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Stacked Injustice and an Avenue for Relief: The Interplay of "Stacked" 18 U.S.C. § 924(c) Convictions and Expanded Compassionate Release Under the First Step Act

* J.D. Candidate 2022, University of Oregon School of Law. First and foremost, I must thank my sister, Elizabeth Costello, without whom this Comment would not have been possible. The topic draws on her pro bono work, and she is my touchstone for all important aspects of life. I must also thank Professor Kristen Bell. Her excellent editing and feedback were transformative. Finally, I would like to recognize the excellent editors of the *Oregon Law Review* and Journal Coordinator Barbara Hewick for their contributions.

INTRODUCTION

By all accounts, Samson Adeyemi was a model child.[1] Samson's parents, Nigerian emigrants to London, brought him and his three younger sisters to Philadelphia, Pennsylvania, when Samson was nine years old.[2] Samson was sweet, kind, and gentle; he walked one of his younger sisters to school in an effort to keep her safe after she had experienced bullying.[3] He mentored younger children at Christ Apostle Church, was a counselor at summer camp, and held a steady job.[4] At age nineteen, Samson was just twenty credits shy of obtaining a bachelor's degree in biology in 2006; he had medical school aspirations.[5]

Samson's dreams were dashed by a two-hour period on January 3, 2006: he acted as a getaway driver while three accomplices committed a total of seven robberies, although Samson participated in only two.[6] The two robberies where Samson was present occurred at the drive-through windows of a Taco Bell and a McDonald's.[7] In both instances,

1 United States v. Adeyemi, 470 F. Supp. 3d 489, 493 (E.D. Pa. 2020).
2 *Id.*
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.* at 493–94.
7 *Id.* at 494.

Samson ordered, paid for his food, and drove away.[8] In each instance, a masked man wielding an inoperable firearm held together by a rubber band robbed the cashier at the window shortly after Samson drove out of the drive-through.[9] After each robbery, Samson drove the robber away.[10] Samson did not physically steal any money or brandish the inoperable firearm, nor did he or his accomplices physically injure anyone.[11] His only role in the robberies—which yielded a total haul of $852.21—was to order a meal, pay for his food, and serve as the getaway driver.[12]

Samson had never been arrested prior to that date, but the fallout from his singular lapse in judgment was devastating.[13] Samson's accomplices, who had committed five robberies in addition to the two in which Samson participated, all obtained plea deals and testified against him at trial.[14] Two coconspirators received 96-month sentences and the third received a 129-month sentence.[15] Samson was charged with conspiracy to interfere with interstate commerce by robbery, two counts of Hobbs Act robbery, and, crucially, two counts of possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c).[16] Rather than accept a plea himself, Samson exercised his constitutional right to trial; upon conviction, he was sentenced to 385 months in prison.[17] While the sentencing judge varied downward from the range of 425–435 months recommended by the then-applicable sentencing guidelines, the sentence imposed on Samson still exceeded the sentences of his three accomplices *combined* by sixty-seven months.[18]

Such an outcome elicits questions: how is such an inequitable administration of justice possible, and how did the law get here? While the sentencing judge was able to vary downward from the guidelines on several charges, the two charges brought under § 924(c) required stiff mandatory minimum penalties at the time: seven years for the first

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8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*

charge and twenty-five years for the second.[19] Despite the fact that both charges had occurred on the same night and were charged in the same indictment, and that Samson had not been previously convicted under § 924(c), the sentencing judge was unable to deviate from the mandatory minimums prescribed by the statute.[20] Thus, despite the fact that Samson never held the inoperable firearm, the sentencing judge was required to impose a mandatory minimum sentence of 385 months solely for the two § 924(c) charges.[21]

Samson Adeyemi's harrowing case is illustrative of the seemingly disproportionate sentences that often accompany § 924(c) charges. Initially, § 924(c) was passed as an effort to "persuade the man who is tempted to commit a federal felony to leave his gun at home."[22] However, almost since its inception, § 924(c) has been a source of ambiguity and frustration for sentencing courts.[23] The statute has required consistent clarification and interpretation by the Supreme Court and frequent amendments by Congress—often to adjust to Supreme Court rulings Congress felt undermined the statute.[24] These changes have played out over decades and, due to the mandatory minimum sentencing required by the statute, have proven a powerful weapon for prosecutors.[25] While Congress and the judiciary have carried out their dialogue over § 924(c), those charged under the statute have suffered the consequences of draconian mandatory minimum penalties that required judges to impose sentences they found repugnant.[26]

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19 *Id.*

20 *Id.*

21 *Id.* at 518–19.

22 114 CONG. REC. 22231 (1968).

23 *See infra* Part I.

24 *See infra* Part I.

25 *See infra* Parts I–II.

26 *See* Letter from T.S. Ellis, III, U.S. Dist. J., E. Dist. of Va., to Sen. Chuck Grassley, Sen. Judiciary Comm. Chairman, and Rep. Bob Goodlatte, House Judiciary Comm. Chairman (Dec. 1, 2015) (on file with Politico), https://www.politico.com/f/?id=00000164-6faa-d85b-a776-ffbb22630001 [https://perma.cc/FZ6A-N854] (letter calling attention to "grossly excessive and unjust sentences that can result from the mandatory minimum sentences required by 18 U.S.C. § 924(c)(1)(C) for a 'second or subsequent conviction.'"); United States v. Looney, 532 F.3d 392, 397–98 (5th Cir. 2008) (lamenting that "the prosecutor exercised his discretion—rather poorly we think—to charge her with counts that would provide for what is, in effect, a life sentence for Ms. Looney."); United States v. Washington, 301 F. Supp. 2d 1306, 1309 (M.D. Ala. 2004) ("While Washington broke the law and should be punished, even severely, a 40-year sentence is shockingly harsh given the nature of his offenses and his lack of criminal history. Indeed, this sentence is the worst and

Ultimately, the "brutal harshness of stacking"[27] turned the statute into a powerful prosecutorial tool that could be used indiscriminately against recidivist and first-time offenders. "Stacking" refers to the practice of bringing multiple charges—and their accompanying mandatory minimums—of § 924(c) in the same indictment.[28] The practice of stacking allowed prosecutors to bring multiple § 924(c) charges stemming from the same incident, which would trigger mandatory minimum penalties even if the defendant had no prior criminal record.[29] As such, the practice of stacking § 924(c) charges frequently resulted in sentences that appeared draconian, unjust, and disproportionate to the crime.[30] Such charges were often brought against nonviolent drug offenders; all too often, stacked charges were brought against defendants who had never brandished or fired the weapon.[31] Moreover, the charges were disproportionately brought against minority defendants[32] and, as in Samson Adeyemi's case, used as trial penalties when defendants had the temerity to exercise their constitutional right to trial.[33]

Recognizing that the current interpretation of § 924(c) frequently resulted in controversial sentences—frequently treating first-time, nonviolent offenders as violent recidivists—Congress acted to make the statute a true recidivist statute. The First Step Act, passed in 2018, contained two crucial components relevant to those convicted under § 924(c). First, Congress prohibited the practice of stacking, clarifying that a second or subsequent conviction required a prior, final,

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most unconscionable sentence the undersigned has given in his 23 years on the federal bench.").

27 United States v. Jones, 482 F. Supp. 3d 969, 979 (N.D. Cal. 2020).

28 U.S. SENT'G COMM'N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 359 (2011).

29 *Id.*

30 *See infra* Part II; sources cited *infra* note 242.

31 *See infra* Part II; sources cited *infra* note 242.

32 U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2018); *see also* Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 32, 37, 79 (2013); Ames Grawert & Priya Raghavan, *Criminal Justice Reform Must Start with Sentencing Reform*, 31 FED. SENT'G REP. 101, 104 (2018).

33 Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 FED. SENT'G REP. 284, 284–87 (2019); NAT'L ASSOC. OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 3, 48–49 (2018).

conviction under § 924(c)[34] and evincing congressional intent that the statute apply only to recidivists. Yet, crucially, this relief was not made retroactive.[35] Second, Congress increased the application, use, and transparency of compassionate release through 18 U.S.C. § 3582.[36]

The congressional expansion of Compassionate Release removed the Director of the Bureau of Prisons (BOP) as the sole gatekeeper for compassionate release motions.[37] Under the new framework, defendants are still required to petition the BOP, but are now permitted to file directly with the sentencing court thirty days after filing the request.[38] Such defendant-initiated motions are now considered by the sentencing court on a case-by-case basis.[39] Thus, this Comment argues that, while Congress explicitly foreclosed categorical retroactive relief for those sentenced with stacked § 924(c) charges, the expansion of Compassionate Release coupled with the prohibition on stacking allows for a case-by-case determination for reduction in sentence. Moreover, persons sentenced under stacked § 924(c) charges are not merely eligible for this relief, they are among the *most deserving* for reduction in sentence.

In Part I, this Comment sets forth the historical context of § 924(c) in terms of legislative background, Supreme Court interpretation, and subsequent congressional adjustment. This explanation of § 924(c) illustrates how we have arrived at the current iteration of the law and the extensive dialogue Congress and the courts have had regarding its meaning and purpose. Part II explores controversial sentences imposed under § 924(c) and judicial pleas for presidential, prosecutorial, or legislative action to redress the wrongs imposed. This Part also addresses systemic issues pertinent to § 924(c), chiefly the outsized power that prosecutors wield, racial disparities in sentencing, and sentencing issues that arise due to the mandatory minimum penalties prescribed by § 924(c). Part III addresses congressional changes made to both § 924(c) and compassionate release via the First Step Act, and it articulates that, despite Congress mandating that changes to § 924(c) be nonretroactive, relief is appropriate on a case-by-case basis for those incarcerated under stacked § 924(c) charges through compassionate release. Part IV addresses, then dispels, concerns that such relief may

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34 *Infra* Section III.A.

35 *Infra* Section III.A.

36 *Infra* Section II.B.

37 *Infra* Section III.C.

38 *Infra* Section III.C.

39 *Infra* Section III.C.

be an end around of legislative intent with regard to stacked § 924(c) charges, explaining that foreclosing blanket retroactivity does not preclude relief on a case-by-case basis. Part V provides additional support for case-by-case relief on the basis of two particularly germane sentencing factors, which are relevant when considering a reduction in sentence via compassionate release.

I
HISTORICAL CONTEXT: 18 U.S.C. § 924(C)

This Part serves to track the historical evolution of § 924(c) as Congress and the judiciary debated the meaning of the statute. The courts stepped in to clarify the meaning of the ambiguous statute, and Congress would often respond with legislation if it felt the courts had overstepped or misinterpreted the statute. As a result of this colloquy, defendants sentenced under various iterations of the statute received disparate sentences, becoming collateral damage as Congress and the judiciary struggled to interpret and refine the statute. Congress initially passed § 924(c) as part of the Gun Control Act of 1968.[40] Section 924(c) was offered as an amendment on the House floor by Representative Poff and was passed the same day it was proposed.[41] As such, there were no committee reports or congressional hearings from which the courts could draw guidance in interpreting the law.[42] Rather, courts were left to search for clues to congressional intent in "the sparse pages of floor debate that make up the relevant legislative history."[43] Thus, courts turned to what little evidence was offered during the brief floor debate surrounding the amendment.

The limited record indicates that when Congress was considering the amendments it intended the Gun Control Act to "return to law enforcement, where the criminal can be sure of being arrested, tried, convicted and punished, for that is the real deterrent to crime."[44] The initial language of § 924(c) subjected to seizure "[a]ny firearm or

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40 Gun Control Act of 1968, Pub. L. No. 90-618, sec. 102, § 924(c), 82 Stat. 1213, 1224; *see also* George P. Apostolides, *18 U.S.C. § 924(c) – The Court's Construction of "Use" and "Second or Subsequent Conviction*," 84 J. CRIM. L. & CRIMINOLOGY 1006, 1008 (1994) (providing detailed history of § 924(c) up to 1994, the chronology of which is mirrored in this Comment).

41 Busic v. United States, 446 U.S. 398, 405 (1980).

42 *Id.*

43 *Id.*

44 114 CONG. REC. 22238 (1968).

ammunition involved, or used or intended to be used in, any violation of the provisions of this chapter, or a rule or regulation promulgated thereunder, or violation of any other criminal law of the United States."[45] Dueling amendments were offered by Representatives Robert Casey and Richard Poff. Representative Casey's amendment altered the text to apply to "whoever during the commission of any robbery, assault, murder, rape, burglary, kidnapping, or homicide (other than involuntary manslaughter), uses or carries any firearm which has been transported in interstate or foreign commerce shall be imprisoned" for a minimum of ten years in the case of first offenses and a minimum of twenty-five years for further offenses.[46] Representative Poff then submitted to the committee his own amendment, "not in derogation of the Casey amendment[;] [r]ather, it retains its central thrust and targets upon the criminal rather than the gun," strengthening the Casey amendment.[47]

The amendment contained four substantial differences from Representative Casey's. First, it lowered the mandatory minimum sentence to one to ten years for the first offense and five to twenty-five years for any further convictions.[48] Second, the penalties could not be suspended, nor could probation be granted.[49] Third, it required that sentences for § 924(c) convictions run consecutively upon the penalty imposed for the base crime, whereas the Casey amendment allowed for concurrent sentences.[50] Fourth, it applied only to federal felonies, whereas the Casey amendment applied to both federal and state felonies.[51] After deliberation, the House passed Representative Poff's amendment.[52] Congress then passed a final version of § 924(c).[53]

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45 *Id.* at 22226.

46 *Id.* at 22229.

47 *Id.* at 22231.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.* at 22248.

53 *Id.* at 30179. At this stage, § 924(c) provided:

> (c) Whoever–
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> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United Sates, or
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> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor

Congress later lowered the mandatory minimum punishment for a second or subsequent conviction from five years to two years.[54] Yet, § 924(c) remained ambiguous, as Sections I.A. through I.D. will illustrate.

A. Initial Supreme Court Interpretations of § 924(c): Simpson *and* Busic

As defendants were convicted under the statute, lower courts grappled with the statutory language, eventually leading to Supreme Court intervention in two notable cases. The Supreme Court first addressed the application of § 924(c) when a defendant was charged under a primary statute that also provided for enhanced punishment if a firearm was used.[55] In *Simpson*, the Court addressed whether a defendant could be sentenced under both § 924(c) and an enhancement provision of the primary statute.[56] After noting that § 924(c) was designed to combat the use of firearms in the commission of federal felonies, the Court held that Congress could not be said to have authorized the imposition of the additional penalty of § 924(c) when the primary statute contained a sentencing enhancement for use of a firearm.[57]

In *Busic*, the Court addressed whether the government could choose to apply the enhancement provided by § 924(c) in lieu of the enhancement provided by the primary statute.[58] After careful consideration, the Court held that a defendant prosecuted under a statute which itself authorizes enhancement if a dangerous weapon is used was subject only to the enhancement under the charged statute, and that § 924(c) could not be substituted.[59]

> more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend this sentence of such person or give him a probationary sentence.

Gun Control Act of 1968, Pub. L. No. 90-618, sec. 102, § 924(c), 82 Stat. 1213, 1223–24.

54 Omnibus Crime Control and Safe Streets Act of 1970, Pub. L. No. 91-644, sec. 13, § 924(c), 84 Stat. 1880, 1889–90 (1971).

55 *See* Simpson v. United States, 435 U.S. 6 (1978); Busic v. United States, 446 U.S. 398 (1980).

56 *Simpson*, 435 U.S. at 12–13.

57 *Id.* at 10–13.

58 *Busic*, 446 U.S. at 399–400.

59 *Id.* at 398.

B. Congressional Response to Supreme Court Rulings

Congress was dissatisfied with the Supreme Court's interpretation of § 924(c) as reflected in the *Simpson* and *Busic* decisions, feeling that the decisions had drastically reduced the effectiveness of the statute.[60] In 1984, Congress set out to revise § 924(c) to "foreclose any attempt by the federal judiciary to undermine the intent of the statute."[61] The Comprehensive Crime Control Act of 1984 refined the statute to Congress's wishes. The new iteration of § 924(c) allowed its application to crimes carrying their own sentencing enhancement for use of a firearm, returned the mandatory minimum for the first conviction to five years, and raised the second or subsequent conviction penalty to ten years.[62] Congress further altered § 924(c) when it passed the Firearm Owners' Protection Act of 1986 (FOPA).[63] Through FOPA, Congress altered § 924(c) in three ways germane to this Comment: first, it struck the word "violence" and replaced it with "violence or drug trafficking crime";[64] second, the phrase "or drug trafficking crime" was inserted before "in which the firearm was used or carried";[65] and third, it defined both "drug trafficking crime" and "crime of violence" for the purposes of § 924(c).[66] These changes brought drug crimes where the firearm was not used to perpetuate violence under the ambit of the statute.[67]

Congress subsequently amended § 924(c) in the Anti-Drug Abuse Act of 1988.[68] The Act increased the sentence for a "second or subsequent conviction" to twenty years.[69] Congress further amended

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60 *See* United States v. Gridley, 725 F. Supp. 398, 400 (N.D. Ind. 1989).

61 *Id.*

62 Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, sec. 1005(a), § 924(c), 98 Stat. 1976, 2138–39.

63 Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449.

64 *Id.* sec. 104(a)(2), § 924(c), 100 Stat. at 457.

65 *Id.*

66 *Id.* (defining "drug trafficking crime" as "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." Defining "crime of violence" as an offense that is a felony and "(A) has as an element the use, attempted use, or threated use of physical force against the person or property of another, or (B) that by its nature, involves substantial risk that physical force against the person or property of another may be used in the course of committing the offense.").

67 *See infra* Part II.

68 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 6460, § 924(c)(1), 102 Stat. 4181, 4373–74 (increasing sentence for second or subsequent conviction with a machine gun, destructive device, or silencer to life imprisonment without release).

69 *Id.*

the statute with regard to firearm type in 1990.[70] Despite these amendments, questions persisted over elements of the statute.

C. Further Supreme Court Interpretation: "Use" and "Second or Subsequent Conviction" in Smith *and* Deal*; Congressional Response*

The most pressing unresolved issues centered on the terms "use" and "second or subsequent conviction," which, absent Supreme Court interpretation, split lower federal court interpretation.[71] In response, the Supreme Court granted certiorari in two cases to provide clarity as to the proper interpretation of "use" and "second or subsequent conviction."[72] In *Smith*, the Supreme Court granted certiorari to alleviate confusion and articulate what constituted "use" of a firearm under § 924(c).[73] The defendant in *Smith* offered to trade his firearm, a MAC-10, for cocaine.[74] The petitioner-defendant argued that "exchanging a firearm for drugs d[id] not constitute 'use' of the firearm within the meaning of the statute."[75] The Court rejected this argument and found that § 924(c) read in its totality provided clarity as to the definition of "use," which included the barter of a firearm for drugs.[76] In dissent, Justice Scalia disagreed with the majority's reasoning and argued that two principles should apply when construing the language

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70 Crime Control Act of 1990, Pub. L. No. 101-647, sec. 1101, § 924(c)(1), 104 Stat. 4789, 4829 (1990) (inserting "or a destructive device" after "a machine-gun" in the first and second sentence of the subsection and inserting "and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years" in the first sentence of the subsection).

71 United States v. Harris, 959 F.2d 246, 261–62 (D.C. Cir. 1992) (holding that use "in relation to" requirement of § 924(c) is met when a firearm is exchanged for drugs); United States v. Rawlings, 821 F.2d 1543, 1546–47 (11th Cir. 1987) (finding that "second or subsequent conviction" language of § 924(c) allowed for enhanced penalty provisions when multiple charges are brought in one indictment and defendant has no prior final conviction under the statute). *Contra* United States v. Phelps, 877 F.2d 28, 30 (9th Cir. 1989) (holding that mere presence of firearm does not trigger the statute; using a gun for barter for drugs is conduct excluded by the statute); United States v. Abreu, 962 F.2d 1447, 1451–53 (10th Cir. 1992) (applying rule of lenity, holding that a defendant may not receive an enhanced sentence under § 924(c) for a second or subsequent conviction absent the offense underlying the current conviction taking place after a judgment of conviction had been entered on the prior offense).

72 Smith v. United States, 508 U.S. 223, 227–39 (1993) (addressing the construction of the word "use" for the purpose of § 924(c)); Deal v. United States, 508 U.S. 129 (1993) (addressing the construction of "second or subsequent conviction" for the purpose of § 924(c)).

73 *Smith*, 508 U.S. at 227–37.

74 *Id.* at 225–26.

75 *Id.* at 228.

76 *Id.* at 233–35.

of the statute: (1) nontechnical words must be interpreted to have their ordinary meaning, and (2) the meaning of ambiguous statutory terms must be determined from the context of the statue as a whole[77] The dissent's reading found that the plain meaning of "use," when read in the context of § 924(c), did not include trading guns for drugs.[78] The dichotomy of congressional intent and Supreme Court interpretation of § 924(c) that had pervaded earlier interpretation of the statute remained and was carried over to the companion Supreme Court case that interpreted "second or subsequent conviction."[79]

When reading § 924(c), the other remaining aspect of the statute that required clarification was whether a "second or subsequent conviction" required a final judgment, or if the statute was applicable prior to a final judgment of conviction.[80] In *Deal*, the Court held that "conviction," in the context of § 924(c), "unambiguously refer[red] to the finding of guilt that necessarily precedes the entry of a final judgment," rejecting the defendant's contention that "conviction" included both the adjudication of guilt and the sentence.[81] The Court interpreted § 924(c) to be applicable to the use of a gun in committing six bank robberies on six different dates, when a single indictment charged six violations of § 924(c).[82] The majority opinion, authored by Justice Scalia, found that lower courts had erred in finding that enhancements for "subsequent offenses" could apply only when a second offense had been committed and the defendant had been previously convicted under the statute.[83] The majority noted that "the present statute does not use the term 'offense,' and so does not require a criminal act after the first conviction; it merely requires a conviction after the first conviction."[84] The dissent argued that "the long-established usage of the word 'subsequent'" was meant to distinguish between "first offenders and recidivists."[85] In support of this argument, the dissent noted that § 924(c) of the Criminal Code mandates an enhanced 20-year sentence for repeat offenders.

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77 *Id.* at 241–42 (Scalia, J., dissenting) (internal citations omitted).

78 *Id.*

79 *See* Deal v. United States, 508 U.S. 129 (1993).

80 *Id.* at 131–34.

81 *Id.* at 129.

82 *Id.* at 129–31.

83 *Id.* at 129.

84 *Id.*

85 *Id.* at 138 (Stevens, J., dissenting).

> Between 1968, when the statute was enacted, and 1987, when textualism replaced common sense in its interpretation, the bench and bar seem to have understood that this provision applied to defendants who, having once been convicted under § 924(c), "failed to learn their lesson from the initial punishment" and committed a repeat offense.[86]

D. "Use" Revisited in Bailey*; Congress Enacts the* Bailey *Fix in Response*

Finally, the Supreme Court again revisited the application of § 924(c) as it pertained to "use," this time narrowing the scope of the statute.[87] The question presented in *Bailey* was whether evidence or proximity and accessibility of a firearm to drugs or proceeds was alone sufficient to support a conviction for use of a firearm under § 924(c).[88] In two consolidated cases, the Court addressed one case where the defendant was arrested and a search of his vehicle revealed thirty grams of cocaine in the passenger compartment and a pistol in the trunk.[89] In the other case, the defendant sold crack cocaine to undercover operatives in two controlled buys.[90] Police then obtained a warrant and executed a search of the defendant's apartment, where they discovered 10.88 grams of crack cocaine and an unloaded firearm.[91] Both defendants were convicted under an "accessibility and proximity test" that construed the "use" prong of § 924(c) as being violated "whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime."[92] The question presented to the Court was whether or not § 924(c)'s "use" prong required active employment of a firearm.[93]

In its analysis, the Court noted the difficulty in interpreting "use" before looking to context, as well as the statute and sentencing scheme, to ascertain the meaning Congress intended.[94] First, the Court noted that "use" must mean more than possession, due to the fact that application of such a standard would provide almost no limitation on

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86 *Id.* at 146 (Stevens, J., dissenting) (internal citation omitted).

87 *See* Bailey v. United States, 516 U.S. 137 (1995).

88 *Id.* at 138–39.

89 *Id.*

90 *Id.* at 140.

91 *Id.*

92 *Id.* at 141.

93 *Id.* at 143.

94 *Id.*

the kind of possession that would be criminalized.[95] As evidence to support this conclusion, the Court looked to the definition of the word "use" and the statutory scheme, as Congress had included the terms "used" and "intended to be used" in § 924(d)(1).[96] Thus, the Court reasoned, had Congress meant to broaden the application of § 924(c) beyond actual use, Congress would have specified so, as it did in § 924(d)(1).[97] The Court settled on a definition of use that required "active employment" of a firearm.[98] Crucially, in light of this holding, lower courts interpreted *Bailey* to apply retroactively.[99]

Congress realized that *Bailey* had opened the floodgates to thousands of incarcerated persons to seek post-conviction relief.[100] At least one Senator lamented that "as a result of the Court's decision, the prison revolving door is in full swing" before opining that "another roadblock has been erected between a savage criminal act and swift, certain punishment."[101] In direct response to these fears and the *Bailey* ruling, Congress revised § 924(c), replacing "uses or carries" with "uses or carries a firearm, or who in furtherance of any crime, possesses

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95 *Id.* at 143–44.

96 *Id.* at 145–46.

97 *Id.*

98 *Id.* at 150. Examples of the active employment understanding of use include brandishing, displaying, bartering, striking with, and firing or attempting to fire the firearm. *Id.* at 148. Also included are references to a firearm calculated to bring about change in circumstances. *Id.* However, placement of a firearm at or near the site of a drug crime or its proceeds or paraphernalia, nor nearby concealment of a gun to be at the ready for an imminent confrontation, constitute use. *Id.* at 149–150.

99 *See* United States v. Barnhardt, 93 F.3d 706, 708–09 (10th Cir. 1996) ("*Bailey* establishes a new non-constitutional rule of substantive law which may produce a different result under the facts of this case than that dictated by prior law . . . . Therefore, we hold that *Bailey* applies retroactively to convictions under 18 U.S.C. § 924(c)(1)."); United States v. Johnston, 127 F.3d 380, 404 (5th Cir. 1997) (reversing § 924(c) conviction because the government conceded that there was insufficient evidence of use, as construed by *Bailey*, to uphold the conviction); United States v. Lindsey, 123 F.3d 978, 982 (7th Cir. 1997) (reversing § 924(c) conviction because the government conceded that the convictions could not stand in light of *Bailey*); United States v. Welch, 97 F.3d 142, 150 (6th Cir. 1996) (reversing conviction because the mere presence of firearms in the room did not support conviction under the use prong); United States v. Rehkop, 96 F.3d 301, 306 (8th Cir. 1996) (reversing conviction under the use prong because the firearm was merely found in a vehicle); United States v. Valle, 72 F.3d 210, 216–17 (1st Cir. 1995) (reversing § 924(c) conviction under the use prong because the firearms found under the bed did not constitute active employment); United States v. Jones, 74 F.3d 275, 276 (11th Cir. 1996) (reversing the conviction of using a firearm under § 924(c)).

100 Julie D. Bettenhausen, *The Implications of* Bailey v. United States *on the Rise of Convicted Criminal Claims and the Fall of 18 U.S.C. § 924(c)(1)*, 46 DRAKE L. REV. 677, 679 (1998); United States v. O'Brien, 560 U.S. 218, 232–33 (2010).

101 142 CONG. REC. S1977 (daily ed. Mar. 13, 1996) (statement of Sen. Jesse Helms).

a firearm."[102] In implementing the "*Bailey* Fix,"[103] Congress once again redressed what it viewed as an improper interpretation by the Supreme Court, mandating mere possession of a firearm in relation to or furtherance of a crime of violence or drug trafficking crime fall under the ambit of § 924(c).[104] This final iteration of the statute read:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.[105]

Taken together, the interplay between Supreme Court decisions interpreting § 924(c) and the ensuing congressional action shows that Congress has acted, and will continue to act, to eliminate what it deems improper judicial interpretation of § 924(c).[106] Ultimately, the back-and-forth discussion of § 924(c) is indicative of a long pattern of ambiguity that has followed the statute, resulting in a consistent need for clarification and allowing for sentencing disparities. The collateral damage of this extensive dialogue between Congress and the judiciary are those individuals sentenced under the many varied interpretations of § 924(c)—arguably none more so than those sentenced under stacked § 924(c) charges allowed by the decision in *Deal*.

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[102] Criminal Use of Guns, Pub. L. No. 105-386, sec. 1, § 924(c), 112 Stat. 3469, 3469 (1998).

[103] *See* United States v. O'Brien, 560 U.S. 218, 233 (2010) (citing 144 CONG. REC. 26608 (1998) (remarks of Sen. Mike DeWine)).

[104] *Id.*

[105] 18 U.S.C. § 924(c)(1)(A)(i)–(iii).

[106] *See supra* Sections I.A–D.

Although not directly tethered to congressional discontent with Supreme Court decisions surrounding § 924(c),[107] Congress further amended § 924(c) on several occasions.[108] However, these alterations to § 924(c) constituted nuanced changes to the statute, rather than sweeping alterations in response to Supreme Court decisions that Congress felt obstructed the statute's effectiveness.

II
CONTROVERSIAL SENTENCES IMPOSED UNDER § 924(C) AND FURTHER STRUCTURAL INEQUITIES: THE DIALOGUE BETWEEN CONGRESS AND THE COURTS CONTINUES

As noted above, the swift contemplation and adoption of § 924(c) allowed for varied interpretation of the statute and a running dialogue between Congress and the Supreme Court when it came to interpreting its meaning.[109] Several cases illustrate the disconnect of the original intent of Representative Poff's amendment (allowing for one to ten years for a first conviction, and five to twenty years for a second or subsequent conviction)[110] and the application of § 924(c) that "[i]n the 36 years since its passage" has made penalties attached to § 924(c) "continually harsher by judicial interpretation or congressional action."[111] This Part will first illustrate two cases that are indicative of a broader issue: in each case the sentencing judge (1) felt the sentence did not comport with the crime and (2) stated on the record that the sentence imposed was unjust. Finally, the sentencing judges in each case issued public pleas to other branches of the government to amend § 924(c) so that such controversial sentences would not be mandatorily imposed. This Part will then address systemic inequities relevant to § 924(c) including prosecutorial power, racial disparities in sentencing, and a lack of judicial discretion in sentencing due to mandatory minimum penalties prescribed by § 924(c).

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107 United States v. Gridley, 725 F. Supp. 398, 400 (N.D. Ind. 1989).

108 *See* H.R. 3355, 103d Cong. § 110,102(c)(2) (1994) (inserting "'or semiautomatic assault weapon,' after 'short-barreled shotgun'") (enacted); Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, sec. 6, § 924(c), 119 Stat. 2095, 2101–02 (2005) (adding fifteen years to life imprisonment for use of armor piercing ammunition); Codification of Title 46, Pub. L. No. 109-304, § 17(d)(3)(A), 120 Stat. 1485, 1707 (2006) (striking "the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)" and substituting "chapter 705 of title 46.").

109 *See supra* Sections I.A–D.

110 114 CONG. REC. 22231 (1968).

111 United States v. Angelos, 345 F. Supp. 2d 1227, 1233 (D. Utah 2004).

A. The Case of Weldon Angelos

The case of Weldon Angelos is among the most well publicized § 924(c) cases.[112] Mr. Angelos was a twenty-four-year-old father of two and a successful music executive; he had no prior criminal history at the time the charges were brought.[113] He was convicted of three § 924(c) counts that stemmed from three controlled buys of $350 of marijuana and a subsequent search of his home that revealed additional handguns.[114]

In the introduction to his ruling, sentencing Judge Paul Cassell lamented both the fact that "the government and the defense agree that Mr. Angelos should serve about six to eight years in prison" but that, due to the mandatory nature of § 924(c), the court was required to impose a sentence that was "unjust, cruel, and even irrational."[115] The court further noted that the de facto life sentence for Mr. Angelos, which added fifty-five years on top of a sentence for drug dealing, was "far beyond the roughly two-year sentence that the congressionally-created expert agency (the United States Sentencing Commission) believes appropriate for possessing firearms under the same circumstances."[116] Thus, the court "reluctantly conclude[d]" that it could not set aside § 924(c) and accordingly sentenced Mr. Angelos to a prison term of fifty-five years and one day—the minimum allowed by the law.[117]

The conviction stemmed from three controlled buys of marijuana by a government informant from Mr. Angelos.[118] The informant observed a handgun by the center console of Mr. Angelos's car during the first buy and in an ankle holster during a second buy; the third buy revealed no evidence of a gun's presence during the transaction.[119] After arresting Mr. Angelos for the three controlled buys, police searched his

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112 *See* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1026 (2020) (listing additional controversial cases); *see also* Jason Pye, *"Unjust, Cruel, and Even Irrational": Stacking Charges Under 924(c)*, FREEDOMWORKS (Jan. 29, 2018), https://www.freedomworks.org/content/%E2%80%9Cunjust-cruel-and-even-irrational%E2%80%9D-stacking-charges-under-924c [https://perma.cc/YL5C-3X37].

113 *Angelos*, 345 F. Supp. 2d at 1231–32.

114 *Id.* at 1230.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.* at 1231.

119 *Id.*

home and found five additional firearms.[120] Initially, the government offered Mr. Angelos a plea deal: plead guilty to drug distribution and one § 924(c) count, and the government would drop all other charges and recommend a prison sentence of fifteen years.[121] However, in what had become a trend in § 924(c) cases,[122] the government made clear to Mr. Angelos that if he rejected the plea deal, a superseding indictment would be filed, adding several § 924(c) charges that could lead to Mr. Angelos facing over one hundred years of mandatory prison time.[123] As such, "Mr. Angelos faced the choice of accepting 15 years in prison or insisting on a trial by jury at the risk of a life sentence."[124] Mr. Angelos chose the latter and the government made good on its threat, returning a superseding indictment charging twenty counts; five of which were § 924(c) charges, which, standing alone, carried a potential mandatory minimum sentence of 105 years.[125]

The sentencing guidelines prescribed for all charges except those brought under § 924(c) were seventy-eight to ninety-seven months.[126] However, after the guideline sentence was imposed, the court was required to impose the stacked § 924(c) charges, resulting in the addition of a fifty-five-year mandatory minimum sentence to run consecutively to any other time imposed.[127] Thus, the minimum sentence the court could impose was seventy-eight months for the thirteen counts under the guidelines, and fifty-five years (roughly 660 months) for the three § 924(c) counts. When accounting for maximum "'good behavior' credit," Mr. Angelos would not be eligible for release until he was seventy-eight years old.[128]

Mr. Angelos challenged his conviction on two grounds: (1) that § 924(c) was unconstitutional as applied to him, either because the additional fifty-five-year sentence constituted irrational punishment that violated equal protection principles or violated the Eighth Amendment's prohibition on cruel and unusual punishment, or (2) that the seventy-eight- to ninety-seven-month sentence per the guidelines

120 *Id.*

121 *Id.*

122 *See* U.S. SENT'G COMM'N, *supra* note 28, at 97, J-31; Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2210 (2016); *infra* Section II.B; Neily, *supra* note 33, at 284–87; NAT'L ASSOC. CRIM. DEF. LAWS, *supra* note 33, at 48–49.

123 *Angelos*, 345 F. Supp. 2d at 1231.

124 *Id.* at 1232.

125 *Id.*

126 *Id.* at 1260.

127 *Id.*

128 *Id.* at 1232.

was unconstitutional under *Blakely v. Washington*[129] because the jury did not make the required factual findings to support the calculation.[130] Although the court found the guidelines unconstitutional as applied to Mr. Angelos,[131] it "reluctantly conclude[d]" that § 924(c) survived rational basis scrutiny and rejected Mr. Angelos's equal protection claim.[132] The court further rejected Mr. Angelos's Eighth Amendment challenge, despite an *amicus* brief filed by a group of twenty-nine distinguished district court judges, circuit court judges, and United States Attorneys in support of Mr. Angelos's argument.[133]

While the court was compelled to sentence Mr. Angelos to an additional fifty-five-year sentence under § 924(c), it lamented imposing a sentence that was "unjust, disproportionate to his offense, demeaning to victims of actual criminal violence—but nonetheless constitutional."[134] Although forced to impose such an unjust sentence, Judge Cassell meticulously and persuasively detailed the myriad issues arising under § 924(c) charges and convictions throughout his opinion.[135] In addressing the irrationality of § 924(c), the court noted that Mr. Angelos was effectively receiving a life sentence due to the mandatory minimums the statute imposed.[136]

In addressing unjust punishment from § 924(c), the court also noted that the United States Sentencing Commission (the expert agency established by Congress to evaluate federal sentences that the court must follow when imposing sentences) had specified twenty-four months as an appropriate enhanced penalty for Mr. Angelos's possession of a firearm, and *no more than 121 months as just punishment for all Mr. Angelos's offenses.*[137] The court further noted that placing Mr. Angelos in prison for almost sixty-two years was not "just punishment" for his crimes.[138] In perhaps the most stark illustration of the inequity of § 924(c), the court compared Mr. Angelos's mandatory sentence with those of other, arguably more severe, federal crimes, finding § 924(c) classifications "simply

129 542 U.S. 296, 303–05 (2004).

130 *Angelos*, 345 F. Supp. 2d at 1234.

131 *Id.* at 1260.

132 *Id.* at 1256.

133 *Id.* at 1260.

134 *Id.* at 1261.

135 *Id.* at 1239–60.

136 *Id.* at 1239.

137 *Id.* at 1241 (emphasis added).

138 *Id.*

irrational."[139] Indeed, at the time of sentencing, Mr. Angelos's maximum possible sentence—a staggering 738 months—dwarfed the sentences imposed on a three-time aircraft hijacker (405 months), a rapist of three ten-year-old children (188 months), a three-time kidnapper (210 months), a three-time second-degree murderer (235 months), or a terrorist who detonated three bombs in public places (293 months), among other three-time criminals.[140]

Moreover, the court noted that "when multiple § 924(c) counts are stacked on top of each other, they produce lengthy sentences that fail to distinguish between first [-time] offenders (like Mr. Angelos) and recidivist offenders."[141] Such a practice fails to distinguish between first-time offenders and those true recidivists who have failed to learn lessons from the initial punishment and commit a repeat offense.[142] That § 924(c) jumps from a mandatory five-year sentence for a first violation to a twenty-five-year mandatory sentence for a second violation, which may occur days, hours, or even almost simultaneously, illustrates that it is not a recidivist provision.[143] Finally, the court noted that when sentences for actual violence inflicted on a victim are dwarfed by a sentence for carrying guns to several drug deals, "the implicit message to victims is that their pain and suffering counts for less than some abstract 'war on drugs.'"[144]

Although the court recognized its obligation to impose the sentence under § 924(c), it took the drastic step of engaging in dialogue with the other two branches of government.[145] The court requested that then-President Bush commute Mr. Angelos's sentence to a prison term of no more than eighteen years, which was the average sentence recommended by the jury that heard the case.[146] However, recognizing that a commutation would resolve Mr. Angelos's particular case, yet still allow "§ 924(c) [to] remain[] in place and . . . continue to create injustices for future cases" the court implored Congress to enact legislative reform.[147] Reiterating that "count stacking" § 924(c) charges for first-time offenders would continue to lead to unjust results,

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139 *Id.* at 1244.

140 *Id.* at 1246 (detailing the absurdity of Mr. Angelos's sentence relative to other crimes).

141 *Id.* at 1248.

142 *Id.*

143 *Id.*

144 *Id.* at 1251.

145 *Id.* at 1261–63.

146 *Id.* at 1262.

147 *Id.* at 1262–63.

the court recommended Congress repeal the stacking feature, making second or subsequent § 924(c) charges applicable only to defendants who had previously been convicted of a serious offense, rather than first-time offenders.[148]

B. The Case of Francois Holloway

Sentencing judges, perturbed by the "misuse of prosecutorial power . . . result[ing] in a significant number of federal inmates who are serving *grotesquely severe sentences*," continued to urge other branches of government to remedy injustices.[149] Francois Holloway, along with an accomplice, stole three cars at gunpoint over two days in October 1994.[150] The government initially brought separate counts for each carjacking, with each count accompanied by its own § 924(c) count.[151] Prior to trial, the government approached Holloway with a plea deal: in exchange for Holloway's guilty plea for the carjackings, two of the three § 924(c) charges would be dropped, resulting in a sentencing range of 130–147 months.[152] Holloway exercised his constitutional right to trial, and the government brought charges for the three carjackings, each accompanied by a § 924(c) charge.[153] Holloway was found guilty of all charges, resulting in a 151-month prison term for the three carjackings, coupled with a consecutive 540-month sentence for the three § 924(c) charges.[154] Holloway's sentence produced a total prison term of fifty-seven years and seven months.[155]

Yet again, the court found itself bound to impose the mandatory minimum sentence mandated by § 924(c), despite feeling that Holloway had received a trial penalty of forty-two years in prison.[156] In fiscal year 2013, Holloway's forty-two-year sentence for carjacking and § 924(c) violations eclipsed the average sentences for bank robbery (seventy-seven months) and murder (248 months).[157] Moreover, Holloway's codefendant, who engaged in the same conduct

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148 *Id.* at 1263.

149 United States v. Holloway, 68 F. Supp. 3d 310, 316–17 (E.D.N.Y. 2014) (emphasis added).

150 *Id.* at 312.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.* at 313.

156 *Id.*

157 *Id.*

as Holloway but pled guilty and testified for the government at Holloway's trial, was sentenced to only twenty-seven months in prison.[158]

After conviction, Holloway exhausted his appeal and collateral attack options.[159] During his time in prison, Holloway attempted to better himself, availing himself of the educational programs on offer while incarcerated.[160] His disciplinary record contained five infractions, but had largely been flawless for fourteen years.[161] In 2012, Holloway filed a motion to reopen his § 2255 proceeding.[162] The court recognized that, while good reasons existed to revisit Holloway's excessive sentence, there were "no legal avenues or bases for vacating it."[163] In response, the court issued an order stating: "I respectfully request that the United States Attorney consider exercising her discretion to agree to an order vacating two or more of Holloway's 18 U.S.C. § 924(c) convictions."[164] After the United States Attorney declined to do so, the court reiterated its request.[165] This time, the United States Attorney obliged, and at a court appearance noted that Holloway's record while in custody was "extraordinary," that he had "the mildest of disciplinary records," and that it was "clear that he took advantage to better himself" while in custody.[166] After making clear that the United States Attorney's position on Holloway's case did not reflect a broader view of § 924(c), the government agreed to not oppose vacating two of Holloway's three § 924(c) convictions.[167]

Sentencing Judge John Gleeson concluded, noting the importance of this case, that "it has authorized [the court] to give Holloway back more than 30 years of his life."[168] Moreover, the case demonstrated the difference between a "Department of Prosecutions and a Department of *Justice*."[169] After detailing the harm that the misuse of prosecutorial

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158 *Id.*

159 *Id.* at 313–14.

160 *Id.* at 314 (Holloway took Basic Wellness, Parenting, Stress Management, Parenting Skills, Preparation for Release, and many other courses while incarcerated).

161 *Id.*

162 *Id.* 28 U.S.C. § 2255 provides an avenue for federal prisoners to collaterally attack the sentence imposed upon them.

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.* at 315.

167 *Id.*

168 *Id.* at 316.

169 *Id.*

power had wrought, particularly in sentencing defendants to decades or life without parole for narcotics offenses that involved no physical injury to others, the court concluded by suggesting that such inmates should receive the same careful consideration that was given to Francois Holloway.[170]

While various lower courts and the Sentencing Commission expressed opinions similar to those in *Angelos* and *Holloway*,[171] relief for those sentenced under the inflexible mandatory minimum sentencing scheme mandated by § 924(c) remained exclusively vested in presidential pardons or commutations, or in a United States Attorney agreeing to vacate convictions. This remained the case until Congress decided to act to remedy the "misinterpretation of law rendered by courts across the country that we are now correcting," with regard to stacked § 924(c) charges, according to Senator Mike Lee of Utah.[172]

C. Structural and Systemic Inequities Surrounding § 924(c)

As the two cases noted above illustrate, § 924(c) has had devastating impacts on individuals charged with stacked counts. However, systemic issues also merit discussion as they present further issues. Chief among these systemic or structural issues are prosecutorial discretion, including trial penalties and coercive plea bargaining, racial disparities in charging, and harrowing mandatory minimum penalties.

First, after alterations to sentencing law in the 1980s, prosecutors began to wield outsized discretion when deciding which charges they

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170 *Id.*

171 *See* United States v. Andrews, 75 F.3d 552, 558 (9th Cir. 1996) (rejecting defendant's argument that the application of § 924(c)'s enhanced penalties, designed for repeat offenders, makes no sense when applied to cases where there is no time for a defendant to reflect and understand the consequences because, although it carries much force, "it does not permit [the court] to avoid the import of the Supreme Court's unambiguous definition of 'second or subsequent conviction' in *Deal*. The fact that 'section 924(c) sentences can produce anomalous results and will provide no additional deterrence . . . cannot defeat the plain language of the statute.'"); United States v. Jefferson, 302 F. Supp. 2d 1295, 1302 (M.D. Ala. 2004) (noting that the arbitrary sentencing scheme of § 924(c) causes great injustice to the individual defendant, as well as to the integrity of our system of justice); United States v. Washington, 301 F. Supp. 2d 1306, 1309 (M.D. Ala. 2004) (imposition of forty-year sentence on twenty-two-year old defendant due to stacked § 924(c) charges was "the worst and most unconscionable sentence the undersigned has given in his 23 years on the federal bench"); U.S. SENT'G COMM'N, *supra* note 28, at 359 ("the 'stacking' of mandatory minimum penalties for multiple violations of section 924(c) results in *excessively severe and unjust sentences* in some cases.") (emphasis added).

172 Pye, *supra* note 112.

would bring, add, or drop in any given case.[173] This discretion is often used to influence a defendant's choice to exercise their constitutional right to trial or to accept a plea deal.[174] As one might imagine, this power—absent a judicial check due to the mandatory nature of the charges—can be a powerful coercive mechanism. An assistant U.S. Attorney, speaking on condition of anonymity, illustrated the choice defendants often face: "If a person won't plead . . . then I would add weapons charges for trial. The defendant has opened herself up. She made the choice to go to trial."[175] Indeed, it appears this line of thinking is quite common among federal prosecutors.[176] One court described prosecutorial power in § 924(c) cases as "an extraordinary development in American criminal jurisprudence. A modern-day dark ages—a period of prosecutorial § 924(c) windfall courts themselves were powerless to prevent . . . ."[177]

Given that prosecutors have near-total control of imposing such a "trial penalty," which is generally defined as the discrepancy between the sentence offered during plea negotiations and the sentence a defendant will face after trial,[178] it is unsurprising that more than 97% of criminal convictions are obtained through guilty pleas.[179] The result of a system wherein only roughly 3% of defendants elect to go to trial is that even innocent defendants will balk at trial penalties and plead guilty to crimes they have not committed.[180] Indeed, due to the vast discretion prosecutors have in charging, they are able to threaten § 924(c) enhancements if defendants refuse to plead guilty.[181] Due to the mandatory nature of the charges, defendants are aware that rolling the dice at trial, against the enhanced trial penalties, will lead to a situation where a sentencing judge has no leeway after a finding of guilt.[182] Our current system is succinctly characterized by former district court Judge John Gleeson:

> Our Constitution claims to protect the guilty as well, affording them a presumption of innocence and protecting them from punishment

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173 NAT'L ASS'N CRIM. DEF. LAWS., *supra* note 33, at 16.

174 Neily, *supra* note 33, at 286–87.

175 HUM. RTS. WATCH, AN OFFER YOU CAN'T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 57 (2013).

176 *Id.* at 60–62.

177 United States v. Haynes, 456 F. Supp. 3d 496, 502 (E.D.N.Y. 2020).

178 NAT'L ASS'N CRIM. DEF. LAWS., *supra* note 33, at 15; Neily, *supra* note 33, at 291.

179 Neily, *supra* note 33, at 284.

180 NAT'L ASS'N CRIM. DEF. LAWS., *supra* note 33, at 6; Neily, *supra* note 33, at 284.

181 NAT'L ASS'N CRIM. DEF. LAWS., *supra* note 33, at 49.

182 *Id.*

> unless the government can prove them guilty beyond a reasonable doubt. A system characterized by extravagant trial penalties produces guilty pleas in cases where the government cannot satisfy that burden, hollowing out those prosecutions and producing effects no less pernicious than innocents pleading guilty.[183]

In addition to the outsized power prosecutors hold in terms of charging, coercive plea bargaining, and imposing trial penalties, § 924(c) is rife with racial disparities.[184] This is borne out by the United States Sentencing Commission's (USSC) statistics year over year. In fiscal year 2016, Black offenders were convicted of firearms offenses carrying mandatory minimum penalties more frequently than any other racial group.[185] Moreover, people of color constituted a staggering 84.3% of all § 924(c) convictions in fiscal year 2016.[186] The numbers are even more stark for individuals charged and convicted with multiple § 924(c) counts: people of color accounted for 93.6% of convictions.[187] Data from fiscal year 2018 illustrates that this trend remains prevalent: Black offenders represented over half of those convicted of at least one § 924(c) count, and more than 70% of those convicted of multiple counts.[188] Further, in fiscal year 2018, people of color accounted for 80.3% of defendants convicted of one count, and 91.1% of defendants convicted of more than one count.[189] While each of these structural issues merits a much lengthier discussion, for the purpose of this Comment they are merely intended to be a brief overview of the systemic issues surrounding § 924(c) and to provide additional support to the individual cases noted above.

Finally, drastic changes in federal sentencing law over the past forty years have had no impact on the mandatory minimum penalties imposed upon conviction under § 924(c). After Congress passed the Sentencing Reform Act of 1984, the USSC was established and ordered to promulgate sentencing guidelines to ensure consistency in sentencing.[190] The guidelines would last roughly twenty years before

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183 *Id.* at 3.

184 Starr & Rehavi, *supra* note 32, at 32.

185 U.S. SENT'G COMM'N, *supra* note 32.

186 *Id.*

187 *Id.* at 24.

188 U.S. SENT'G COMM'N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 39 (2020).

189 *Id.* at 40.

190 Maimon Schwarzchild, *The Bureaucratic Takeover of Criminal Sentencing*, 49 N.M. L. REV. 93, 95–96 (2019).

they were deemed advisory, rather than mandatory, by the Supreme Court in *Booker*.[191] Yet, none of these alterations to federal sentencing law—even the return to semi-judicial discretion post-*Booker*—has allowed judges to use discretion when applying the mandatory minimums imposed by § 924(c). This lack of discretion resulted in a prolonged chorus of pleas from the judiciary to lessen the penalties imposed by the statute and eliminate the practice of stacking.[192] Indeed, one judge characterized the mandatory sentence he was forced to impose due to § 924(c) as "the worst and most unconscionable sentence the undersigned has given in his 23 years on the federal bench."[193] The First Circuit has gone so far as to "urge the Supreme Court to consider whether the Eighth Amendment permits, at least in cases such as this, the mandatory stacking of sentences under § 924(c) that—due to their cumulative length—necessarily results in the imposition of a mandatory sentence of life without parole."[194]

III
CONGRESS ADDRESSES MISINTERPRETATIONS OF § 924(C) AND EXPANDS COMPASSIONATE RELEASE IN THE FIRST STEP ACT

As this Comment has laid out, the ambiguous nature of the text of § 924(c) in 1968 and the back-and-forth dialogue between Congress and the courts pertaining to the interpretation of the statute allowed for varied sentences that were often viewed as harsh or disproportionate.[195] In 2018, Congress decided to remedy the inequities in sentencing that stemmed from the statute's mandatory minimum penalties.[196] This Part first notes that the First Step Act clarified § 924(c) and prohibited the stacking of unfinalized charges absent a prior final conviction. Next, this Part notes that the First Step Act expanded compassionate release under 18 U.S.C. § 3582 because Congress was dissatisfied with the BOP's stewardship of compassionate release. Finally, this Part argues that those sentenced

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191 United States v. Booker, 543 U.S. 220 (2005) (holding that USSC guidelines are advisory, not mandatory).

192 *See* United States v. Angelos, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004); United States v. Holloway, 68 F. Supp. 3d 310, 316–17 (E.D.N.Y. 2014); Letter from T.S. Ellis, III, *supra* note 26.

193 United States v. Washington, 301 F. Supp. 2d 1306, 1309 (M.D. Ala. 2004).

194 United States v. Rivera-Ruperto, 884 F.3d 25, 48 (1st Cir. 2018).

195 *See supra* Parts I–II.

196 *See infra* note 198 and accompanying text.

under stacked § 924(c) charges are among the most eligible for compassionate release, on a case-by-case basis.

After decades of pleas for change from both the judiciary and the Sentencing Commission with regard to stacked § 924(c) charges, Congress finally acted to implement criminal justice reform in a "simultaneously monumental and incremental" way.[197] On December 21, 2018, Congress passed the First Step Act (FSA).[198] For the purposes of this Comment, there are two sections of the law that are especially germane. The first, which prohibited the practice of stacking multiple unfinalized § 924(c) charges in a single proceeding, is § 403 of the FSA. The second, expanding the use and transparency of compassionate release, is § 603(b) of the FSA.

A. The First Step Act Clarified § 924(c) and Prohibited the Practice of Stacking

The first section pertinent to this discussion is § 403, entitled "Clarification of Section 924(c) of Title 18, United States Code."[199] The FSA amended § 924(c) to provide clarity by striking "second or subsequent conviction" and inserting "violation of this subsection that occurs *after prior conviction under this subsection has become final*."[200] In providing this clarity, and rebuking the Supreme Court's holding in *Deal*,[201] Congress provided exactly the legislative remedy that the court had requested in *Angelos*.

Moving forward, this clarification would ensure much more equitable and just punishment, effectively making § 924(c) a true recidivist statute. However, the following subsection appeared to illustrate Congress's lack of regard for those already incarcerated under the now-banned stacking practice. While preventing future instances of stacked § 924(c) charges stemming from one indictment, Congress stated: "This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment."[202] Thus, while Congress had acknowledged

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197 United States v. Brooker, 976 F.3d 228, 230 (2d Cir. 2020).

198 First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

199 *Id.* sec. 403, § 924(c)(1)(C), 132 Stat. at 5221.

200 *Id.* (emphasis added).

201 United States v. Deal, 508 U.S. 129 (1993).

202 First Step Act of 2018, Pub. L. No. 115-391, sec. 403(b), § 924(c), 132 Stat. 5194, 5222.

that the Supreme Court's interpretation of second or subsequent conviction was contrary to congressional intent, it had apparently foreclosed avenues of relief for those incarcerated under the "odious practice of 'stacking.'"[203]

Despite Congress's express intent to ensure § 403 of the FSA did not provide *blanket retroactive relief*, the alteration to § 403(a) provides for relief on a case-by-case basis, when read together with another section of the statute. Section 603(b) provides for an increase in both the use and transparency of compassionate release under 18 U.S.C. § 3582.[204]

B. The First Step Act Expanded the Transparency and Use of Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A)(i) in Response to BOP Inaction

The original iteration of the compassionate release statute was the only avenue for judicial discretion to modify an imposed term of imprisonment; however, there was a significant impediment for a defendant to overcome: such proceedings could reach the court only "upon motion of the Director of the Bureau of Prisons."[205] The Bureau of Prisons (BOP) exercised this power extremely infrequently. As explained in a scathing 2013 report by the Office of the Inspector General, over a five-year span, the BOP was responsible for approximately 218,000 federal prisoners; whereas the number of compassionate release motions, on average, brought by the BOP was twenty-four.[206] The report noted that "the BOP [did] not properly manage the compassionate release program," which resulted in the preclusion of inmates who may have been eligible from even being considered.[207] Additionally, the BOP did not have timelines, standards for review of motions, formal procedures to inform inmates about the program, or a system to track requests.[208] Moreover, the BOP approved requests for only two reasons: debilitating conditions and terminal

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203 Brief of Appellant at 21, United States v. Kinsey, No. 20-11208 (11th Cir. 2020).

204 First Step Act of 2018, Pub. L. No. 115-391, sec. 603(b), § 3582, 132 Stat. 5194, 5239.

205 Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 3582, 98 Stat. 1987, 1998–99.

206 U.S. DEP'T OF JUST. OFF. OF THE INSPECTOR GEN., THE FED. BUREAU OF PRISON'S COMPASSIONATE RELEASE PROGRAM 1 (2013).

207 *Id.* at 11.

208 *Id.*

illness.[209] The BOP's narrow criteria and sluggish review pace resulted in the death of 13% (28 of 208) of the inmates whose release request *had been approved* by a warden prior to a final decision by the Director of the BOP, prior to their release.[210] The BOP's reluctance to grant compassionate release motions also flew in the face of the congressionally created United States Sentencing Commission, which had promulgated guidelines illustrating what should be considered "extraordinary and compelling reasons" for reduction in sentence.[211] The most important aspect of § 1B1.13 of the guidelines was what came to be referred to as the "catch-all clause."[212] The commentary allowed for "an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)."[213] The combination of the catch-all clause and the scathing Office of the Inspector General report caused the BOP to implement modest changes, resulting in the release of eighty-three inmates over a thirteen-month period.[214]

C. Congressional Expansion of Compassionate Release and Removal of Director of the BOP as Sole Gatekeeper

Not satisfied by the BOP's changes, Congress decided to act in 2018. As part of the FSA, Congress greatly expanded compassionate release and, crucially, provided inmates with a route to bypass BOP obstinance.[215] The change to § 3582 allowed inmates to bring their own motions for reduction in sentence, after fully exhausting administrative remedies, to appeal a BOP denial or failure to bring a motion on the inmate's behalf, or the lapse of thirty days after the warden of the defendant's facility received the request.[216] Post-FSA, the statute reads:

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209 *Id.* at 73.

210 *Id.*

211 U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1 (U.S. SENT'G COMM'N 2018).

212 *Id.* at cmt. n.1(D).

213 *Id.*

214 Michael E. Horowitz, Inspector Gen., U.S. Dept of Just., Statements before the United States Sentencing Commission Hearing on Compassionate Release and the Conditions of Supervision (Feb. 17, 2016).

215 *See* First Step Act of 2018, Pub. L. No. 115-391, sec. 603(b), § 3582, 132 Stat. 5194, 5239–41.

216 *Id.*

> The court may not modify a term of imprisonment once it has been imposed except that—
>
> (1) in any case—
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, 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, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
>
> (1) extraordinary and compelling reasons warrant such a reduction . . . .[217]

Congress had many reasons to expand and increase the use of compassionate release, especially due to the unsustainable trend in inmate population, the costs associated with incarceration, and the BOP's failure to provide for compassionate release as Congress intended.[218] Indeed, Congress did not even intend to foreclose access to compassionate release to violent or serious felons, as it rejected a "poison pill" amendment proposed by Senators Tom Cotton and John Kennedy.[219] Congress's intent was distilled in the title of § 603(b): "Increasing the Use and Transparency of Compassionate Release."[220] The intent of Congress is further elucidated by the statements of several cosponsors and proponents of the First Step Act, who stated that the changes were intended to both "expand and expedite" compassionate release[221] and "improv[e] [the] application of compassionate release."[222]

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217 18 U.S.C. § 3582(c)(1)(A)(i).

218 *See* H.R. REP. NO. 113-171, at 47 (2013); S. REP. NO. 113-78, at 78 (2013); S. REP. NO. 112-78, at 62 (2011).

219 164 CONG. REC. S7753 (daily ed. Dec. 18, 2018) (Sen. Cotton's amendment sought to prohibit early release for criminals convicted of coercing a child to engage in prostitution or any sexual activity, carjacking, assaulting a law enforcement officer, bank robbery, assisting Federal prisoners with jailbreak, hate crimes, and assault).

220 First Step Act of 2018, Pub. L. No. 115-391, sec. 603(b), § 3582, 132 Stat. 4194, 5239–41.

221 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Benjamin Cardin).

222 164 CONG. REC. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler).

While Congress intended to grant sentencing courts broader discretion on a case-by-case basis to reduce unjust and severe sentences, the government has broadly contended that the power to determine what may constitute "extraordinary and compelling reasons" under § 3582 still resides solely with the BOP director, per United States Sentencing Guidelines Manual § 1B1.13, comment n.1(D). While courts have been split on the issue, a majority of federal appellate and district courts have concluded that the FSA allows district courts to exercise their discretion in assessing what constitutes extraordinary and compelling circumstances.[223] The majority stance is much more in line with congressional intent surrounding § 3582, which, as amended by the FSA, was intended to increase the breadth, speed, and application of compassionate release as a means for sentence reduction.[224]

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[223] *See* United States v. Brooker, 976 F.3d 228, 234 (2d Cir. 2020); United States v. Gunn, 980 F.3d 1178, 1180–81 (7th Cir. 2020); United States v. Jones, 980 F.3d 1098, 1105–11 (6th Cir. 2020); United States v. McCoy, 981 F.3d 271, 280–82 (4th Cir. 2020); United States v. Cole, No. 3:18-CR-00573-IM, 2020 WL 4736298, at *3 (D. Or. Aug. 15, 2020) (agreeing "with the reasoning of a majority of district courts" and finding the policy statement nonbinding); United States v. Adeyemi, 470 F. Supp. 3d 489, 492 (E.D. Pa. 2020) ("[W]e do not agree sentencing policy marginalizes judges' ability to address 'other' reasons [under United States Sentencing Guidelines § 1B1.13] so long as we are consistent with the Sentencing Commission's policy."); United States v. Brown, 411 F. Supp. 3d 446, 451 (S.D. Iowa 2019) ("[I]f the [First Step Act] is to increase the use of compassionate release, the most natural reading of the amended § 3582(c) and § 944(t) is that the district court assumes the same discretion as the BOP Director when it considers a compassionate release motion properly before it. . . . Thus, the Director's prior interpretation of 'extraordinary and compelling' reasons is informative, but not dispositive."); United States v. Cantu, 423 F. Supp. 3d 345, 351 (S.D. Tex. 2019) ("Given the changes to the statute, the policy-statement provision that was previously applicable to 18 U.S.C. § 3582(c)(1)(A) no longer fits with the statute and thus does not comply with the congressional mandate that the policy statement must provide guidance on the appropriate use of sentence-modification under § 3582.") (emphasis omitted). *Contra* United States v. Shields, No. 12-cr-00410-BLF-1, 2019 WL 2359231, at *4 (N.D. Cal. June 4, 2019) ("Shields has not cited, and the Court has not discovered, any authority for the proposition that the Court may disregard guidance provided by the Sentencing Commission where it appears that such guidance has not kept pace with statutory amendments."); United States v. Solis, Crim. Action No. 16-015-CG-MU, 2019 WL 2518452, at *3 (S.D. Ala. June 28, 2019) ("Lastly, to the extent that Solis' motion seeks pre-release custody/home confinement, no relief is available because Section 3582(c)(1)(B).").

[224] *See* 164 CONG. REC. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler).

IV
COMPASSIONATE RELEASE AS A PATH FOR CASE-BY-CASE RELIEF

While there is clear evidence of congressional intent to prevent retroactive relief to *all* defendants convicted under the now-banned practice of stacking § 924(c) charges, ample evidence also exists to suggest that Congress did intend for a case-by-case analysis.[225] In amending § 924(c) and clarifying that "second or subsequent" conviction required a prior conviction under the statute to be final, Congress remedied a statute that had imposed "unjust, cruel, and even irrational sentences"[226] indiscriminately on first-time offenders and recidivists alike. The foreclosure on retroactive application to defendants is also a clear indication that Congress did not wish to open the floodgates for post-conviction relief as the decision in *Bailey* had.[227]

Yet, in passing the FSA, Congress had also clearly intended to increase both the use and scope of compassionate release, as plainly stated in the title of the provision.[228] The legislative history of the FSA notes that action was taken to expand compassionate release due to the "BOP's failure to provide for compassionate release as Congress intended."[229] The FSA was intended to "offer[] an avenue to the courts for compassionate release"[230] in light of the BOP's intransigence to do so. The dissatisfaction with the BOP's use of compassionate release—or lack thereof—has been voiced by many Senators as well.[231] Taken together, the implication is that, after decades of failure on the part of the BOP to bring any significant number of compassionate release motions before the courts, Congress

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225 First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194; 164 CONG. REC. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler); 164 CONG. REC. S774 (statement of Sen. Benjamin Cardin).

226 United States v. Angelos, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004).

227 *See* Bettenhausen, *supra* note 100 and accompanying text; 142 CONG. REC. S1970 (daily ed. March 13, 1996).

228 First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

229 H.R. REP. NO. 113-171, at 47 (2013).

230 *Hearing on The Federal Bureau of Prisons and Implementation of the First Step Act Before the Subcomm. on Crime, Terrorism, and Homeland Security Oversight of the H. Comm. of Judiciary*, 116th Cong. 1 (2019) (statement of David Patton, Exec. Dir., Fed. Def. of N.Y.).

231 Letter from Brian Schatz et al., U.S. Senators, to Thomas R. Kane, Acting Dir., Bureau of Prisons, and Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't of Justice, (Aug. 3, 2017) (on file with U.S. Senate) (Bipartisan group of Senators asking for a "serious look at the [BOP]'s use of compassionate release" and expressing "deep[] concern[] that [the] BOP is not fulfilling its role[s] in the compassionate release process.").

amended the statute to make the courts the decision maker as to compassionate release when the BOP fails to act.[232] Moreover, Congress explicitly noted that extraordinary and compelling circumstances may justify a reduction of unusually long sentences, or when the sentencing guidelines for the offense of which the defender was convicted have been later amended to provide a shorter term of imprisonment.[233] Thus, district courts have been vested with the ability to independently assess, on a case-by-case basis, whether other extraordinary and compelling circumstances exist under § 3582(c)(1)(A)(i).

In interpreting extraordinary and compelling circumstances with regard to stacked § 924(c) charges, courts have noted that the sentences often fall squarely within the parameters contemplated by Congress when passing the first iteration of the compassionate release statute: unusually long sentences, where the sentencing guidelines have been later amended to provide a shorter term of imprisonment.[234] Indeed,

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232 United States v. Brooker, 976 F.3d 228, 236 (2d Cir. 2020); United States v. Adeyemi, 470 F. Supp. 3d 489, 509 (E.D. Pa. 2020) ("We agree with Mr. Adeyemi and the majority of judges who have reviewed the judge's authority to consider 'other' reasons. The First Step Act's amendment of the compassionate release statute removed sole authority from the Bureau of Prisons, imbuing judges with the ability to decide compassionate release motions if the Bureau of Prisons denies or defers the motion.").

233 S. REP. NO. 98-225, at 56 (1983).

234 *Id.*; *see also* United States v. Jones, 482 F. Supp. 3d 969, 979–80 (N.D. Cal. 2020) ("Today, Mr. Jones would likely receive 14.75 years imprisonment, if not less; the sentence he actually received—29.75 years—is more than twice that length. . . . Under these conditions, Mr. Jones's continued incarceration is unjust."); United States v. Urkevich, No. 8:03CR37, 2019 WL 6037391, at *4 (D. Neb. 2019) ("A reduction in his sentence is warranted by extraordinary and compelling reasons, specifically the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed."); United States v. Redd, 444 F. Supp. 3d 717, 728 (E.D. Va. 2020) ("With respect to the need to avoid unwarranted sentencing disparities, not only is Mr. Redd's sentence grossly disparate relative to what a defendant today would receive for comparable conduct, it is now grossly disparate to the reduced § 924(c) sentence received pursuant to the First Step Act by an increasing number of defendants who were sentenced before the passage of the First Step Act."); United States v. Quinn, 467 F. Supp. 3d 824, 829 (N.D. Cal. 2020) ("Consistent with numerous other courts to have confronted similar situations since the FSA, this decision turns on the enormous sentencing disparity created by subsequent changes to federal sentencing law which constitutes an 'extraordinary and compelling reason' for Quinn's compassionate release."); United States v. Bryant, No. CR 95-202-CCB-3, 2020 WL 2085471, at *3 (D. Md. Apr. 30, 2020) ("[T]he court finds that Bryant's continued incarceration under a sentencing scheme that has since been substantially amended is a permissible 'extraordinary and compelling' reason to consider him for compassionate release."); United States v. Brown, 457 F. Supp. 3d 691, 703 (S.D. Iowa 2020) ("[I]t is hard to argue that the manifest unfairness of keeping a man in prison for decades more than if he had committed the same crime today is neither extraordinary nor

the only restriction on extraordinary and compelling reasons is that rehabilitation *alone* does not suffice.[235]

Given that the FSA has freed district courts to interpret what may constitute extraordinary and compelling reasons that an incarcerated person may bring before them in seeking a reduction in sentence via compassionate release,[236] those persons convicted under stacked § 924(c) charges are not precluded from seeking a reduction in sentence. Some may argue that this flies in the face of congressional intent, as Congress explicitly made the changes to § 924(c) nonretroactive.[237] This argument fails for multiple reasons. First, Congress likely made the alterations nonretroactive due to concerns for both the judicial economy and a desire to prevent a *Bailey* situation where the "floodgates" were opened to *all* persons incarcerated under the old iteration of § 924(c). Second, this argument ignores the fact that the section of the FSA that expanded compassionate release—after decades of BOP failure to implement compassionate release—was titled "Increasing the Use and Transparency of Compassionate Release."[238] The confluence of these two facts strongly indicates that Congress did not intend to allow for a reduction in sentence to *all* defendants convicted under § 924(c); yet, neither did Congress intend to *entirely* foreclose a reduction in sentence to those defendants.[239]

If Congress had intended all avenues of relief to be foreclosed to those defendants convicted under stacked § 924(c) charges, it would have included such language in its revisions of either § 924(c) or § 3582 in the FSA. Prior congressional alterations to § 924(c) when the Supreme Court has interpreted the statute in ways that Congress had

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compelling."); United States v. McPherson, 454 F. Supp. 3d 1049, 1053 (W.D. Wash. 2020) ("So we have here Mr. McPherson, sentenced to over 32 years in prison for what is now probably a 17-year crime. . . . It is extraordinary that a civilized society can allow this to happen to someone who, by all accounts, has long since learned his lesson.").

235 28 U.S.C. § 994(t).

236 *Brooker*, 976 F.3d at 237.

237 First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

238 *Id*. at 5239. Moreover, congressional intent to allow for judicial discretion to reduce terms of imprisonment was both discussed during debate and included in the Sentencing Reform of 1984: the very law that gutted federal parole, enshrined mandatory minimums, and drastically reduced judicial sentencing discretion. *See* S. REP. NO. 98-225, at 56 (1983).

239 United States v. Decator, 452 F. Supp. 3d 320, 325 (D. Md. 2020) (quoting United States v. Maumau, No. 2:08-CR-00758-TC-11, 2020 WL 806121, at *7 (D. Utah Feb. 18, 2020); *accord Urkevich*, 2020 WL 6037391, at *4 ("A reduction in [defendant's] sentence is warranted by extraordinary and compelling reasons, specifically the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed.")).

disapproved of evinces Congress's intent.[240] Moreover, when including compassionate release in the Sentencing Reform Act of 1984, Congress expressly preserved judicial discretion to reduce sentences when sentencing guidelines are later amended to provide significantly shorter sentences for the conduct charged.[241] Finally, Congress amended § 924(c) to provide clarification of the statute, as Congress had recognized that the mandatory minimums imposed by § 924(c) resulted in overincarceration, often at the expense of people convicted of nonviolent drug offenses who merely possessed or were in close proximity to a gun.[242] The confluence of these factors has led sentencing courts to find that the FSA's "lack of retroactivity does not justify withholding sentencing relief given the overall purpose of the FSA Amendments, which expressly allowed for a sentence reduction based on an individualized assessment of the § 3553(a) factors and other criteria."[243]

Once the court finds extraordinary and compelling reason, consideration must be given to the sentencing factors in 18 U.S.C. § 3553(a), to the extent they are applicable.[244] Of the factors, the most relevant for the purpose of this Comment are (2)(A)—the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense—and (6)—the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar

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240 *See supra* Sections I.A–D.

241 S. REP. NO. 98-225, at 56 (1983).

242 *See* Bailey v. United States, 516 U.S. 137, 137–38 (1995), *superseded by statute*, 18 U.S.C. § 924(c) (1998), Pub. L. No. 105-368, 112 Stat. 3469, *as recognized in* Welch v. United States, 136 S. Ct. 1257, 1267 (2016); United States v. Hungerford, 465 F. 3d 1113, 1114–16 (9th Cir. 2006); United States v. Adeyemi, 470 F. Supp. 3d 489, 526 (E.D. Pa. 2020); United States v. Angelos, 345 F. Supp. 2d 1227, 1231–32, 1258 (D. Utah 2004); United States v. Jefferson, 302 F. Supp. 2d 1295, 1297 (M.D. Ala. 2004); *Urkevich*, 2019 WL 6037391, at *1; *see also* HUM. RTS. WATCH, *supra* note 175, at 59–66 (listing other such "irrational, inhumane, and absurd" sentences).

243 *See* United States v. Redd, 444 F. Supp. 3d 717, 729 (E.D. Va. 2020); United States v. Quinn, 467 F. Supp. 3d 824, 829 (N.D. Cal. 2020) ("[I]t is not unreasonable for Congress to conclude that not *all* defendants convicted under § 924(c) should receive new sentences, even while expanding the power of the courts to relieve *some* defendants of those sentences on a case-by-case basis.") (internal citations omitted).

244 18 U.S.C. § 3582(c)(1)(A).

conduct.[245] Post-offense developments are highly relevant to these factors.[246]

Thus, those defendants incarcerated under the now-barred practice of stacking § 924(c) charges are not merely eligible for compassionate release on a case-by-case basis, they are among the *most* eligible candidates for sentence reduction. Indeed, the avenue to sentence reduction for those convicted under stacked § 924(c) charges is not even foreclosed to those convicted of violent or serious felonies if all applicable sentencing factors are satisfied.[247] This is evidenced by the failure of Senators Cotton and Kennedy to pass their "poison pill"

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[245] 18 U.S.C. § 3553(a)

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for a sentence imposed—
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> > (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
> >
> > > (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issues under section 994(p) of title 28); and
> > >
> > > (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
> > >
> > > . . . .
>
> (5) any pertinent policy statement—
>
> > (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
> >
> > (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
>
> (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

[246] Pepper v. United States, 562 U.S. 476, 490–93 (2001).

[247] *See* 164 CONG. REC. S7753 (daily ed. Dec. 18, 2018).

amendment to the FSA precluding relief for such defendants.[248] The Kennedy-Cotton amendment would have prohibited early release for "certain heinous criminals" convicted of serious or violent offenses.[249] In voting down the Kennedy-Cotton amendment, Congress clearly evinced its intent to allow for individualized determinations for reduction in sentence—for both violent and nonviolent offenders.

In light of clear congressional intent, courts should first consider the fact that these defendants, if sentenced today, would receive a dramatically lower sentence than what they are now serving. This fact alone surpasses the threshold for extraordinary and compelling reasons, as elucidated by the Congress that enacted the first compassionate release statute.[250] Then, the sentencing court may move to weigh any applicable sentencing factors and determine whether the defendant merits a reduction in sentence via compassionate release.

V
FURTHER RATIONALES FOR COMPASSIONATE RELEASE FOR STACKED § 924(C) CHARGES: SENTENCING DISPARITIES AND OVERINCARCERATION

As discussed in Part IV, the prohibition of stacking and the expansion of compassionate release in the First Step Act (FSA) allow for case-by-case reduction in sentence for defendants convicted under stacked § 924(c) charges.[251] This Part explores powerful rationales that provide additional support for case-by-case determinations for reduction in sentences for defendants sentenced under stacked § 924(c) charges. Due to the prohibition of stacking after the FSA became law, defendants sentenced prior to the Act now have disparate sentences relative to similarly situated defendants sentenced after the FSA was passed.[252] The existence of this issue is antithetical to § 3553(a)(2)(A) and (6). This Part will address in turn these additional rationales for the use of compassionate release to

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248 *Id.* at S7756.

249 *Id.* at S7776.

250 S. REP. NO. 98-225, at 56 (1983).

251 *See supra* Part IV.

252 *See* United States v. McCoy, 981 F. 3d 271, 284–88 (4th Cir. 2020) ("As the court observed in *Bryant*, multiple district courts have concluded that the severity of a § 924(c) sentence, combined with the enormous disparity between that sentence and the sentence a defendant would receive today, can constitute an 'extraordinary and compelling' reason for relief under § 3582(c)(1)(A). We find their reasoning persuasive.") (internal citations omitted).

reduce the sentences of defendants convicted of stacked § 924(c) charges.

As previously noted in Part II, various sentencing judges lamented the fact that they were required to sentence defendants to "grotesquely severe sentences"[253] that were demeaning to victims of actual violence.[254] These implorations were joined in support by a bipartisan chorus including the Federalist Society,[255] Human Rights Watch,[256] the Heritage Foundation,[257] and Families Against Mandatory Minimums.[258] While the FSA prohibited stacked § 924(c) charges in one indictment moving forward, § 403(b)'s mandate that relief not be categorically retroactive has ensured sentencing disparities among similarly situated defendants.[259] A defendant convicted of three § 924(c) charges pre-FSA faced a mandatory minimum penalty of fifty-five years; a defendant sentenced post-FSA faces a mandatory minimum penalty of fifteen years.[260] Indeed, various courts have noted that the FSA's clarification of § 924(c) was an exceptionally dramatic shift.[261]

This shift brings pre-FSA sentences directly into conflict with § 3553(a)(2)(A), which requires that the sentence imposed reflect the seriousness of the offense, promote respect for law, and provide just punishment for the offense.[262] The FSA's changes in federal sentencing have placed defendants in "a state of sentencing purgatory" in that they have "long ago completed a sentence which Congress and

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253 United States v. Holloway, 68 F. Supp. 3d 310, 317 (E.D.N.Y. 2014).

254 United States v. Angelos, 345 F. Supp. 2d 1227, 1251 (D. Utah 2004).

255 Andrew C. Cook, *Recidivism in the Sentencing Reform and Corrections Act*, THE FEDERALIST SOC. (Apr. 13, 2016), https://fedsoc.org/commentary/fedsoc-blog/recidivism-in-the-sentencing-reform-and-corrections-act [https://perma.cc/5GFU-ADKD].

256 *Coalition of Rights Groups Submit Comment on the Sentencing Commission's Proposed Priorities for 2018-2019 Amendment Cycle*, HUM. RTS. WATCH (Aug. 10, 2018, 9:00 AM), https://www.hrw.org/news/2018/08/10/coalition-rights-groups-submit-public-comment-sentencing-commissions-proposed [https://perma.cc/DX9T-PMAJ].

257 John Malcolm & John-Michael Siebler, *Trump Is Leading the Way on Conservative Criminal Justice Reform. Here's the Proposal.*, THE HERITAGE FOUND. (Nov. 15, 2018), https://www.heritage.org/crime-and-justice/commentary/trump-leading-the-way-conservative-criminal-justice-reform-heres-the [https://perma.cc/SBX6-VX4C].

258 *Gun Mandatory Minimum Sentences*, FAMS. AGAINST MANDATORY MINIMUMS, https://famm.org/our-work/u-s-congress/gun-mandatory-minimum-sentences/ [https://perma.cc/PER2-5ADS] (last visited Feb. 11, 2021).

259 U.S. SENT'G COMM'N, *supra* note 188, at 40.

260 *Id.*

261 United States v. McCoy, 981 F.3d 271, 285 (4th Cir. 2020); United States v. Jones, 482 F. Supp. 3d 969, 977–80 (N.D. Cal. 2020).

262 18. U.S.C. § 3553(a)(2)(A).

the U.S. Sentencing Commission in the present day consider sufficient and proportionate to [their] misconduct."[263] This purgatory is the direct result of a legislative rejection of the need to impose sentences under § 924(c) as initially enacted, coupled with a legislative declaration of what level of punishment is adequate.[264] As § 3553(a) contains three particularly germane sentencing rationales, I will address each in turn.

First, the sentence imposed must reflect the seriousness of the offense. Congress has clearly elucidated what it now deems an appropriate sentence for § 924(c) charges brought under one indictment: five years each, absent a prior final conviction.[265] As such, defendants sentenced under the old interpretation of § 924(c) now carry sentences that are grossly disparate to congressional intent. Moreover, stacked § 924(c) charges carry a more severe charge than many other more serious federal crimes—especially when brought against a nonviolent defendant. A hypothetical defendant with a criminal history score of I, sentenced to three stacked § 924(c) charges pre-FSA would receive a minimum fifty-five-year sentence.[266] Table 1[267] details the sentencing guidelines for three counts of various federal crimes and the associated sentence for a defendant with a criminal history score of I.

Congress has prescribed the punishment it feels reflects the seriousness of § 924(c) offenses. The Sentencing Commission's guidelines further illustrate that the old sentencing regime does not reflect the seriousness of the offense. When a three-time aircraft hijacker or sexual abuser of a child under the age of twelve faces a less severe sentence than a nonviolent marijuana dealer who merely possess or is near a firearm, just punishment is not served. Moreover, it makes a mockery of respect for the rule of law. To ensure just punishment and respect for law, defendants sentenced under stacked § 924(c) charges must have their convictions reviewed for potential sentence reduction. While Congress has done well to foreclose stacked § 924(c) charges in the future, it is a dark stain on our criminal justice system that this exact situation currently exists and is wholly dependent on when a defendant happened to be sentenced. Action must be taken to rectify this gross miscarriage of justice.

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263 United States v. Quinn, 467 F. Supp. 3d 824, 828 (N.D. Cal. 2020).

264 United States v. Redd, 444 F. Supp. 3d 717, 723 (E.D. Va. 2020).

265 First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

266 18 U.S.C. § 924(c).

267 U.S. SENT'G GUIDELINES MANUAL §§ 2A1.2, 2A3.1, 2A3.2, 2A4.1, 2A5.1, 2B3.1, 5A (U.S. SENT'G COMM'N 2018).

Table 1. Sentencing Guidelines Calculations

Offense Guideline	Offense Calculation	Maximum Sentence
Three § 924(c) charges pre-FSA	Three § 924(c) counts	660 months
Three counts of criminal sexual abuse of a child under 12	Base offense level 38 + 3 units = 41	405 months
Three counts of criminal sexual abuse of a minor under the age of 16	Base offense level 18 + 3 units = 21	46 months
Three counts of aircraft piracy (hijacking)	Base offense level 38 + 3 units = 41	405 months
Three counts of second-degree murder	Base offense level 38 + 3 units = 41	405 months
Three counts of kidnapping	Base offense level 32 + 3 units = 35	210 months
Three counts of robbery	Base offense level 20 + 3 units = 23	57 months

Second, the sentence imposed must avoid unwanted sentencing disparities among defendants with similar records found guilty of similar conduct.[268] In eliminating the "grossly excessive and unjust sentences . . . required by . . . § 924(c)[]"[269] while precluding categorical retroactive relief, Congress has ensured that sentencing disparities among similarly situated § 924(c) defendants are myriad.[270] A defendant convicted of three § 924(c) charges pre-FSA would receive a fifty-five year mandatory minimum sentence; that defendant's post-FSA counterpart would receive a fifteen-year sentence.[271] Third, the sentence imposed must promote respect for the law and provide just punishment for the offense. If America purports to have a rehabilitative criminal justice system, how are defendants

268 18 U.S.C. § 3553(a)(6).

269 Letter from T.S. Ellis, III, *supra* note 26, at 1.

270 *See* United States v. Jones, 482 F. Supp. 3d 969, 979–81 (N.D. Cal. 2020) (supporting the general proposition, adopted by various district courts, that the "enormous sentencing disparity" created by "changes to federal sentencing law" reduction in sentence via compassionate release is, or may be, appropriate).

271 U.S. SENT'G COMM'N, ESP INSIDER EXPRESS SPECIAL EDITION: FIRST STEP ACT 1, 4 (2019), https://www.ussc.gov/sites/default/files/pdf/training/newsletters/2019-special_FIRST-STEP-Act.pdf [https://perma.cc/5935-K5DH].

sentenced under a "regime that has not only been held unconstitutional but has also been substantially amended to eliminate the brutal harshness of stacking"[272] still precluded from relief?

CONCLUSION

Stacked § 924(c) charges have imposed unjust, cruel, and irrational sentences[273] on criminal defendants, all too often for nonviolent drug crimes. Indeed, even those defendants who possessed, but did not use, a firearm in the commission of a drug crime or crime of violence have been sentenced to draconian prison sentences far in excess of what Congress now deems appropriate. Such sentences would be laughable if they were not being imposed upon very real people.[274] Samson Adeyemi served a sentence that far exceeded his culpability for his crime; his sentence is indicative of the dysfunction of America's criminal justice system. While Samson has since been released,[275] he will never be able to recoup the years that were stolen from him. Moreover, Samson is among the precious few defendants who have been granted release. While Congress has cast aside "a regime that has not only been held unconstitutional but has also been substantially amended to eliminate the brutal harshness of stacking," work remains to be done to rectify the unjust sentences imposed by the statute.[276] Aside from the moral depravity that accompanies such convictions, society has an interest in releasing and reintegrating these individuals. Compassionate release should be widely used as a mechanism to redress the wrongs imposed on these defendants, to, as Judge Gleeson phrased it, give defendants their lives back.[277]

While it is impossible to attain a perfect criminal justice system, a functional one must seek to remedy blatant wrongs. As one court eloquently stated:

> This case indeed is about making up for past mistakes. Defendant has made up for his. Now the Court must make up for its own. Congress passed the First Step Act as a down payment in unwinding decades

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272 *Jones*, 482 F. Supp. 3d at 979–80.

273 United States v. Angelos, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004).

274 United States v. Holloway, 68 F. Supp. 3d 310, 316 (E.D.N.Y. 2014).

275 United States v. Adeyemi, 470 F. Supp. 3d 489, 533–34 (E.D. Pa. 2020).

276 *Jones*, 482 F. Supp. 3d at 979–80.

277 *Holloway*, 68 F. Supp. 3d at 315–16 ("There is important work to be done in preparation for resentencing, but the significance of the government's agreement is already clear: it has authorized me to give Holloway back more than 30 years of his life.").

> of mass incarceration. That law's text was explicit that it sought to increase the use of compassionate release. The Court intends to follow that directive.[278]

It is time to recognize that this now-discarded vestige of a failed war on drugs has caused far more harm than good. Caught in the crossfire of the statute's draconian mandatory minimums are thousands of defendants who merely possessed a firearm while dealing drugs—many of whom were dealing marijuana, now a legal drug in many states.[279] While the First Step Act did well to ban the stacking of unfinalized § 924(c) charges, it was, as the name states, merely a first step. Congress erred in not providing categorical relief, or at least directing an entity to review cases for eligibility for relief. We expect criminal defendants to take accountability and accept responsibility when they err; it is hypocritical to not expect the same from our elected representatives.

To achieve these goals, there are several avenues. President Biden could direct the Office of the Pardon Attorney to form a committee to review convictions for eligible candidates. This could mirror the Obama-era Clemency Initiative, which granted clemency to many individuals due to the crack-cocaine sentencing disparity.[280] Indeed, given the racial disparities in sentencing and the discrepancy in length of sentences in both § 924(c) and crack-cocaine cases, this would be an excellent model to follow. More funding could be granted to the Federal Public Defender so that each office could establish a team dedicated to compassionate release. Congress could enact further legislation mandating a review of those convicted under stacked § 924(c) charges to determine eligibility for sentence reduction. While there are many solutions to this staggering miscarriage of justice, what is certain is that action must be taken to rectify the wrongs imposed on these defendants.

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278 United States v. Brown, 457 F. Supp. 3d 691, 705 (S.D. Iowa 2020).

279 *Map of Marijuana Legality by State*, DISA GLOB. SOLS., https://disa.com/map-of-marijuana-legality-by-state [https://perma.cc/Q3JU-TWGT] (last visited June 22, 2021); *see also* Johnny Baldwin, *Map of Marijuana Legalization by States in 2021 (Medical & Recreational)*, WEEDNEWS., https://www.weednews.co/marijuana-legality-states-map/ [https://perma.cc/RED8-AW8N] (last updated Jan. 9, 2021). To date, thirty-two states and the District of Columbia have decriminalized marijuana, and nineteen states and the District of Columbia have fully legalized the drug.

280 *Obama Administration Clemency Initiative*, U.S. DEP'T OF JUST. ARCHIVES, https://www.justice.gov/archives/pardon/obama-administration-clemency-initiative [https://perma.cc/KR2G-VYCE] (last updated Jan. 12, 2021).