means for the first time, the aging population in state prisons has surpassed the number of young adults between the age 18 and 24.").

127. See Tomoko Udo, *Chronic Medical Conditions in U.S. Adults With Incarceration History*, 38 *Health Psych.* 217, 221 (2019).

128. *Id.* at 220; CDC, *Medical Conditions*, *supra* note 14.

129. See Udo, *supra* note 127, at 218.

130. Timothy S. Jost, *Considering Race and Ethnicity in Covid Risk Assessments—Legal Concerns and Possible Solutions*, 387 *New Eng. J. Med.* 481, 481 (2022) ("It is well documented that Black, Indigenous, and Latinx people have been at high risk for poor outcomes during the Covid-19 pandemic. . . . Moreover, Black, Indigenous, and Latinx people have died from Covid-19 at younger ages than White people, on average.").

131. Beyond the imprisoned population, the COVID-19 pandemic has further exposed healthcare inequities throughout the American population writ large. Compared to white Americans, Black individuals were 2.2 times more likely to be hospitalized due to COVID-19 and 1.7 times more likely to die due to it. See *Risk For COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> [<https://perma.cc/AJP5-X736>] (last updated Nov. 22, 2021). Latinx individuals were similarly 2.1 times more likely to be hospitalized and 1.8 times more likely to die due to it. *Id.* Beyond race, the pandemic has also highlighted underlying economic inequities. See Eddie Bernice Johnson & Lawrence J. Trautman, *The Demographics of Death: An Early Look at COVID-19, Cultural and Racial Bias in America*, 48 *Hastings Const. L.Q.* 357, 457 ("[T]he U.S. 2020-21 pandemic experience highlights the growing income inequality and current predatory policies toward minority groups and the less fortunate.").

132. See Eda Katharine Tinto & Jenny Roberts, *Expanding Compassion Beyond the Covid-19 Pandemic*, 18 *Ohio St. J. Crim. L.* 575, 588 (2021) (explaining that federal judges

that “according to the CDC website some of [the defendant’s] underlying medical conditions, specifically, obesity and Type 2 diabetes, can make him more likely to become severely ill should he contract COVID-19” but nonetheless held that “such commonplace maladies do not make [the defendant’s] case ‘extraordinary.’”¹³³ Despite this holding, the statutes that impute courts with the ability to release individuals from prison do not require that a disease be a rarity in order for it to be an “extraordinary” reason, or one that demands compassionate release.¹³⁴

In another case involving the defendant’s preexisting conditions, Marie Neba was a 56-year old woman with stage four breast cancer when the COVID-19 pandemic hit.¹³⁵ She was also in federal prison for Medicare fraud.¹³⁶ Prior to the pandemic, she petitioned for compassionate release due to her cancer diagnosis—the Warden denied her request.¹³⁷ During the pandemic, she petitioned for compassionate release once more—the Warden ignored her request all together.¹³⁸ Ms. Neba then hoped for relief from the court. In a handwritten letter to Judge Andrew Hanen, she wrote: “I have not been getting the treatments I should be getting for my stage 4 breast cancer” and “had to wait for . . . a couple of months to see the oncologist.”¹³⁹ She also recounted that her breast cancer initially progressed because her prison-issued doctor “ignored [her] breast complaints on several occasions and prescribed only Ibuprofen and NEVER examined [her] breast.”¹⁴⁰ Finally, she pleaded with the judge that she was “at risk to contract [COVID-19] because of [her] terminal status” and that her treatments could lead her to her grave: “Please Judge help me get . . . out of this facility if possible as soon as possible or else I will die leaving behind my twin [9 year-old] boys Trevor and Travis [and] Chandel my daughter.”¹⁴¹ Marie Neba’s fears came true when she contracted and subsequently died from COVID-19 in federal prison.¹⁴²

reach different conclusions on whether a “medically vulnerable prisoner was sufficiently ill to warrant release or how best to determine a prisoner’s risk of catching COVID-19 while imprisoned”).

133. See *United States v. Forman*, No. 4:15-CR-129(6), 2021 WL 1536491, at *5 (E.D. Tex. Apr. 16, 2021).

134. See FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended at 18 U.S.C. (2018)).

135. See Joseph Neff & Keri Blakinger, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied.*, The Marshall Project (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied> [<https://perma.cc/QSB3-5BS7>].

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

Cancer is a terminal medical condition and is included in the USSC's definition of "a terminal illness which will lead to the end of life, even if there is not a specific prognosis of life expectancy."¹⁴³ The USSC guidelines also specifically refer to "metastatic solid-tumor cancer" as an example of terminal illness.¹⁴⁴ Cancer is also a preexisting condition for COVID-19, according to the CDC, which states that "[h]aving cancer can make you more likely to get very sick from COVID-19."¹⁴⁵ Marie Neba should not have died in federal prison; the compassionate release statutory scheme is precisely designed to avoid deaths like Ms. Neba's.

B. *Lack of Standardization: Vaccination and Prior Infection Status*

1. *Courts' Propensity Toward Not Granting Relief When the Petitioner Has Received the COVID-19 Vaccination.* — Since incarcerated persons began receiving the COVID-19 vaccination in December 2020, courts started using positive vaccination status as a reason to deny COVID-19 based compassionate release requests, irrespective of preexisting conditions.¹⁴⁶ As the District Court for the Eastern District of Texas explained earlier this year, "In the Fifth Circuit and elsewhere, courts have denied early release to inmates with a variety of medical conditions who have been vaccinated for COVID-19."¹⁴⁷ Even when defendants are "in the process of being vaccinated," some courts have held that defendants cannot meet their burden of establishing COVID-19 as an extraordinary and compelling risk.¹⁴⁸

At the same time, other courts have continued to hold that vaccination status "should not, and does not," change the court's consideration of a compassionate release request.¹⁴⁹ In *United States v. Manglona*, the district court judge held that "vaccination during the pendency of the Motion for Compassionate Release . . . should not, and does not, in some way trump the Court's consideration of the motion."¹⁵⁰ In that case, the government argued that the COVID-19 vaccine lowered the defendant's risk, despite his preexisting conditions (including high cholesterol and blood pressure, asthma, and obesity).¹⁵¹ The defendant countered with a declaration from a doctor that the "[r]isk appears to remain, but it is

143. U.S. Sent'g Guidelines Manual § 1B1.13 cmt. (1)(A)(i) (U.S. Sent'g Comm'n 2018).

144. *Id.*

145. CDC, Medical Conditions, *supra* note 14.

146. See *supra* note 16. See *infra* note 158 for additional context on the distribution of vaccinations to those incarcerated.

147. See *United States v. Forman*, No. 4:15-CR-129(6), 2021 WL 1536491, at *7 (E.D. Tex. Apr. 16, 2021) (citing U.S. cases, all denying defendants' compassionate release requests because of vaccine availability).

148. See *United States v. Wakefield*, No. 1:19-CR-00095-MR-WCM, 2021 WL 640690, at *3 (W.D.N.C. Feb. 18, 2021).

149. See *United States v. Manglona*, No. CR14-5393RJB, 2021 WL 808386, at *1 (W.D. Wash. Mar. 3, 2021).

150. *Id.*

151. *Id.*

reduced to an unknown degree.”¹⁵² To some courts, like the *Manglona* court, vaccination status “should not” change the outcome of a request, while in others, it makes all the difference.

While vaccination does often protect against severe illness, hospitalization, and death,¹⁵³ the fact that an individual is vaccinated should not conclude a court’s inquiry on that individual’s compassionate release request. In the last few months of 2020, the United States contended with major outbreaks of two new COVID-19 variants—Delta and Omicron.¹⁵⁴ Vaccinated individuals are still at risk of contracting both variants, at risk of having symptoms, and at risk for “long COVID.”¹⁵⁵ Vaccinated individuals with preexisting conditions are also still at risk of severe illness and death from the current variants¹⁵⁶ and the potentially more deadly ones to follow in the future. Additionally, the definition of “fully vaccinated” continues to change, as additional vaccination doses, otherwise known as “boosters,” are needed to provide protection as the COVID-19 virus evolves, with new variants continuing to emerge.¹⁵⁷ Incarcerated people were largely not prioritized in the first vaccination round, so it is difficult to imagine that they would be prioritized in the

152. *Id.*

153. See COVID-19 Vaccines Work, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html> [<https://perma.cc/QPH2-4L5V>] (last updated June 28, 2022).

154. For background context on the Delta variant, see generally Kathy Katella, 5 Things to Know About the Delta Variant, *Yale Med.* (Jan. 6, 2022), <https://www.yalemedicine.org/news/5-things-to-know-delta-variant-covid> [<https://perma.cc/8CB2-VHTZ>] (last updated Mar. 1, 2022). For additional context about the Omicron variant in the United States, see generally Potential Rapid Increase of Omicron Variant Infections in the United States, CDC (Dec. 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/mathematical-modeling-outbreak.html> [<https://perma.cc/56NR-2UDD>].

155. See Nancy Lapid, *Explainer: Why You Should Still Try to Avoid Catching Omicron*, *Reuters* (Jan. 12, 2022), <https://www.reuters.com/business/healthcare-pharmaceuticals/why-you-should-still-try-avoid-catching-omicron-2022-01-12/> [<https://perma.cc/896C-MYTJ>] (“Infections with earlier variants of the coronavirus, including mild infections and ‘breakthrough’ cases after vaccination, sometimes caused the lingering, debilitating long-haul COVID syndrome.”).

156. See Erika Edwards & Laura Strickler, *Rarely, Covid Vaccine Breakthrough Infections Can Be Severe. Who’s at Risk?*, *NBC News* (July 19, 2021), <https://www.nbcnews.com/health/health-news/rarely-covid-vaccine-breakthrough-infections-can-be-severe-who-s-n1274164> [<https://perma.cc/3TZQ-YPSA>] (“Despite the power of Covid-19 vaccines in cutting the risk of hospitalization and death from the disease, fully vaccinated people can get very sick and die from the virus in rare cases.”).

157. See Bryan Pietsch, *Omicron Could Redefine ‘Fully Vaccinated’ to Include a Booster Dose*, *Wash. Post* (Dec. 19, 2021), <https://www.washingtonpost.com/health/2021/12/19/fully-vaccinated-booster-omicron-coronavirus-definition/> (on file with the *Columbia Law Review*) (“Health officials in the United States and around the world have signaled in recent days that the definition of being fully vaccinated could be expanded to include booster shots, as the omicron coronavirus variant’s spread alters the world’s path to recovery.”).

booster rounds to come.¹⁵⁸ Incarcerated persons continue to have a higher risk of contracting COVID-19 not only due to the congregate nature of carceral systems, but also because of their forced exposure to unvaccinated individuals—namely, corrections officers.¹⁵⁹ As the country continued to

158. See Brennan Ctr. for Just., *supra* note 109 (“Recommendations from the Centers for Disease Control have encouraged states to prioritize incarcerated people in their vaccine distribution plans, [as] only about half of states included incarcerated people in the early stages of their vaccine rollout plan.”); Beth Schwartzapfel & Keri Blakinger, *Omicron Has Arrived. Many Prisons and Jails Are Not Ready.*, The Marshall Project (Dec. 22, 2021), <https://www.themarshallproject.org/2021/12/22/omicron-has-arrived-many-prisons-and-jails-are-not-ready> [<https://perma.cc/62V7-VG6U>] (“But there is little good public information about how widely boosters are available to incarcerated people or how widespread booster uptake is among correctional staff, many of whom resisted vaccination in the first place.”).

159. Throughout the country, states have dealt with corrections officers refusing the COVID-19 vaccine. For example, at one point in Pennsylvania, more than 75% of the prison population had been vaccinated, compared with only 22% of the corrections officers. See Brennan Ctr. for Just., *supra* note 109. Some cities and states have mandated that corrections officers get vaccinated, with the risk of being suspended should they refuse. See, e.g., *Hundreds of NYC Correction Workers at Risk of Suspension Over Vaccine Mandate*, NBC N.Y. (Dec. 1, 2021), <https://www.nbcnewyork.com/news/coronavirus/hundreds-of-nyc-correction-workers-face-suspension-over-vaccine-mandate/3427664/> [<https://perma.cc/FF3T-Y5H2>]. Regarding the federal system, President Joseph Biden mandated that all federal employees, including BOP corrections officers, get vaccinated or submit to regular testing for COVID-19. See Michael D. Shear, Sheryl Gay Stolberg & Annie Karni, *Biden Seeks to Revive Vaccine Effort With New Rules and Incentives*, N.Y. Times (July 29, 2021), <https://www.nytimes.com/2021/07/29/us/politics/biden-vaccine-mandates.html> (on file with the *Columbia Law Review*). A federal employee union, which includes BOP staff, submitted a grievance that the mandate was unconstitutional. See Walter Pavlo, *Federal Bureau of Prisons Staff 63% Vaccinated but Union Digging in Heels on Mandate*, Forbes (Oct. 6, 2021), <https://www.forbes.com/sites/walterpavlo/2021/10/06/federal-bureau-of-prisons-staff-63-vaccinated-but-union-digging-in-heels-on-mandate/?sh=562d11c010ae> [<https://perma.cc/V8H4-WD63>].

Some have argued that incarcerated individuals themselves should be required to get vaccinated—especially since some corrections officers have essentially been required to do so—but, as of yet, that step has not been taken. See Chandra Bozelko, *Vaccine Mandates Should Cover the Incarcerated, Too, Not Just Prison Guards and Workers*, STATNews (Nov. 18, 2021), <https://www.statnews.com/2021/11/18/vaccine-mandates-should-cover-inmates-too-not-just-prison-guards-and-workers/> [<https://perma.cc/78FJ-R37M>] (arguing that those incarcerated are at higher risk for infection and death from COVID-19 than prison guards and, as such, should be required to be vaccinated). Others argue that requiring incarcerated individuals to receive the vaccine would violate international human rights laws. See Yousef Haik & Eleni Polymenopoulou, *COVID-19 Vaccines and Their Pitfalls in Informed Consent*, 12 *Hastings Sci. & Tech. L.J.* 147, 155 (2021) (“Vaccination without informed consent is generally considered . . . as a form of compulsory medical intervention ‘even if it is of a minor importance’. As such it amounts to an interference with the right to respect for one’s private life ‘which includes a person’s physical and psychological integrity.’” (first quoting *Y.F. v. Turkey*, 2003-IX Eur. Ct. H.R. 171, 179; then quoting *Salvetti v. Italy*, App. No. 42197/98 (July 9, 2002), <https://hudoc.echr.coe.int/fre#%20> [<https://perma.cc/M5ZR-XYEX>])). While those in prison have not been required to get vaccinated (and likely *cannot* be required to do so), a few judges have taken the step of requiring individuals on probation to get vaccinated. See Christine Hauser, *Get a Covid-19 Vaccine or Face Prison, Judges Order in Probation Cases*, N.Y. Times (Aug. 9, 2021), <https://>

experience coronavirus outbreaks, with hundreds of thousands of individuals testing positive for COVID-19 each day,¹⁶⁰ so too did the federal prisons.¹⁶¹ Incarcerated individuals did not have access to the tools necessary to protect themselves from COVID-19 at the beginning of the pandemic¹⁶² and do not have access to the tools necessary to protect themselves now.¹⁶³

www.nytimes.com/2021/08/09/us/ohio-judge-covid-vaccine.html (on file with the *Columbia Law Review*) (last updated Nov. 2, 2021).

160. The *New York Times* maintains a daily case count for U.S. COVID-19 cases by region and state, including the number of individuals who have tested positive, been hospitalized, and died on any given day. See *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times (Dec. 30, 2021), <https://www.nytimes.com/interactive/2021/us/covid-cases.html> (on file with the *Columbia Law Review*) [hereinafter N.Y. Times, *Coronavirus in the U.S.*]. As of December 27, 2021, the average for newly reported cases in the United States was 243,128 cases per day and increasing. The number of new COVID-19 cases for December 27, 2021 alone was 543,540. *Id.*

161. Schwartzapfel & Blakinger, *supra* note 158 (“From local lockups in California to prisons in Wisconsin to jails in Pennsylvania, COVID-19 is once again surging behind bars, posing a renewed threat to a high-risk population with spotty access to healthcare and little ability to distance.”).

162. See *supra* section I.A.3. While some prisoners were paid pennies per hour to make masks for the outside world, they were not allowed to wear masks themselves while working. Hamilton & Blakinger, *supra* note 81.

163. With the arrival of the more infectious Omicron variant, epidemiologists and other public health experts began to recommend that the general public wear higher-quality masks, such as N95 masks. Clare Ansberry, Nidhi Subbaraman & Jemal R. Brinson, *Why Cloth Masks Might Not Be Enough as Omicron Spreads*, *Wall St. J.* (Jan. 10, 2022), <https://www.wsj.com/articles/cloth-face-mask-omicron-11640984082?mod=e2tw> (on file with the *Columbia Law Review*) (“With infections surging due to the fast-spreading Omicron variant, including among the vaccinated, physicians are now urging people to ditch cloth face masks, which they say may not provide enough protection against the virus.”); Jamie Ducharme, *An N95 Is the Best Mask for Omicron. Here’s Why*, *TIME* (Jan. 13, 2022), <https://time.com/6139169/n95-best-mask-omicron-covid-19/> [<https://perma.cc/TK9C-CQQ8>] (last updated Jan. 18, 2022) (quoting Dr. Mohammad Sobhanie, an infectious disease physician, who observed that “Omicron has really changed how we need to protect ourselves”).

President Biden announced that, for the first time, the White House planned to make “high-quality N95 masks, which are most effective at preventing transmission of the virus, available for free.” Zeke Miller, *Biden Details Federal ‘Surge’ of Medical Teams, Free COVID Tests & N95s to Fight Omicron*, *NBC DFW* (Jan. 13, 2022), <https://www.nbcdfw.com/news/coronavirus/biden-highlighting-federal-surge-response-help-weather-covid-spike/2857866/> [<https://perma.cc/27X3-3YSE>]. Additionally, Senator Bernie Sanders introduced a bill in Congress that was designed to send N95 masks out to all Americans and increase awareness about the benefits of more protective masks. Press Release, Bernie Sanders, Sen., U.S. Senate, *NEWS: Sanders Reintroduces Legislation to Give Every American Lifesaving N95 Masks* (Jan. 12, 2022), <https://www.sanders.senate.gov/press-releases/news-sanders-reintroduces-legislation-to-give-every-american-lifesaving-n95-masks/> [<https://perma.cc/9MCA-L9WK>]. While the proposed legislation sought to ensure that the N95 masks would also be distributed to individuals in prison, at least one incarcerated individual has suggested that those incarcerated are not allowed to have N95s in prison. Christopher Blackwell (@ChrisWBlackwell), *Twitter* (Dec. 28, 2021, 1:20 PM), <https://mobile.twitter.com/ChrisWBlackwell/status/1475894485498228736> [<https://perma.cc/X6KF-9Y4A>] (“There’s

2. *Courts' Propensity Toward Not Granting Relief When the Petitioner Has Refused the COVID-19 Vaccination.* — While some courts have held that vaccinated individuals are adequately protected from COVID-19 such that they may remain in prison, other courts have also held that individuals who chose to not get vaccinated have shown that they do not care enough about protection from the virus to be released because of it. Judge Jed Rakoff, sitting in the Southern District of New York, held in a case involving an unvaccinated defendant that “the Court cannot credit [Defendant] with health risks he has voluntarily and unreasonably exacerbated.”¹⁶⁴ While ultimately granting the defendant a reduction in sentence on other grounds, Judge Rakoff held that the defendant’s lack of vaccination was, alone, enough to find that “the risks posed by the COVID-19 pandemic do not weigh in [Defendant’s] favor.”¹⁶⁵ The court reached this conclusion despite the defendant providing the court with a letter stipulating both his reasons for not yet having received the vaccination—a “distrust of the medical department at the prison where he is currently incarcerated”—and a commitment to receive the vaccine should he be moved to a different prison.¹⁶⁶ As the COVID-19 related prong of the test for compassionate release hinged on negative vaccination status alone, this case raises the question of whether defendant would have had a different outcome—at least on this prong—had he brought the case prior to the widespread availability of the vaccine.

3. *Prior Infection With COVID-19.* — The final category in which courts continue to make rules on-the-fly is with regard to defendants’ prior infection with coronavirus. In the Fifth Circuit, courts have summarily held that—regardless of preexisting conditions—defendants cannot establish “extraordinary and compelling” reasons for COVID-19 based compassionate release when they have both recovered from COVID-19 previously and also received the vaccination.¹⁶⁷ But other courts have allowed for COVID-19 based release even when the defendant has previously tested positive for COVID-19 and recovered.¹⁶⁸

another covid outbreak on my prison unit. DOC has plenty of N95 masks now, but prisoners will get a disciplinary infraction if they’re caught with one. Why? Because N95s also protect us from their tear gas, which they still freely use during a respiratory pandemic.”).

164. *United States v. Ballard*, 552 F. Supp. 3d 461, 469 (S.D.N.Y. 2021).

165. *Id.*

166. *Id.*

167. See *United States v. Forman*, No. 4:15-CR-129(6), 2021 WL 1536491, at *7 (E.D. Tex. Apr. 16, 2021) (“[G]iven Forman’s recovery from COVID-19 and his receipt of the vaccine, Forman has failed to establish that sufficient reasons exist regarding COVID-19 that would constitute extraordinary and compelling reasons to release him from prison.”); see also *United States v. McDougal*, No. 1:08-CR-91-HSO-RHW-5, 2022 WL 1019229, at *2–3 (S.D. Miss. Apr. 5, 2022) (denying the defendant’s motion for compassionate release given vaccination status notwithstanding his “various medical conditions”).

168. For examples of cases in which courts have granted sentence reductions to defendants, despite those defendants having previously recovered from COVID-19, see *United States v. Staats*, 502 F. Supp. 3d 958, 964 (E.D. Pa. 2020) (“Some cases of reinfection

C. *The Problem With Unequal Outcomes on the Issues of Comorbidities, Vaccination Status, and Prior Infection*

The overall problem with such disparate outcomes is that individuals are either given the opportunity to live, outside of prison, or essentially sentenced to die, solely based on the locale in which they find themselves incarcerated.¹⁶⁹ From January 1, 2020, through June 30, 2021, the Southern District of California granted 44.3% of the 194 compassionate release motions it heard—releasing eighty-six individuals from prison.¹⁷⁰ During the same time period, the Southern District of Georgia granted 1.7% of its 230 compassionate release requests—for a total of just four individuals released from prison.¹⁷¹ Some might argue that cross-country comparisons ought not be made, but even intrastate district-to-district disparities are stark. Compare the Southern District of Georgia’s statistics with those of the Northern District of Georgia: The Northern District granted 44.0% of 168 cases heard, meaning seventy-four individuals were granted compassionate release.¹⁷² All else being equal, an individual imprisoned in Atlanta is 42.3% more likely to be granted compassionate release than is an individual just across the state in Savannah.¹⁷³ These discrepancies exist across the country.¹⁷⁴ As a recent CNN exposé put it: “[W]hether defendants get released early during the pandemic has had almost as much to do with which courts are hearing their motion as it does

have been far more severe than the initial infection. Because Mr. Staats’s underlying conditions could mean that a second infection may be more severe or even fatal, the fact he has tested positive for the virus is not a reason to deny his release.” (footnote omitted)); *United States v. Easton*, No. 1:18-CR-00022-RLW, slip op. at 10 (E.D. Mo. Nov. 17, 2020) (“The fact that Easton has already contracted COVID-19 does not mean he is no longer at risk, but it does show the BOP cannot protect him from the virus.”); *United States v. Hayes*, No. 2:11-CR-69-NR, 2020 WL 6546135, at *1 n.1 (W.D. Pa. Nov. 5, 2020) (“Mr. Hayes also recently contracted COVID-19 When a prisoner contracts COVID-19, and can point to specific post-illness medical conditions or effects from the virus, as well as a non-speculative risk of re-exposure, an extraordinary and compelling reason for release exists.”).

169. See Tolan, *supra* note 17.

170. U.S. Sent’g Comm’n, *Compassionate Release Data Report, Calendar Years 2020 to 2021* (2021), <https://www.usc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf> [<https://perma.cc/4X8N-Y2J6>] [hereinafter U.S. Sent’g Comm’n, *Compassionate Release Data Report 2020–2021*].

171. *Id.*

172. *Id.*

173. Northern District of Georgia, U.S. Marshals Serv., <https://www.usmarshals.gov/local-districts/northern-district-of-georgia> [<https://perma.cc/YS4L-QAVZ>] (last visited Aug. 7, 2022).

174. For a litany of other examples, see U.S. Sent’g Comm’n, *Compassionate Release Data Report 2020–2021*, *supra* note 170, at tbl.2. The table, produced by the United States Sentencing Commission, shows, for example, that the Northern District of Florida granted 37.3% of requests, while the Middle District of Florida granted 6.0%. The Southern District of Texas granted 26.8% of motions; the Eastern District of Texas granted the same relief for just 2.2% of individuals. *Id.*

with the facts of their cases” and “[t]here’s an arbitrariness in the way these decisions are being made.”¹⁷⁵

Incarcerated individuals deserve a criminal justice system in which their outcomes are not determined solely by location, or by a court’s political preference. The BOP has, rightly, been routinely criticized for exercising too much control in the compassionate release sphere.¹⁷⁶ The DOJ previously reported that the BOP’s regulations did not “establish appropriate medical and non-medical criteria for compassionate release consideration and do not adequately define ‘extraordinary and compelling’ circumstances that might warrant release.”¹⁷⁷ The same DOJ report also found that BOP institution staff had differing understandings of what extraordinary and compelling circumstances warranted release.¹⁷⁸ That confusion has bled over to the federal courts—individual judges do not have a clear understanding of which pandemic-era circumstances demand release, resulting in disparate, unfair outcomes. Just as the DOJ found that BOP staff were deciding compassionate release requests without “clear or comprehensive standards,”¹⁷⁹ so too is the federal judiciary. The federal courts are disparately applying the power to release vested in them by the SRA and the FIRST STEP Act. The compassionate release program, as currently implemented, does not result in a criminal justice system that upholds the values on which the United States was founded—freedom, equality, and justice.¹⁸⁰

175. Tolan, *supra* note 17.

176. For an example of such criticism, see Hum. Rts. Watch & Fams. Against Mandatory Minimums, *The Answer Is No: Too Little Compassionate Release in U.S. Federal Prisons*, Hum. Rts. Watch (Nov. 30, 2012), <https://www.hrw.org/report/2012/11/30/answer-no-too-little-compassionate-release-us-federal-prisons> [<https://perma.cc/89J2-5QMB>] (explaining that “[t]he BOP insists that it has essentially unbounded discretion with regard to compassionate release, and it has chosen to exercise that discretion to reject compassionate release in all but a few cases”).

177. DOJ, *supra* note 69, at 53.

178. *Id.*

179. *Id.*

180. See *The Declaration of Independence* para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”). Support for increased uniformity—and increased granting of compassionate release requests—exists outside of moral and equity-based justifications. For example, since the beginning of the pandemic, experts have contended that the spread of COVID-19 within prisons endangers the general public along with those who are incarcerated. See, e.g., Kiran Misra, ‘A Death Sentence’: US Prisons Could Receive Covid Vaccines Last Despite Being Hotspots, *Guardian* (Feb. 9, 2021), <https://www.theguardian.com/us-news/2021/feb/09/us-jails-prisons-covid-vaccines> [<https://perma.cc/7GZW-VR5X>] (reporting that a recent study found that “outbreaks in jails and prisons contributed to nearly half a million additional Covid-19 cases in surrounding states and counties just from May to August 2020”); Josiah Rich, Scott Allen & Mavis Nimoh, *Opinion, We Must Release Prisoners to Lessen the Spread of Coronavirus*, *Wash. Post* (Mar. 17, 2020), <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/> (on file with the *Columbia Law Review*) (“Unless government officials act now, the novel coronavirus will

III. SOLUTION: UNITED STATES SENTENCING COMMISSION'S PROMULGATION OF PANDEMIC-ERA GUIDELINES FOR USE BY FEDERAL COURTS

This Note has thus far illustrated that the current system for compassionate release is broken, unequal, and unfair.¹⁸¹ Courts have been left to decide individual outcomes—decisions which often make the difference between life and death—with little more guidance than that the justification for release must be “extraordinary and compelling.”¹⁸² This guidance has proven ineffective, especially in the context of a deadly pandemic, which continues to kill thousands of people each week.¹⁸³ This Part proposes one way to resolve the lack of standardization across jurisdictions: the adoption of uniform guidance, to be provided by the USSC, for considering vaccine status and comorbidities in compassionate release decisions. It further argues that vaccination status should not be a barrier to compassionate release, especially given the limitations—in both understanding and efficacy—of the current vaccine offerings.¹⁸⁴ Section III.A provides an overview of the recent conditions of the USSC. Section III.B outlines the details of this Note's proposed solution and explains why the USSC is the correct agency to offer these guidelines. Finally, section III.C

spread rapidly in our jails and prisons, endangering not only prisoners and corrections workers but the general public as well.”).

Additionally, a streamlined approach to compassionate release would result in saved costs for the BOP and, thus, the average American taxpayer. See DOJ, *supra* note 69, at 43–49 (finding that “effectively managing the compassionate release program would result in cost savings for the BOP”). Finally, effective management of the compassionate release program would also provide the “BOP with a significant non-monetary benefit, namely assistance in managing the growing inmate population that has resulted in significant capacity issues for the BOP.” *Id.* at 49.

181. For an additional critique on the injustices of the compassionate release system, see Walter Pavlo, *Federal Judge Rulings Across Country Inconsistent on Compassionate Release*, *Forbes* (June 19, 2020), <https://www.forbes.com/sites/walterpavlo/2020/06/19/federal-judge-rulings-across-country-inconsistent-on-compassionate-release/> [<https://perma.cc/H9EK-Y2KF>] [hereinafter Pavlo, *Federal Judge Rulings*] (arguing that the criminal justice system's implementation of compassionate release “does not seem fair because it is not fair” and explaining that whether or not an incarcerated individual gets a “second chance at life” currently may be “determined by a virus and not the justice system”); see also *supra* section II.C.

182. See Pavlo, *Federal Judge Rulings*, *supra* note 181 (“The BOP's inaction has forced judges to make life or death decisions.”).

183. See *N.Y. Times*, *Coronavirus in the U.S.*, *supra* note 160 (showing that as of December 29, 2021, the daily average number of COVID-19 related deaths was 1,207).

184. The four vaccines currently available in the United States are the Johnson & Johnson (J&J), Moderna, Novavax, and Pfizer-BioNTech vaccines. See Kathy Katella, *Comparing the COVID-19 Vaccines: How Are They Different?*, *Yale Med.* (Feb. 24, 2021), <https://www.yalemedicine.org/news/covid-19-vaccine-comparison> [<https://perma.cc/FEY9-72H4>] (last updated July 20, 2022). The J&J vaccine is the least effective of the four vaccine offerings. *Id.* Both the Moderna and Pfizer vaccines are considered highly effective, but each vaccine declines in effectiveness over time after an individual receives the initial set of doses. They also are less effective against new variants of COVID-19. *Id.*

identifies potential flaws in the proposed solution—and in standardization more broadly—and offers a response to those critiques.

A. *Recent Issues With the USSC*

Congress allocated the USSC the power—and the obligation—to set guidelines regarding compassionate release.¹⁸⁵ From January 2019 to August 2022, the USSC had multiple vacancies that prevented a quorum needed to vote on measures.¹⁸⁶ That lack of quorum resulted in the Commission’s severe inability to complete the tasks which the FIRST STEP Act and the SRA contemplate it must do.¹⁸⁷ The USSC’s situation was so dire that multiple Congresspersons called on President Joseph Biden to prioritize nominating new members to the Commission.¹⁸⁸ As those Representatives put it, the Commission’s inability to meet quorum “forestalled the important work of updating and establishing new sentencing guidelines” and “because of the vacancies, the Commission has been unable to update the guidelines to implement the First Step Act.”¹⁸⁹ In addition to these calls, another movement on the Hill seeks to increase membership on the USSC by adding an ex officio member with a public defender background.¹⁹⁰ Senators Cory Booker and Dick Durbin introduced legislation that seeks to add this additional perspective to ensure a more balanced perspective exists on the USSC.¹⁹¹ The state of the USSC also prompted calls from two current Supreme Court Justices, who argued

185. 28 U.S.C. § 994(t) (2018) (“The Commission . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.”).

186. Deanna Paul, *Once Home to Ketanji Brown Jackson, Sentencing Commission Now Sits Quiet as Issues Go Unresolved*, Wall St. J. (Mar. 16, 2022), <https://www.wsj.com/articles/once-home-to-ketanji-brown-jackson-sentencing-commission-now-sits-quiet-while-issues-go-unresolved-11647433838> (on file with the *Columbia Law Review*) (“The seven-member body has dwindled to one Senate-confirmed commissioner, preventing it from conducting official business for more than three years and rendering it unable to provide formal guidance to judges after Congress passed a significant criminal-justice overhaul in 2018.”).

187. See *id.* (describing compassionate release under the FIRST STEP Act as a “pressing issue[]” facing the USSC).

188. Press Release, Jamie Raskin, Sen., U.S. Senate, Raskin, Armstrong Request President Biden Make Nominations to the U.S. Sentencing Commission (Nov. 22, 2021), <https://raskin.house.gov/2021/11/raskin-armstrong-request-president-biden-make-nominations-to-the-u-s-sentencing-commission> [<https://perma.cc/8SD4-3UEX>].

189. *Id.*

190. See Press Release, Cory Booker, Sen., U.S. Senate, Booker and Durbin Introduce Legislation Aimed at Increasing Membership Within U.S. Sentencing Commission (Nov. 30, 2021), <https://www.booker.senate.gov/news/press/booker-and-durbin-introduce-legislation-aimed-at-increasing-membership-within-us-sentencing-commission> [<https://perma.cc/8SD4-3UEX>] (quoting Senator Booker, who stated: “[a]dding a statutory member to the Commission with a public defender background will ensure that the Commission’s ranks include this distinct and essential perspective on our criminal justice system and, thus, bring us one step closer to a more balanced and just system”).

191. *Id.*

that the lack of quorum has resulted in unresolved circuit splits.¹⁹² After the three years of vacancy, President Biden announced the nomination of seven individuals to the USSC in May 2022.¹⁹³

B. *Proposed Matrix to Be Offered by the USSC*

Now that President Biden's nominees to the USSC have been confirmed,¹⁹⁴ the USSC should be prepared to promulgate new guidelines. The USSC is the correct organization to offer these guidelines because this Note's proposed uniform guidelines would better enable courts to meet the standardization goals of the Sentencing Reform Act and the FIRST STEP Act.¹⁹⁵ As discussed in Part I, the SRA tasked the USSC with setting guidelines for release, including defining what constitutes "extraordinary and compelling."¹⁹⁶ The most important of the new guidelines that the USSC should adopt is a matrix detailing how courts should consider various factors when deciding COVID-19 based compassionate release requests. The matrix should detail the appropriate amount of weight courts should apply to a number of known preexisting conditions and provide courts with up-to-date guidance on how to consider vaccination status in making a determination.

The aim of this matrix is a more uniform and standardized approach to requests, resulting in a reduction in the discrepancy of requests granted between districts. The final matrix, including the exact weight to be given to various comorbidities, combined with vaccination status, is not offered within this Note; instead, this Note suggests that the final matrix would

192. See Debra Cassens Weiss, *Sotomayor and Barrett Flag Sentencing Commission's Longtime Lack of a Quorum*, ABA J. (Jan. 11, 2022), <https://www.abajournal.com/news/article/barrett-and-sotomayor-flag-sentencing-commissions-longtime-lack-of-a-quorum> [<https://perma.cc/MKJ7-SE5X>] (noting a joint statement by Justices Sonia Sotomayor and Amy Coney Barrett that "the Sentencing Commission [should] . . . ensure fair and uniform application of the guidelines" and expressing a desire for the commission to "resume its important function").

193. See President Biden Nominates Bipartisan Slate for the United States Sentencing Commission, *The White House* (May 11, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/11/president-biden-nominates-bipartisan-slate-for-the-united-states-sentencing-commission/> [<https://perma.cc/SR98-HHR7>] (introducing President Biden's nominees for the USSC).

194. See Madison Alder, *US Sentencing Commission Restocked After Senate Confirmations*, *Bloomberg L.* (Aug. 4, 2022), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XC7KMM7G000000?bna_news_filter=us-law-week#jcite (on file with the *Columbia Law Review*).

195. Another possible approach would involve the Executive branch or Congress convening a new group of experts whose sole task is to create pandemic-specific guidelines for courts to utilize in deciding compassionate release requests. See Nat'l Acad. of Scis., Eng'g & Med., *supra* note 31, at 102 (suggesting the creation of a "planning and review group comprising public health experts, health care providers, and community representatives, including formerly incarcerated individuals . . . to review release policies from a public health perspective . . .").

196. See *supra* Part I.

have input from carceral experts and the scientific/medical community. The final matrix should place an emphasis on health factors, given the ongoing nature of the pandemic.¹⁹⁷ The proposed matrix could suggest that if any individual in prison has the “right” combination of preexisting conditions, vaccination status, and other predetermined factors, then a strong presumption for release should exist, barring exigent circumstances. Outside of this strong presumption for release from prison, once the USSC promulgates these guidelines, it would then be incumbent on the courts to actually enact them. The matrix is designed to give courts a reference point at which to start in order to make evidenced-based, rational decisions—decisions which should be more heavily based on medical components during a global public health crisis.¹⁹⁸ This proposed matrix would serve defendants—both as a reference point for what to expect and as a citation—in submitting requests for compassionate release.

One critique that has been lodged against compassionate release is that, in its current application, it is not designed to “effectuate the rapid release of [a] large number of individuals.”¹⁹⁹ The result is that the current process is slow, and cumbersome, by design. A solution is necessary because equal treatment under the law cannot permit one circuit to repeatedly hold that to be obese in prison, during a deadly pandemic, is not an “extraordinary” circumstance, while a neighboring circuit holds the opposite.

This Note’s view is that a more uniform approach is ideal; without one, the decisions handed down by courts are inconsistent at best and arbitrary at worst. Compassionate release procedures, both before and throughout the pandemic, were “structured around individual relief, when the pandemic necessitated a focus on aggregate carceral population reduction.”²⁰⁰ The compassionate release program, as it currently operates, is not well-suited to a pandemic—it is slow-paced by design and puts

197. See Nat’l Acads. of Scis., Eng’g & Med., *supra* note 31, at 91 (“When considering petitions[,] . . . decision makers, such as judges[,] . . . should emphasize health criteria and age as well as the evolving environment of health risks during the pandemic, embracing evidence-based principles by adopting medical eligibility criteria that reflect current medical knowledge about how people commonly experience serious illness and die.”).

198. See *id.* at 92 (arguing that “decisions relying substantially on the petitioner’s original crime will tend to overlook the medical criteria that should gain greater weight in a public health emergency”).

199. Tinto & Roberts, *supra* note 132, at 587–88.

200. Jenny E. Carroll, COVID-19 Relief and the Ordinary Inmate, 18 Ohio St. J. Crim. L. 427, 445 (2021); see also Nat’l Acads. of Scis., Eng’g & Med., *supra* note 31, at 16 (“The releases among sentenced jail and prison populations that have occurred have, for the most part, occurred on a case-by-case basis and have been procedurally slow and not well suited to crisis situations.”). For a perspective on individualism versus the collective good (advocating for a less individualistic approach), see also Aaron E. Carroll, Opinion, To Fight Covid, We Need to Think Less Like Doctors, N.Y. Times (Jan 14, 2022), <https://www.nytimes.com/2022/01/14/opinion/covid-america.html?referringSource=articleShare> (on file with the *Columbia Law Review*) (arguing that society should approach COVID-19 from a general public perspective, instead of focusing on specific, individualized outcomes).

too great an emphasis on individualized factors.²⁰¹ The larger goal of the matrix is not only to increase uniformity and fairness in the compassionate release program but also to support efforts to decarcerate in the midst of the ongoing public health crisis.²⁰²

C. *Drawbacks to This Solution and to Standardization More Generally*

A central topic within the law in general is whether the adoption of uniform rules and standards is an effective mechanism to achieve desired outcomes.²⁰³ Even within the literature resulting from the passage of the SRA, disagreement exists about whether increased uniformity is desirable.²⁰⁴

Standards allow for more flexibility, while rules help to ensure that the law is applied equitably across different groups.²⁰⁵ The issue presented here, the lack of standardization across courts in deciding cases with similar factors, is not novel—legal commentators have debated how flexible the law should be for decades.²⁰⁶ In the compassionate release context, some have argued that “[t]here is no reason that inmates with identical circumstances should be treated differently solely based on the jurisdiction

Dr. Aaron Carroll also writes that, as opposed to focusing on individual outcomes, “[i]f we’re trying to prevent Covid surges and end the pandemic, then we need to center the population in our thinking.” *Id.* This Note argues that this perspective—that the pandemic necessitates a more uniform, generalized approach than might otherwise be adopted—is applicable in the compassionate release context as well.

201. See Nat’l Acads. of Scis., Eng’g & Med., *supra* note 31, at 90.

202. See *id.* at 88 (finding that “[d]ecarceration is an appropriate and necessary mitigation strategy to include in the COVID-19 response in correctional facilities”); Wong, *supra* note 105, at 11 (arguing that recent increased rates of incarceration, alongside high rates of COVID-19 nationwide, “underscore the necessity for decarceration in support of public health”).

203. See, e.g., Amanda Frost, *Overvaluing Uniformity*, 94 Va. L. Rev. 1567, 1573, 1639 (2008) (acknowledging that “[s]ome scholars and jurists conclude that standardizing the meaning of federal law is not only good policy, but is also one of the federal courts’ constitutional obligations,” yet arguing, contrary to that point, that “[r]easonable variations in the interpretation of ambiguous laws are not necessarily unfair”); Meghan J. Ryan, *Framing Individualized Sentencing for Politics and the Constitution*, 58 Am. Crim. L. Rev. 1747, 1762 (2021) (explaining that “[d]espite its importance, uniformity in sentencing has always been a value that must be balanced against individualization”).

204. See, e.g., Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 870 (1992) (arguing that “[u]ndue rigidity in the formal sentencing process and inability to accommodate relevant differences among offenders is partly responsible for plea manipulation, which appears to generate disparity but often serves instead to restore needed flexibility”). Professor Stephen Schulhofer further argues that the formal Guidelines process should have the capacity for “flexible, individualized decisions within a visible and structured framework.” *Id.*

205. Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 Iowa L. Rev. 195, 225 (2009) (describing the ongoing legal debate between “certain and predictable” rules and “flexible and adaptive” standards).

206. *Id.* at 225 n.92 (discussing analyses of the differences between standards and rules dating back to the 1930s).

in which their case is brought.”²⁰⁷ But, it’s also highly unlikely that two defendants will have identical circumstances (i.e., that they will have the same set of preexisting conditions and medical history). A compassionate release request, based on COVID-19 factors, must be “highly fact-intensive and dependent on the specific conditions of confinement and medical circumstances faced by the defendant.”²⁰⁸ And it stands to reason that a defendant should not be able to “satisfy his burden of proof by simply citing to nationwide COVID-19 statistics, asserting generalized statements on conditions of confinement within the BOP, or making sweeping allegations about a prison’s ability or lack thereof to contain an outbreak.”²⁰⁹

But the fact-intensive nature of the inquiry should not result in a complete disregard for some form of standard treatment across individuals and cases. At a minimum, some degree of uniformity in pandemic-era requests for release is necessary for the same reasons uniformity is generally touted as an ideal.²¹⁰ As Professor Evan Caminker argues, “Both the Constitution’s framers and the Supreme Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective Such uniform interpretation serves several laudable goals of a coherent and legitimate judicial system.”²¹¹ In addition to uniformity as an important end based on the nation’s founding principles, national uniformity also “ensures that similarly situated litigants are treated equally,” which is “considered a hallmark of fairness in a regime committed to the rule of law.”²¹²

207. Annie Wilt, *The Answer Can Be Yes: The First Step Act and Compassionate Release*, Harv. C.R.-C.L. L. Rev. Amicus Blog (Oct. 23, 2019), <https://harvardcrcl.org/the-answer-can-be-yes-the-first-step-act-and-compassionate-release/> [<https://perma.cc/E3SE-F632>].

208. *United States v. Koons*, 455 F. Supp. 3d 285, 290 (W.D. La. 2020); see also Furia & Coleman, *supra* note 14 (“Even in nonpandemic times, federal judges engage in a highly fact-intensive analysis to determine whether reducing a defendant’s prison term is appropriate under the compassionate release framework.”).

209. *Koons*, 455 F. Supp. 3d at 290–91.

210. See Frost, *supra* note 203, at 1570 (explaining some of the scholarly reasons for uniformity as a goal, including preserving fairness and predictability, upholding the legitimacy of the federal court system, advancing uniformity as a constitutionally derived value, and protecting against the unfairness that would be inherent in asking multi-state actors to comply with conflicting legal standards).

211. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1, 38 (1994) (footnotes omitted).

212. *Id.* at 39. Professor Caminker goes on to argue that “geographical variances” might make sense in certain contexts, for example in the “adjustment of environmental regulations to local habitats,” but that “geographical variances in the application of a uniform rule caused by divergent judicial interpretations seem both irrational and unfair.” *Id.* This Note argues that the granting or denial of compassionate release requests falls in the latter category, in that there is no logical reason why a preexisting condition or vaccination status would hold different weight in one part of the country versus another.

CONCLUSION

Courts continue to rule on incarcerated individuals' compassionate release requests every day. With the ongoing impact of the coronavirus, and the variants to come, it is crucial to protect vulnerable populations, incarcerated and otherwise. The implementation of a more effective, evidenced-based compassionate release program will not only reduce the spread of COVID-19 in prisons but will also have a direct impact on decreasing the number of COVID-19 cases in the general public. Until recently, courts had not had the opportunity to revisit the "extraordinary and compelling" standard, with the added context of the FIRST STEP Act and a pandemic. As such, courts currently do not have the tools necessary to make informed, consistent decisions on compassionate release requests. Methods, attitudes, and policies enacted by the criminal justice system during this pandemic will have lasting effects in viral outbreaks to come.²¹³ More importantly, the federal judiciary's adoption of a more compassionate attitude toward actually granting compassionate release will reduce the number of individuals incarcerated.

The imprisoned population in the United States continues to be extremely vulnerable to contracting COVID-19. As new variants continue to arise, and the pandemic rages on, those in prison are more vulnerable than ever to the ever-changing virus. In light of that vulnerability, and the BOP's lack of regard thereof, it is incumbent on courts to grant compassionate release in a fair, equitable, and compassionate manner. The federal courts have adopted a scattershot approach to compassionate release requests throughout the pandemic thus far; this approach demonstrates that the courts need additional guidance in determining when to grant compassionate release.

213. See Matthew J. Akiyama, Anne C. Spaulding & Josiah D. Rich, *Flattening the Curve for Incarcerated Populations—Covid-19 in Jails and Prisons*, *New Eng. J. Med.* (May 28, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2005687> [<https://perma.cc/YQK9-FZXY>] ("As U.S. criminal justice reform continues to unfold, emerging communicable diseases and our ability to combat them need to be taken into account.").