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Smoke and Mirrors: Model Penal Code § 305.7 and Compassionate Release

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I. INTRODUCTION

Sentencing finality is falling victim to scarce correctional resources. With over 1.5 million people currently confined in state and federal prisons,[1] the United States is the world's incarceration leader, both in terms of the number of people it incarcerates and its rates of incarceration.[2] Between 1985 and 2010, the state prison population grew by 204%, and states' correctional spending rose by 674%.[3] States now spend about fifty billion dollars a year housing prisoners,[4] a figure second only to

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1. E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, at 3 tbl.2 (Dec. 2012), *available at* http://www.bjs.gov/content/pub/pdf/p11.pdf.

2. MARSHALL CLEMENT ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., THE NATIONAL SUMMIT ON JUSTICE REINVESTMENT AND PUBLIC SAFETY 2 (2011), *available at* https://www.bja.gov/Publications/CSG_JusticeReinvestmentSummitReport.pdf.

3. VERA INST. OF JUSTICE, THE CONTINUING FISCAL CRISIS IN CORRECTIONS: SETTING A NEW COURSE 4 (2010), *available at* http://www.vera.org/sites/default/files/resources/downloads/The-continuing-fiscal-crisis-in-corrections-10-2010-updated.pdf. However, state correctional populations have recently begun to drop. *See* E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012–ADVANCE COUNTS, at 1 (July 2013), *available at* http://www.bjs.gov/content/pub/pdf/p12ac.pdf ("The U.S. prison population declined for the third consecutive year.").

4. Carrie Johnson, *Budget Crunch Forces A New Approach To Prisons*, NAT'L PUB. RADIO (Feb. 15, 2011, 12:01 AM), http://www.npr.org/2011/02/15/133760412/budget-crunch-forces-a-new-approach-to-prisons.

Medicaid spending.[5] Over the past few years, a broad consensus has formed around the need to reduce prison populations,[6] with even prominent "tough on crime" conservatives calling for criminal justice reform.[7] In response, states have instituted various measures to reduce prison populations and correctional spending, including increased use and diversity of early-release mechanisms.[8] Specifically, recent reports show that states have expanded their use of good-time credits, enlarged parole eligibility, and increasingly authorized the "compassionate release" of costly and low-risk ill or elderly inmates.[9]

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5. Adam Skolnick, *Runaway Prison Costs Thrash State Budgets*, FISCAL TIMES, Feb. 9, 2011, http://www.thefiscaltimes.com/Articles/2011/02/09/Runaway-Prison-Costs-Thrash-State-Budgets.aspx#page.

6. *See, e.g.*, Michael Vitiello, *Alternatives To Incarceration: Why Is California Lagging Behind?*, 28 GA. ST. U. L. REV. 1273, 1276–84 (2012) (discussing the consensus between liberals and conservatives on reducing excessive incarceration); PEW CTR. ON THE STATES, PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA 1 (2012), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/PEW_NationalSurveyResearchPaper_FINAL.pdf (reporting that voters "overwhelmingly" support shifting non-violent offenders from prison to effective, less expensive alternatives and that "[s]upport for sentencing and corrections reforms (including reduced prison terms) is strong across political parties, regions, age, gender, and racial/ethnic groups").

7. *See, e.g.*, Newt Gingrich & Pat Nolan, *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST, Jan. 7, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html (announcing the Right on Crime Campaign and calling on conservative legislators to "lead the way" in "intelligently" reducing prison populations); Neil King, Jr., *As Prisons Squeeze Budgets, GOP Rethinks Crime Focus*, WALL ST. J., June 21, 2013, http://www.online.wsj.com/article/SB10001424127887323836504578551902602217018.html (detailing efforts of conservative governors to enact criminal justice reform and quoting Eli Lerher as describing the movement as "the most important social reform effort on the right since the rise of the pro-life movement in the 1970s").

8. *See* NICOLE D. PORTER, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2012: DEVELOPMENTS IN POLICY AND PRACTICE 1–2 (2013) (stating that "[s]tate lawmakers in at least 24 states adopted 41 criminal justice policies that in 2012 may contribute to downscaling prison populations . . . while promoting effective approaches to public safety" and providing an overview of recent policy reforms, including sentence modification and parole reforms); AM. CIVIL LIBERTIES UNION, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 9–14 (2011), *available at* http://www.aclu.org/files/assets/smartreformispossible.pdf (identifying and endorsing a number of sentencing and corrections reforms enacted recently by Texas, Kansas, Mississippi, South Carolina, Kentucky, and Ohio, including "back-end" sentencing reforms).

9. *See, e.g.*, Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 485–98 (2010) (examining the recent proliferation of early release legislation, including the expansion of parole eligibility, sentence credit, and compassionate release programs)

Within this shifting climate, the American Law Institute has revised the sentencing articles of the Model Penal Code to include three important sentence modification measures.[10] One of these provisions, Model Penal Code § 305.7, would allow a judge to reduce a prison sentence at any time for any "compelling" reason, if the purposes of sentencing justify sentence modification.[11] Compelling circumstances may include advanced age, physical infirmity, or any other circumstance that sufficiently affects the retributive or utilitarian aims that animate limiting retributivism,[12] the philosophy undergirding the revised Model Penal Code sentencing articles.[13] Limiting retributivism provides that

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[hereinafter Klingele, *Changing the Sentence*]; Cara Buckley, *Law Has Little Effect on Early Release for Inmates*, N.Y. TIMES, Jan. 30, 2010, at A17, *available at* http://www.nytimes.com/2010/01/30/nyregion/30parole.html?_r=0 (noting that about a dozen states "expanded, enacted, or streamlined" compassionate release programs between 2008 and 2010); NAT'L CONFERENCE OF STATE LEGISLATORS, A REPORT OF THE NCSL SENTENCING AND CORRECTIONS WORK GROUP 4–5 (2011), http://www.ncsl.org/issues-research/justice/principles-of-sentencing-and-corrections-policy.aspx (detailing the existence of state sentence credit laws and conditional release reforms); Michael O'Hear, *The Early-Release Renaissance: Updated Chart*, LIFE SENTENCES BLOG (Feb. 25, 2011, 7:26 PM), http://www.lifesentencesblog.com/?p=1687#more-1687 (documenting and describing early release measures in thirty-six states). The plight and cost of elderly prisoners, in particular, has received much recent attention, spurring many jurisdictions to create early release mechanisms for a subset of these prisoners. *See, e.g.*, AM. CIVIL LIBERTIES UNION, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY (2012), *available at* http://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf; TINA CHIU, VERA INST. OF JUSTICE, IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE (2010), *available at* http://www.vera.org/sites/default/files/resources/downloads/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf.

10. *See* MODEL PENAL CODE: SENTENCING §§ 305.1, 305.6, 305.7 (Tentative Draft No. 2, 2011) [hereinafter TD-2] (approved at the May 17, 2011 Annual Meeting, subject to discussion at the Meeting and editorial prerogative), *available at* http://www.ali.org/00021333/Model%20Penal%20Code%20TD%20No%202%20%20online%20version.pdf. Section 305.1 provides for presumptive sentence reductions of 15% for good conduct, and an additional 15% for participation in rehabilitative programs. *See id.* § 305.1. Section 305.6 would authorize judicial sentence modification for prisoners who have served fifteen years of any sentence of imprisonment when the purposes of sentencing would be better served by a modified sentence than by the completion of the original sentence. *See id.* § 305.6. For commentary regarding the three proposed sentence modification measures, see Richard S. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT'G REP. 194, 195–200 (2009). For an outline of the American Law Institute's process for revising the Model Penal Code, see Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 FLA. L. REV. 683, 687–89 (2009).

11. TD-2, *supra* note 10, § 305.7(1), (7).

12. *Id.*; *see also id.* cmt. a (scope) & cmt. b (criteria for eligibility).

13. *See* MODEL PENAL CODE: SENTENCING § 1.02(2) (Tentative Draft No. 1, 2007) [hereinafter TD-1], *available at* http://www.ali.org/00021333/mpc_2007.pdf.

individual sentences should occur within the bounds of deserved punishment, while allowing for the accommodation of a number of crime-control goals (such as rehabilitation, deterrence, and incapacitation), as well as restorative and reintegrative objectives.[14]

Section 305.7 of the revised Model Penal Code contains much to celebrate. Its tethering to limiting retributivism grounds sentence modification in the purposes of sentencing. The provision does not restrict sentence modification to certain groups, but rather recognizes that countless changes in the offender, his family, his community, and society might merit sentence reconsideration.[15] It evidences humility in the sentencing process and the recognition that finality is less precious than the humaneness and ultimate justness of punishment.

As scholars have recognized, the success of an early-release measure such as Section 305.7 depends upon the clarity and persuasive force of its underlying theoretical rationale.[16] Section 305.7 makes clear that judges should evaluate the merits of a prisoner's grounds for sentence modification in light of the principles of limiting retributivism,[17] and the comments to Section 305.7 provide a few examples of how certain offender circumstances may affect the retributive or utilitarian aims of punishment.[18] However, the historical framing of Section 305.7—its express derivation from existing and previous state and federal laws—also affects its theoretical lucidity and force.[19]

The American Law Institute presented Section 305.7 as derivative of states' and the federal government's compassionate release statutes.[20] In many respects, this choice of precursor appears obvious and sensible: compassionate release provisions,

14. *See id.* § 1.02(2)(a); *see also infra* Part II.A.

15. *See infra* Part II.B.

16. *See* Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 633 (2012) ("The key to a sustainable and healthy transformation of penal law and policy is reform guided by longer-range principles."); Margaret Colgate Love & Cecelia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of The Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859, 866 (2011) ("Without a proper theoretical underpinning, sentence modification laws are less likely to be perceived as legitimate and may be less durable than laws that have been more robustly conceptualized.").

17. *See* TD-2, *supra* note 10, § 305.7(7); *see also id.* cmts. b & h.

18. *See id.* § 305.7 cmt. b.

19. *See infra* Part II.C.

20. *See infra* Part II.C.

like Section 305.7, authorize early release when compelling circumstances—such as serious, debilitating illness—suggest that continued imprisonment would be unwise or inappropriate.[21] However, important substantive, procedural, and theoretical differences distinguish Section 305.7 from traditional compassionate release laws.[22] These differences, which arguably outweigh similarities between the measures, hold potential ramifications for the perceived legitimacy of Section 305.7 and states' willingness to adopt the provision in its current form. Indeed, the unintended result of locating Section 305.7 within the tradition of compassionate release may be to dilute the clarity and force of its theoretical principles and to obstruct the measure's application to populations that would not typically qualify for relief under traditional compassionate release statutes.[23] In essence, by presenting Section 305.7 as a compassionate release measure, legislatures and the public will tend to view the provision much more narrowly than they otherwise would, leading to a distortion in its underlying theory, a narrowing in scope, and probable underuse.[24]

The modest aims of this article are to explore the aptness and possible implications of framing Section 305.7 as a compassionate release measure and to propose an alternative framing device for consideration. Although components of Section 305.7 correspond to traditional compassionate release statutes, its broad scope and allocation of decision-making authority more closely resemble states' judicial sentence modification provisions.[25] These provisions often afford judges a window of time in which to reconsider a sentence for any reason and may be used to advance the interests of justice or a range of utilitarian sentencing objectives.[26] The analogy of judicial sentence modification is far from perfect—nearly all states limit judges' revision power to one year or less,[27] for instance—but this alternative framing may facilitate the expression of the principles

21. TD-2, *supra* note 10, § 305.7(7).

22. *See infra* Part III.A.

23. *See infra* Part III.D.

24. *See infra* Part III.D.

25. *See infra* Part IV.

26. *See infra* Part IV.

27. *See* Steven Grossman & Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. BALT. L. REV. 1, 11 (2003).

of limiting retributivism and further the perceived legitimacy and ultimate resilience of Section 305.7.

This article proceeds in four parts. Part II outlines the substance of revised Model Penal Code § 305.7 and its derivation, and implicit designation, as a compassionate release measure. Part III highlights ways in which Section 305.7 differs from traditional compassionate release laws and untangles the rationales that support these measures. This part also posits possible reasons why the American Law Institute might have chosen to utilize a compassionate release label and explores two potential, unintended consequences of this choice. Part IV suggests that judicial sentence modification may provide an alternative framing device for Section 305.7 and explores some benefits that could flow from this framing. Finally, Part V delineates several areas of theoretical inquiry that could expand the conception of "compassionate release" and contribute to the lucidity and strength of Section 305.7's theoretical foundation.

II. MODEL PENAL CODE § 305.7

Proposed Model Penal Code § 305.7 authorizes judicial modification of any sentence of imprisonment, at any time, for any "compelling reason warranting modification of sentence."[28] A reason need not be "extraordinary" in order to warrant relief.[29] Section 305.7 includes a partial list of potentially compelling circumstances,[30] including advanced age,[31] physical or mental infirmity,[32] and exigent family circumstances,[33] but a judge's authority to modify a prisoner's sentence is not limited to these

28. TD-2, *supra* note 10, § 305.7(1).

29. *See* Love & Klingele, *supra* note 16, at 871–72 n.73 (noting that the criterion of "extraordinary" was eliminated in 2010 in recognition of the fact that "some circumstances that might warrant release (such as old age and serious illness) [are] hardly 'extraordinary'"); *see also* TD-2, *supra* note 10, § 305.7 cmt. b (comparing the "compelling reasons" standard to the "extraordinary and compelling reasons" criterion in federal law and "good cause shown" and general suitability criteria in two states).

30. None of these offender circumstances necessarily suffices to justify sentence modification. *See* TD-2, *supra* note 10, § 305.7 cmt. b (quoting § 305.7(7) and emphasizing that "such considerations [must] 'justify a modified sentence in light of the purposes of sentencing in § 1.02(2)'").

31. TD-2, *supra* note 10, § 305.7(7).

32. *Id.*

33. *Id.* § 305.7(1), (7); *see also id.* cmt. a (scope) & cmt. b (criteria for eligibility).

grounds.[34] A "compelling" reason is one that, at least,[35] suggests that resentencing would better serve the purposes of sentencing, outlined in Section 1.02(2),[36] than would the full execution of an original sentence.[37] This Part explores the relationship of Section 305.7 to the theory of limiting retributivism expressed in Section 1.02(2), the diversity of possible grounds for relief under Section 305.7, and the derivation and designation of the provision as a compassionate release measure.

A. Limiting Retributivism

Section 305.7 authorizes a judge to modify a prisoner's sentence when an enumerated circumstance or another compelling reason, evaluated in light of the numerous purposes of sentencing outlined in Section 1.02(2), justifies the modification.[38] Section 1.02(2) embodies the theory of limiting retributivism, where the sentences of individual offenders must occur "within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders."[39] Proportionality thus provides the boundaries, or high and perhaps low ends, of appropriate sentences. Within that

34. *See infra* notes 52–53 and accompanying text.

35. *See infra* note 165 (discussing ambiguity in the meaning of the term "compelling").

36. *See* TD-2, *supra* note 10, § 305.7(7).

37. *Cf. id.* § 305.6(4) ("Sentence modification under this provision should be viewed as analogous to a resentencing in light of present circumstances. The inquiry shall be whether the purposes of sentencing in § 1.02(2) would better be served by a modified sentence than the prisoner's completion of the original sentence.").

38. *Id.* § 305.1(1), (7).

39. TD-1, *supra* note 13, § 1.02(2)(a)(i). Professor Norval Morris was the progenitor of the theory of limiting retributivism, and his theoretical writings inspired the sentencing philosophy expressed in Section 1.02(2). *See id.* § 1.02(2) cmt. b(3). Morris's most important writings on the theory of limiting retributivism include, NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990), NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982), and NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974). For a detailed analysis of Morris's work, see Richard S. Frase, *Limiting Retributivism: The Consensus Model of Criminal Punishment*, *in* THE FUTURE OF IMPRISONMENT IN THE 21ST CENTURY (Michael Tonry ed., 2004) and Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME AND JUST. 363 (1997). This Article accepts, without evaluation or critique, the American Law Institute's determination that limiting retributivism is the best approach to sentencing in order to provide a stable context in which to evaluate the effects of the framing of Section 305.7. Others' reception of limiting retributivism has not been as impassive. *See, e.g.*, Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17 (2003); James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85 (2003).

range, a sentencing judge may, "when reasonably feasible," set an offender's sentence based on utilitarian considerations relating to crime control (rehabilitation, incapacitation, and general deterrence), restorative, or reintegrative aims.[40] Section 1.02(2) adopts the principle of parsimony, whereby a sentence should be "no more severe than necessary" to achieve utilitarian purposes within the bounds of an offender's moral desert.[41] Thus, sentence modification may be appropriate when a change in offender circumstances renders the execution of an original sentence unnecessary to achieve incapacitation or general deterrence, or where the terms of the original sentence are now ill-suited to achieve rehabilitation.[42] In these cases, a permissible modification could reduce the existing sentence but must keep the offender's overall punishment within the confines of proportionate punishment.[43] A disproportionately severe or inhumane sentence would also justify relief.[44] The few commentators who have remarked upon the theoretical rationale of Section 305.7 have characterized the measure as allowing a court to correct an unjust, excessive, unwise, inappropriate, or inhumane sentence.[45]

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40. TD-1, *supra* note 13, § 1.02(2)(a)(ii).

41. *Id.* § 1.02(2)(a)(iii) & cmt. f. On the value and use of parsimony, see NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 60–62 (1974); *see also* Richard S. Frase, *The Theories of Proportionality and Desert*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 131, 141 (Joan Petersilia & Kevin R. Reitz eds., 2012) (discussing the principle of parsimony as an example of alternative-means, utilitarian proportionality).

42. *See* TD-2, *supra* note 10, § 305.7 cmt. b ("The purposes of sentencing that originally supported a sentence of imprisonment may in some instances become inapplicable to a prisoner . . . whose physical or mental condition renders it unnecessary, counterproductive, or inhumane to continue a term of confinement.").

43. *Id.*

44. *See id.*; *see also infra* Part V (listing retributive concerns and utilitarian principles of proportionality that could justify sentence modification under Section 305.7). Even though deontological concerns of justice inspire the conception of proportionate punishment within Section 1.02(2), the provision avoids the use of the term "retribution" or "retributivism" in employing proportionality constraints. *See* TD-1, *supra* note 13, § 1.02(2) cmt. b & rep. n.b(3). For a discussion of the various retributive and utilitarian principles at work in Morris's limiting retributivism, see Frase, *supra* note 39, at 133–41, 143.

45. *See* Frase, *supra* note 10, at 196–98 (observing that Section 305.7 assumes that "some offenders merit sentence reduction, in light of governing sentencing purposes, based on facts that could not be known at the time of the original sentencing" and exploring circumstances that may justify sentence modification); Cecelia Klingle, *The Early Demise of Early Release,* 114 W. VA. L. REV. 415, 454–55 (2012) (endorsing Section 305.7 for permitting the correction of injustices that come to light after the commencement of a sentence); Love & Klingele, *supra* note 16, at 861, 869, 871 (suggesting that early release would be appropriate if changed circumstances rendered a sentence "unwise or unjust"

B. Types of "Compelling" Circumstances

A wide variety of circumstances could justify early release under Section 305.7. Earlier drafts of the revised Model Penal Code's sentencing articles limited relief under Section 305.7 to much narrower grounds,[46] but Section 305.7 now extends as broadly as the "second look" provision of Section 305.6.[47] Indeed, the substantive inquiry of Section 305.7 and 305.6 appears to be identical.[48] While Section 305.7 permits a judge to modify a sentence if she finds any "compelling reason [that] justif[ies] a modified sentence in light of the purposes of sentencing in § 1.02(2),"[49] Section 305.6 allows a judicial decision-maker to adjust the sentences of certain prisoners "in light of present circumstances" when "the purposes of sentencing in § 1.02(2) would better be served by a modified sentence than the prisoner's completion of the original sentence."[50] Any difference in substance between the two provisions would derive from the term "compelling" in Section 305.7, but it is unclear what work this term might do in restricting the reach of sentence modification under the measure.[51]

Many types of "compelling" circumstances exist that may implicate the purposes of sentencing included in Section 1.02(2) and therefore may provide a basis for sentence modification. Professor Richard Frase has catalogued and evaluated a number of types of changed circumstances that could merit—or even require—sentence reduction under Section 305.7.[52] These

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and identifying, in passing, "mercy" and "compassion" as animating forces of the sentence modification provisions).

46. *See infra* note 93 (tracing revisions of Section 305.7).

47. *See* TD-2, *supra* note 10, § 305.6 (authorizing the filing of a petition once every ten years, after an inmate has served at least fifteen years in prison, for sentence reduction "in light of present circumstances").

48. *Compare id.* § 305.6, *with id.* § 305.7.

49. TD-2, *supra* note 10, § 305.7(7). It is worth noting that, while the comments indicate that the drafters intend Section 305.7 to respond to circumstances that "arise or are discovered after the time of sentencing," no such limiting language appears within the text of Section 305.7. *Id.* § 305.7 cmt. a; *see also id.* cmt. h ("Section 305.7 is designed to respond to circumstances that arise or are discovered after the time of sentencing, including cases in which the full effects of known conditions, such as a prisoner's physical or mental illness, are not appreciated until a later date.").

50. TD-2, *supra* note 10, § 305.6.

51. *See infra* note 165. Section 305.6 only applies to inmates who have served at least fifteen years of any term of imprisonment. *See supra* note 47.

52. Frase, *supra* note 10, at 196–98.

grounds include advanced age or infirmity; substantial progress toward rehabilitation; failure to satisfactorily participate in treatment; religious conversion or other transformation of character; new technologies for treatment and for assessing risk and rehabilitation; meritorious postsentencing behavior (such as preventing a riot or saving the life of another); changes in family, victim, or community circumstances (such as the death of the only fitting caregiver for the offender's minor children or successful victim-offender mediation); and change in societal view of the inmate's crime.[53] Professor Frase derived many of these circumstances from the then-existing version of Section 305.6, but noted that all rationales for sentence modification "would apply under the proposed catchall 'extraordinary and compelling circumstances' expected to be added to Section 305.7."[54] The drafters added this catchall to Section 305.7 as predicted and then expanded it by eliminating the requirement of "extraordinary" in 2010.[55]

C. Framing Section 305.7 as a Compassionate Release Measure

The American Law Institute locates Section 305.7 squarely within the history of jurisdictions' compassionate release efforts.[56] Comment a states:

> Most state codes include sentence-modification provisions that permit the "compassionate release" or "medical parole" or "geriatric release" of aged or infirm prisoners, although the relevant terminology and eligibility criteria vary widely. A handful of jurisdictions have enacted provisions that include broader or open-ended standards. Current federal law on the subject states that "extraordinary and compelling reasons" may warrant the reduction of an incarceration term. . . . Section 305.7 embraces and combines all of the above grounds for sentence modification into

53. *Id.*

54. *Id.* at 197.

55. *See supra* note 29; *infra* note 93.

56. *See* TD-2, *supra* note 10, § 305.7 cmt. a.

> a single provision, to be administered by trial courts in light of the underlying purposes of sentencing in § 1.02(2).[57]

Other comments explore and defend the differences between Section 305.7 and states' compassionate release laws.[58]

The framing of Section 305.7 as a compassionate release measure is absolute and powerful. The derivation of Section 305.7 from the federal government's and states' compassionate release laws grounds Section 305.7 within a rich history of jurisdictions' responses to seriously ill, disabled, and elderly prisoners.[59] Because the commentary does not temper this derivation with a significant discussion of other early-release or sentence-modification measures,[60] the derivation also functions to designate or effectively label Section 305.7 as a compassionate release measure.[61] This label holds implications for the popular understanding of the provision as well as its narrative, theoretical clarity, and ultimate acceptance.[62] In essence, the framing provides a lens through which to view and understand the purposes and ultimate effect of Section 305.7. While framing Section 305.7 as a compassionate release measure conveys familiarity and popular legitimacy to the provision,[63] the many differences between Section 305.7 and traditional compassionate release laws suggest that the label may carry unintended consequences for its adoption and implementation.[64]

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57. *Id.*

58. *See id.* cmt. b (criteria for eligibility); *id.* cmt. c (identity of decisionmaker); *id.* cmt. i (permitted modifications).

59. *See, e.g.*, Timothy Curtin, *The Continuing Problem of America's Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15 ELDER L.J. 473 (2007); Gregory J. O'Meara, *Compassion and the Public Interest: Wisconsin's New Compassionate Release Legislation*, 23 FED. SENT'G REP. 33, 33 (2010) (noting that by 1994, "only three jurisdictions . . . had no programs for the parole or release of terminally ill prisoners"); *cf.* William B. Aldenberg, *Bursting at the Seams: An Analysis of Compassionate-Release Statutes and the Current Problem of HIV and AIDS in U.S. Prisons and Jails*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 541 (1998) (discussing the history of compassionate release programs with a focus on the AIDS epidemic).

60. *Cf.* TD-2, *supra* note 10, § 305.7 cmt. b (noting that good-time provisions provide sentence discounts for prisoners' extraordinarily meritorious conduct).

61. *See id.* at cmt. a.

62. *See infra* Part III.D.

63. *See infra* note 104 and accompanying text.

64. *See infra* Part III.A.

III. LABEL OF COMPASSIONATE RELEASE: MUDDYING AND MISLEADING

Both compassionate release statutes and Section 305.7 authorize early release for inmates with serious medical or age-related conditions.[65] However, Section 305.7 spans much more broadly than traditional compassionate release laws and arguably better resembles other sentence-modification measures available under state law.[66] It is therefore worth examining the aptness of the compassionate release analogy for Section 305.7, why this precursor was chosen, and the consequences that this designation may hold for the adoption and implementation of the provision.

A. The Ill Fit of a Compassionate Release Label

Despite its label as a compassionate release provision, Section 305.7 differs significantly from most compassionate release measures in existence today. First, nearly all existing compassionate release statutes restrict release to terminally or seriously ill, incapacitated prisoners.[67] As Dr. Brie Williams and her colleagues have concluded, to meet the guidelines for release in most states, prisoners "must have a predictable terminal prognosis, be expected to die quickly, or have a health or functional status that considerably undermines" the justifications for incarceration by demonstrating that they no longer pose a risk to public safety or would not benefit from rehabilitation inside a correctional facility.[68] Indeed, while the details of states' compassionate release statutes differ, their broad parameters are

65. *See, e.g.*, TD-2, *supra* note 10, § 305.7(1), (7); *id.* cmt. a (scope); *id.* cmt. b (criteria for eligibility); CONN. GEN. STAT. § 54-131k(a)(1) (2012).

66. *See infra* Part IV.

67. Brie A. Williams et al., *Balancing Punishment and Compassion for Seriously Ill Prisoners,* 155 ANN. INTERN. MED. 122, 122 (2011). ("Whereas medical eligibility guidelines vary by jurisdiction, most [compassionate release statutes] require the following: a terminal or severely debilitating medical condition [and] a condition that cannot be appropriately cared for within the prison."); *see also* CHIU, *supra* note 9, at 6–7 (listing eligibility requirements for geriatric release laws and concluding that, "[t]o be eligible for geriatric release, inmates must meet a number of requirements, usually related to their age, medical condition, and risk to public safety").

68. Williams et al., *supra* note 67, at 123; *see also* Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse Than the Disease?*, 3 WIDENER J. PUB. L. 799, 828–29 (1994) (reporting that all states' compassionate release processes require medical evaluations and discussing varying medical standards).

so consistent that the term "compassionate release" has developed a consistent, generic definition in the scholarly literature that centers on an early-release measure's application to terminally ill, seriously ill, or elderly inmates.[69] By contrast, as Professor Frase has aptly demonstrated, a diverse array of changed circumstances—including positive changes in the offender; meritorious postsentencing acts; changes in the offender's family, the victim, or the community; and changes in societal perception of the offender's crime or sentencing factors—may justify sentence modification under Model Penal Code § 305.7.[70]

Second, typical compassionate release statutes manifest an absolute commitment to protecting public safety.[71] As a substantive matter, the requirement that an individual pose no threat to society is "ubiquitous" in compassionate release statutes.[72] States often require that an inmate be physically or mentally unable—not merely unlikely—to commit a crime or pose a danger to the public.[73] In addition, most state statutes include

69. *See, e.g.*, Nicole M. Murphy, *Dying to be Free: An Analysis of Wisconsin's Restructured Compassionate Release Statute*, 95 MARQ. L. REV. 1679, 1681 (2012) ("Compassionate release refers to early release programs for inmates with serious medical conditions, typically labeled as terminally ill, as well as elderly inmates who may be eligible for release due exclusively to advanced age."); Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 MARQ. L. REV. 1551, 1568–69 (2012) ("The term 'compassionate release' . . . has become a nationally recognized generic term for statutes allowing earned release for age or health reasons."); Williams et al., *supra* note 67, at 122 ("Compassionate release is a mechanism to allow some eligible, seriously ill prisoners to die outside of prison before sentence completion."); *see also* Russell, *supra* note 68, at 801 n.10 (using the term "compassionate release" to "identify all forms of release available to terminally ill prisoners" and recognizing that state terminology includes, but is not limited to "medical parole, medical furlough, executive clemency, medical pardon, medical reprieve, medical release, parole for humanitarian reasons, parole of dying prisoners, community furlough, and compassionate leave"); *cf.* Love & Klingele, *supra* note 16, at 860 n.7 (classifying "retroactive sentence recalculations where overly harsh sentences are subsequently reduced" as an example of "so-called 'compassionate release statutes'" in an article defending the revised Model Penal Code § 305.7).

70. *See supra* text accompanying notes 52–54; *see also* TD-2, *supra* note 10, § 305.7(1), (7); *id.* cmt. a (scope); *id.* cmt. b (criteria for eligibility). For a discussion of how the substantive criteria of section 305.7 compare to those in the federal safety valve provision, 18 U.S.C. § 3582(c)(1)(A)(i), see *infra* notes 94–99 and accompanying text.

71. *See infra* note 72 and accompanying text.

72. TD-2, *supra* note 10, § 305.7(6)(b); *see also* Russell, *supra* note 68, at 829–30 ("With the exception of Delaware, all of the states require a determination that the prisoner's condition so debilitates or incapacitates him that he is incapable of posing a danger to society.").

73. *See, e.g.*, CONN. GEN. STAT. § 54-131k(a)(1) (2012) (authorizing compassionate parole release for certain inmates "so physically or mentally debilitated, incapacitated or infirm as a result of advanced age or as a result of a condition, disease or syndrome that is

eligibility restrictions that exclude prisoners who have committed particular crimes or are serving certain sentences from consideration.[74] For instance, a number of states exclude individuals convicted of capital felonies;[75] others exclude individuals serving life sentences without the possibility of parole.[76] Although these criteria could reflect the judgment that the early release of these prisoners would offend retributive principles of just deserts,[77] they could also evince the determination that these individuals are particularly dangerous, thus implicating incapacitation concerns.[78] Furthermore, most compassionate release statutes authorize the revocation of parole if an inmate's medical condition improves such that he again poses a danger to

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not terminal as to be physically incapable of presenting a danger to society"); FLA. STAT. § 947.149(1) (2012) (authorizing conditional medical release for terminally ill inmates who have "a condition . . . which, to a reasonable degree of medical certainty, renders the inmate terminally ill to the extent that there can be no recovery and death is imminent, so that the inmate does not constitute a danger to herself or himself or others" and for "permanently incapacitated inmate[s]" who have "a condition . . . which, to a reasonable degree of medical certainty, renders the inmate permanently and irreversibly physically incapacitated to the extent that the inmate does not constitute a danger to herself or himself or others"); *see also* John A. Beck, *Compassionate Release From New York State Prisons: Why are So Few Getting Out?*, 27 J.L. MED. & ETHICS 216, 225–28 (1999) (comparing New York's incapacity criteria to those of other states).

74. *See* CHIU, *supra* note 9, at 9 (observing that state compassionate release programs "often exclude individuals convicted of violent offenses or sex offenses and those sentenced to life imprisonment"); Elizabeth Rapaport, *You Can't Get There from Here: Elderly Prisoners, Prison Downsizing, and the Insufficiency of Cost Cutting Advocacy*, 11–12 (2013), *available at* http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2254691 ("The majority of compassionate release programs either exclude prisoners who were convicted of violent crimes or require that the prisoner be incapacitated to the extent that he or she poses no threat to public safety.").

75. *See, e.g.*, CONN. GEN. STAT. § 54-131k(a) (2012); FLA. STAT. § 947.149(2) (2012); IDAHO CODE ANN. § 20-223(a) (2012); OHIO REV. CODE ANN. § 2967.05(C) (West 2012); *see also* Russell, *supra* note 68, at 827 n.112 (listing states that, as of 1994, excluded prisoners convicted of capital felonies or serving sentences of death).

76. *See, e.g.*, OHIO REV. CODE ANN. § 2967.05(C); R.I. GEN. LAWS § 13-8.1-2 (2012); TEX. GOV'T CODE ANN. § 508.146 (West 2013); *see also* Russell, *supra* note 68, at 827 n.113 (listing states that, as of 1994, excluded prisoners serving sentences of life without parole).

77. *See, e.g.*, Beck, *supra* note 73, at 224–25.

78. For more on the connection between incapacitation, life sentencing, and the death penalty, see William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999). For more on incapacitation, indeterminate sentencing, and public safety, see W. David Ball, *Heinous, Atrocious, and Cruel* Apprendi *Indeterminate Sentencing, and the Meaning of Punishment* 109 COLUM. L. REV. 893 (2009).

society.[79] By contrast, the American Law Institute opted not to stress incapacitation at the expense of other aims of sentencing, but instead declared that "[a] global statement . . . incorporating all of the purposes in § 1.02(2) . . . is superior to a requirement that only one among those purposes should be reflected in the judge's decision."[80]

A third feature that distinguishes Section 305.7 from traditional compassionate release measures involves the allocation of decision-making authority. In nearly all states, executive branch officials control compassionate release decisions.[81] Most states' compassionate release programs take the form of medical parole or medical furlough, and thus are controlled by parole boards or prison commissioners.[82] In addition, governors or boards of pardons and parole may grant clemency or commute sentences on the basis of terminal or severe illness.[83] In the federal system and the few states in which trial courts participate in release decisions, correctional agencies or parole boards typically serve as gatekeepers, screening eligible applicants.[84] Section 305.7, on the other hand, provides judges with sole decision-making authority that is unconstrained by executive branch determinations of eligibility.[85]

Finally, few, if any, compassionate release statutes predicate early release on a finding that sentence modification would be a

79. *See* Nat'l Conference of State Legislators, *Three Years of Conditional Release Laws*, THE BULLETIN: ONLINE SENTENCING AND CORRECTIONS POLICY UPDATES, 5 (June 2010), http://www.ncsl.org/portals/1/Documents/cj/bulletinJune-2010.pdf.

80. TD-2, *supra* note 10, § 305.7 cmt. b.

81. *See id.* § 305.7 cmt. c & rep. n.c.; Klingele, *Changing the Sentence*, *supra* note 9, at 494 ("With rare exception, the early release mechanisms share a common feature: they are controlled by departments of corrections or parole boards.").

82. *See* Klingele, *Changing the Sentence*, *supra* note 9, at 492–94 (describing the existence of state medical parole programs); Russell, *supra* note 68, at 819, 824–27; *id.* at 836 ("In the majority of compassionate release statutes, the decisionmaking power rests in the parole board."); Marty Roney, *36 States Offer Release to Ill or Dying Inmates: Programs Help Cut Costs of Heath Care, Officials Say*, USA TODAY, Aug. 14, 2008, at 4A; Nat'l Conference of State Legislators, *supra* note 79, at 5 ("As of 2009, at least 39 states had laws governing medical parole.").

83. *See* Russell, *supra* note 68, at 822–24. For one example of a state vesting clemency power in the board of probation, parole, and pardons, see S.C. CODE ANN. §§ 24-21-920, 24-21-970 (2012).

84. *See* TD-2, *supra* note 10, § 305.7 cmt. c; Russell, *supra* note 68, at 820–22.

85. *See* TD-2, *supra* note 10, § 305.7 cmt. c (defending the choice not to interpose a gatekeeper).

just or proportionate response to the offender's crime.[86] In essence, compassionate release laws appear to reflect the determination that cost and incapacitation considerations trump retributive concerns of just deserts.[87] Alternatively, or perhaps in tandem, it is possible that legislatures have determined that the exclusion of serious offenders from eligibility suffices to ensure that intolerable injustice does not occur.[88] This disregard for or crude approximation of the demands of justice contrasts with the approach taken in Section 305.7, which requires that all sentences occur within the bounds of proportionate punishment.[89]

B. Possible Explanations for the Label

Assuming that the term "compassionate release" has a generally stable definition in the public vernacular and scholarly literature[90]—and that Section 305.7 bears little detailed resemblance to traditional compassionate release measures—why might the American Law Institute have chosen to employ this framing for the nearly unbounded provision of Section 305.7? Several explanations are possible. First, artifacts of the drafting process may account for its ultimate framing. Early versions of the draft provision only recognized age and infirmity as grounds for release and required a recommendation from correctional authorities.[91] Thus, early versions of Section 305.7 closely resembled traditional compassionate release measures.[92] Perhaps these original conceptions anchored the provision to the concept

86. A possible exception is the federal safety valve statute, which specifies that judges must consider the factors delineated in 18 U.S.C. § 3553(a) in release decisions. *See* 18 U.S.C. § 3582(c)(1)(A)(i) (2012).

87. *See infra* notes 109–117 (identifying and discussing cost savings as a primary motivation behind compassionate release laws); *infra* note 130 (listing sources suggesting that cost concerns should be considered along with philosophical objectives). For discussion on whether, and how, cost should factor into sentencing, see *infra* notes 204–06, 214 and accompanying text.

88. *See supra* notes 74–78 and accompanying text.

89. *See* TD-2, *supra* note 10, § 305.7(1), (7); TD-1, *supra* note 13, § 1.02(2)(a)(i).

90. *See supra* note 69; *infra* notes 103, 106.

91. *See* Frase, *supra* note 10, at 196 (describing the then-current version of Section 305.7 and anticipated revisions); Love & Klingele, *supra* note 16, at 871–72 n.73.

92. *See supra* Part III.A.

of compassionate release, a characterization that persisted even after revisions dramatically expanded its scope.[93]

A second, but related, explanation lies in the provision's derivation from the federal "safety valve" provision, 18 U.S.C. § 3582(c)(1)(A)(i).[94] In contrast to most states' narrowly drawn compassionate release criteria, the federal provision permits a court to modify a term of imprisonment when it finds, upon motion of the Director of the Bureau of Prisons and after considering factors delineated in 18 U.S.C. § 3553(a), that "extraordinary and compelling reasons" warrant a reduction in sentence.[95] This provision has never enjoyed broad application, however. The Bureau of Prisons, in its gatekeeping role, has narrowly limited compassionate release under this provision to terminally ill inmates with a life expectancy of less than a year, and to severely, permanently debilitated or impaired prisoners who pose no threat to public safety.[96] Even after the U.S. Sentencing Commission recommended broader application of the statute in

93. *See* Love & Klingele, *supra* note 16, at 871–72 n.73 (tracing revisions to Section 305.7 and recounting that a catchall reference to "extraordinary and compelling reasons" was added in 2009, the reference to family circumstances was added in Tentative Draft No. 2, and the words "extraordinary and" were omitted in 2010, in recognition of the fact that advanced age and serious illness were not extraordinary).

94. *See* Frase, *supra* note 10, at 196 (describing how the "extraordinary and compelling" modification standard, added in a revision to Section 305.7, mimics language in the federal "second look" provision, 18 U.S.C. § 3582(c)(1)(A)(i) (2012)); Klingele, *Changing the Sentence*, *supra* note 9, at 512–13 (noting that Section 305.7, at that time, "closely track[ed] the federal statute by authorizing sentence reduction at any time based on age, infirmity, or extraordinary and compelling circumstances, upon recommendation of a gatekeeping correctional authority"); Love & Klingele, *supra* note 16, at 871 (noting that Section 305.7 was "[m]odeled on the federal law authorizing sentence reduction for 'extraordinary and compelling reasons,' but with one important procedural difference"); *see also* TD-2, *supra* note 10, § 305.7 cmt. b (referencing the federal provision as a model for the "compelling reasons" catchall).

95. 18 U.S.C. § 3582(c)(1)(A)(i) (2006). For a thorough discussion of the federal statute and its application, see HUMAN RIGHTS WATCH & FAMILIES AGAINST MANDATORY MINIMUMS, THE ANSWER IS NO: TOO LITTLE COMPASSIONATE RELEASE IN US FEDERAL PRISONS (Nov. 2012), *available at* http://www.hrw.org/sites/default/files/reports/us1112ForUploadSm.pdf.

96. *See* HUMAN RIGHTS WATCH & FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 95, at 19–23, 54–59 (detailing the Bureau of Prisons' position—expressed through internal memoranda, regulations, and proposed rules—that compassionate release should be limited to terminal and extremely debilitating medical cases that do not threaten public safety); OFFICE OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 12–21, 60–62 (Apr. 2013), http://www.justice.gov/oig/reports/2013/e1306.pdf (summarizing medical and non-medical BOP guidance for compassionate release consideration).

2007,[97] the Bureau has continued to hew to its restrictive medical criteria.[98] As a result, over the last twenty years, only around two dozen federal prisoners have received grants of compassionate release annually, all on medical grounds.[99] Thus, although the federal compassionate release statute contains broad criteria that literally *could* apply to any individual with an "extraordinary and compelling reason" warranting a sentence reduction, its constricted application has thus far resembled that of most states' compassionate release measures.[100]

Finally, the compassionate release label may reflect strategic considerations. Most critically, the designation serves as an effective means to legitimize the provision.[101] The vast majority of jurisdictions in the United States have adopted compassionate release measures.[102] Broad support exists for these statutes, and

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97. *See* U.S. SENTENCING GUIDELINES MANUAL, § 1B1.13 application n.1 (2012), *available at* http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_1.pdf (providing that extraordinary and compelling reasons may exist when: "[t]he defendant is suffering from a terminal illness[;] [t]he defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement[;] the death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children[;]" or the Director of the Bureau of Prisons determines that some other "extraordinary and compelling" reason exists).

98. *See* HUMAN RIGHTS WATCH & FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 95, at 27; *cf.* OFFICE OF THE INSPECTOR GEN., *supra* note 96, at 26 (reporting on the Bureau of Prisons' attempt to revise its compassionate release regulations and its drafting of a new guidance memorandum for medical institutions "that will expand the compassionate release program by making inmates with a life expectancy of up to 18 months eligible for consideration"); Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES, Aug. 12, 2013, http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html?pagewanted=all&_r=0 (reporting Attorney General Eric Holder's release of a new Department of Justice policy to "expand a program of 'compassionate release' for 'elderly inmates who did not commit violent crimes and have served significant portions of their sentences'").

99. HUMAN RIGHTS WATCH & FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 95, at 34, 49; OFFICE OF THE INSPECTOR GEN., *supra* note 96, at 34–35.

100. William W. Berry III, *Extraordinary and Compelling: A Re-examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 866 (2009) ("[T]here is no requirement in the Bureau of Prisons' procedures that its broad discretionary authority be exercised so narrowly."); HUMAN RIGHTS WATCH & FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 95, at 3. Recent federal policy changes suggest that this practice may change. *See supra* note 98.

101. *See* Love & Klingele, *supra* note 16, at 861–62.

102. *See* Murphy, *supra* note 69, at 1695 (reporting that forty-one jurisdictions allow "some sort of medical release," thirty-nine states provide for medical parole by statute,

liberal and conservative pundits alike have recently called for their increased usage.[103] Thus, labeling Section 305.7 as a compassionate release measure effectively demystifies the provision and naturalizes its adoption.[104] In addition, this framing dictates the course of the provision's narrative by linking Section 305.7 with the populations most closely associated with states' compassionate release efforts—the terminally ill, the elderly, and the severely physically incapacitated.[105] These populations include the most appealing candidates for early release because of their perceived low risk of recidivism and high cost of care.[106] Moreover, the close association of compassionate release with elderly and terminally ill prisoners may help the public overlook the omission from Section 305.7 of criteria generally found in states' statutes such as non-dangerousness.[107]

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and thirty-six states have statutes for early release on grounds of health or age); Laura Tobler & Kristine Goodwin, Nat'l Conference of State Legislators, *Reducing Correctional Health Care Spending*, LEGISBRIEF (Mar. 2013), http://www.afscmeinfocenter.org/privatizationupdate/2013/03/reducing-correctional-health-care-spending.htm ("[A]t least 41 states allow medically incapacitated or terminally ill inmates to leave prison early if they do not pose a public safety risk."); Williams et al., *supra* note 67, at 122 ("Compassionate release is a matter of federal statute under the Sentencing Reform Act of 1984, and now all but 5 states have some mechanism through which dying prisoners can seek release.").

103. *See* The Editorial Board, *In Place of Compassion, Cruelty*, N.Y. TIMES, May 5, 2013, at A26, *available at* http://www.nytimes.com/2013/05/06/opinion/in-place-of-compassion-cruelty.html; Tina Maschi, *The State of Aging: Prisoners and Compassionate Release Programs*, HUFFINGTON POST (Aug. 23, 2012, 4:00 PM), http://www.huffingtonpost.com/tina-maschi/the-state-of-aging-prisoners_b_1825811.html; *Nation's Oldest Prisoners May Benefit From New Outlook Toward Compassionate-Release Program*, FOXNEWS.COM (May 12, 2013), http://www.foxnews.com/us/2013/05/12/nation-oldest-prisoners-may-benefit-from-new-outlook-toward-compassionate.

104. *See* Love & Klingele, *supra* note 16, at 868 (characterizing "an authority for early release in the event of compelling changes in a prisoner's circumstances, such as serious illness or disability, advanced age, or family exigency" as a "familiar" sentence reduction mechanism).

105. *See id.* at 865.

106. *See, e.g.*, Vitiello, *supra* note 6, at 1304 ("Around the country, early release for older prisoners—typically based on evidence-based criteria—is not controversial."); Jack Dolan, *Despite Medical Parole Law, Hospitalized Prisoners are Costing California Taxpayers Millions*, L.A. TIMES (Mar. 2, 2011), http://www.articles.latimes.com/2011/mar/02/local/la-me-prisons-20110302; Maschi, *supra* note 103; Amy Neff Roth, *Compassion vs. Safety: Should Aging/Ill Prisoners Be Released?*, OBSERVER-DISPATCH (Utica, NY) (June 25, 2012, 12:20 AM), http://www.uticaod.com/news/x2102585582/Compassion-v-safety-Should-aging-ill-prisoners-be-released?zc_p=0#axzz2XKYo8t90.

107. Legislatures or the public might view such criteria as more dispensable if Section 305.7 were limited to these populations. *But see, e.g.*, Aldenberg, *supra* note 59, at 553 (recounting the example of a bedridden inmate with AIDS, who had been convicted of attempted criminal transmission of HIV, who was rearrested for prostitution after her

All of this discussion about the characterization of Section 305.7 would be needless quibbling—surely it is compassionate, after all, to reduce the lawful sentence of any prisoner, for any sound reason—if the provision's designation as a compassionate release measure did not carry potentially negative consequences for its adoption, implementation, and longevity. Understanding why the label of compassionate release may portend such deleterious consequences requires an elucidation of the term's theoretical baggage.

C. Rationales for Compassionate Release Measures

Commentators have paid relatively little attention to the theoretical and practical justifications for compassionate release,[108] but the primary motivation behind these measures appears to avoid (or, rather, to deflect) the cost of caring for elderly and seriously ill prisoners when their release will not pose a threat to public safety.[109] The cost of housing geriatric and terminally ill

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compassionate release). *Cf.* OFFICE OF THE INSPECTOR GEN., *supra* note 96, at iv (finding a "recidivism rate of 3.5 percent" for inmates released through the federal compassionate release program, which has only granted release on narrow, medical grounds).

108. *See* Reitz, *supra* note 10, at 706–07 ("No one has yet given adequate time and energy to the question of when the edifice of determinacy should give way to other concerns, or how back-end release discretion should best be organized and exercised when it exists."). A partial list of theoretical commentary on compassionate release laws includes Aldenberg, *supra* note 59, at 548–50, 567, 569–70; Beck, *supra* note 73, at 223–25 (outlining four main considerations of compassionate release measures, including "a humanitarian concern for the dying," "a reassessment of the purpose and justification for the inmate's sentence," a desire to "save correctional funds," and a "concern that early release could pose a risk to society"); Berry, *supra* note 100; Murphy, *supra* note 69, at 1681–82, 1691–93, 1697–1700; Russell, *supra* note 68, at 804–06. Other scholars have discussed mitigation of punishment on grounds of age or illness within a broader discussion of mercy. *See, e.g.*, LINDA ROSS MEYER, THE JUSTICE OF MERCY 110–11 (2010); KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST, 11, 97–98, 173–75 (1989); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1465–71 (2004) [hereinafter Markel, *Against Mercy*].

109. *See, e.g.*, CHIU, *supra* note 9, at 2 ("To reduce the costs of caring for aging inmates—or to avert future costs—legislators and policymakers have been increasingly willing to consider early release for those older prisoners who are seen as posing a relatively low risk to public safety."); Fan, *supra* note 16, at 623 ("Budgetary pressures are the common and prevalent justification for the sentence reduction and early release measures."); Love & Klingele, *supra* note 16, at 865 (identifying the primary motivation for states' early release efforts as "a desire for lower custodial populations and lower cost"); *cf.* Margaret Colgate Love, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 31 FED. SENT'G REP. 211, 216 (2009), *available at* http://www.jstor.org/stable/pdfplus/10.1525/fsr.2009.21.3.211.pdf (expressing state

inmates significantly exceeds the cost of housing their younger, healthier peers,[110] because of their needs for medical services and devices, transportation to specialized medical centers, and increased correctional staffing.[111] A correctional system may spend two to four times more on a geriatric or seriously ill prisoner than on a younger, healthy inmate.[112] Because prisoners are ineligible for Medicare or Medicaid reimbursement for care received in prisons,[113] releasing inmates otherwise eligible for federal programs would relieve states of a significant expenditure.[114] The American Civil Liberties Union estimates that releasing an aging prisoner would save a state, on average, $66,294 annually,[115] in addition to possibly generating increased income through sales and income tax.[116] Proponents of compassionate release laws have also argued that the release of low-risk, high-cost prisoners would free up valuable prison space for younger, more dangerous inmates.[117]

A second motivation is humanitarian in nature.[118] This consideration, most prominent in the 1990s at the height of the

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correctional officials' view that "it is easier to sell mercy if it increases public safety and saves money").

110. *See* AM. CIVIL LIBERTIES UNION, *supra* note 9, at 26–27 (estimating the annual incarceration cost per prisoner at $34,135 and the annual incarceration cost per elderly prisoner at around $68,270); *infra* note 112.

111. *See* AM. CIVIL LIBERTIES UNION, *supra* note 9, at 28–29; CHIU, *supra* note 9, at 5.

112. *See* AM. CIVIL LIBERTIES UNION, *supra* note 9, at 27; CHIU, *supra* note 9, at 5; Daniel Arkin, *Exploding Number of Elderly Prisoners Strains System, Taxpayers*, U.S. NEWS (June 29, 2013, 6:57 PM), http://www.usnews.nbcnews.com/_news/2013/06/29/19192020-exploding-number-of-elderly-prisoners-strains-system-taxpayers?lite#about_blog.

113. *See* AM. CIVIL LIBERTIES UNION, *supra* note 9, at 33 & n.62. However, states may receive Medicaid reimbursement for the bills of prison inmates who stay in private or community hospitals for more than twenty-four hours, so long as the inmates are Medicaid-eligible. HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 78–79 (2012), *available at* http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf; Christine Vestal, *Medicaid for Prisoners: States Missing Out on Millions*, USA TODAY (June 25, 2013 10:07 AM), http://www.usatoday.com/story/news/nation/2013/06/25/stateline-medicaidprisoners/2455201.

114. CHIU, *supra* note 9, at 5.

115. AM. CIVIL LIBERTIES UNION, *supra* note 9, at 26-27.

116. *Id.* at 30. Opponents contend that compassionate release statutes merely shift the cost of caring for these expensive individuals to other governmental programs and thus provide no real savings to taxpayers. CHIU, *supra* note 9, at 8.

117. *See, e.g.*, AM. CIVIL LIBERTIES UNION, supra note 9, at 1; Aldenberg, *supra* note 59, at 552; Russell, *supra* note 68, at 805.

118. *See* Nadine Curran, *Blue Hairs in The Bighouse: The Rise In the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 NEW ENG. J.

AIDS epidemic,[119] typically manifests as a desire to afford dignity to the dying.[120] Observing in 1999 that "[t]he genesis of all compassionate release programs is a humanitarian concern for the dying," Dr. John Beck argued that, "[e]ven with the strong public revulsion for criminals, most civilians can accept the notion that all inmates—except the most incorrigible—and their families should have some meaningful time together before those prisoners die."[121] In the words of Nadine Curran,

> [Compassionate release programs] serve as a humanitarian solution to a prisoner's last days. This is important for the terminally ill, elderly inmate because it will offer [him or her] some comfort to know that when the time comes, [he or she] will not have to die behind bars. . . . [I]mplementing a medical parole sets an example for society that death brings a need for dignity and respect that a civilized population should preserve for all people, regardless of whether they are in prison.[122]

While at times this notion has assumed spiritual overtones,[123] it most often is expressed as a dignitarian value worthy of civilized peoples.[124]

ON CRIM. & CIV. CONFINEMENT 225, 260–61 (2000) (identifying the two purposes of medical parole as affording dignity in death and correctional cost savings); Heather Habes, *Paying for the Graying: How California Can More Effectively Manage Its Growing Elderly Inmate Population*, 20 S. CAL. INTERDISC. L.J. 395, 417–18 (2011) ("Compassionate release statutes serve important functions: prisons save on funerary expense, gain inmate space more quickly, and inmates are allowed to spend their last days with their families at little or no risk to the public."); Russell, *supra* note 68, at 803 ("There appear to be two primary concerns at issue: death with dignity, independent of extraordinary and dehumanizing medical intervention; and cost.").

119. *See* Beck, *supra* note 73, at 216, 220–21, 223 (explaining the importance of New York's medical parole program in the context of the AIDS epidemic of the 1990s).

120. *See id.* at 222–23.

121. *Id.* at 223; *see also* Aldenberg, *supra* note 59, at 552 (quoting the mother of Larry Rembert, who died of AIDS in prison: "For the government to deny a mother the right to be with her son at the time of his death is the worst crime of all. . . . [My son] did some bad things in his life. But where is the compassion?").

122. Curran, *supra* note 118, at 260–61.

123. *Id.* at 260 (quoting Lee Gartenberg, one of the drafters of the Massachusetts medical parole bill, as explaining that the measure would allow terminally ill prisoners to seek "spiritual reconciliation" at home prior to death).

Critically, scholars and other commentators have struggled with how to square the existence and operation of compassionate release laws with traditional justifications for punishment.[125] While some commentators have maintained that compassionate release can cohere with purposes of sentencing,[126] one particularly rigorous inquiry of the possible justifications of compassionate release, conducted by Professor William Berry, concluded that a state's purposes for punishment will usually not justify sentence mitigation for terminally ill or permanently physically impaired prisoners, or for inmates needed as caregivers for minor children.[127] Others have agreed with Professor Berry that an inmate's medical state (or age) will typically be irrelevant to the

124. *See, e.g.*, Nancy Neveloff Dubler, *The Collision of Confinement and Care: End-Of-Life Care In Prisons and Jails*, 26 J.L. MED. & ETHICS 149, 149–50, 153–54 (1998) (discussing compassionate release within the context of advanced directives and improved care for terminally ill prisoners); Habes, *supra* note 118, at 417 (observing that many states "have recognized that inmates deserve to die in peace with their families and thus have created statutory provisions that allow for 'compassionate release'"); Russell, *supra* note 68, at 802–05 (examining the humanitarian impulse around dying that motivated early compassionate release measures within the context of "the right to refuse or discontinue treatment, to make choices about the time and manner of one's death or the death of a loved one, and the extent to which these issues should be regulated by the government").

125. *See infra* notes 126–131 and accompanying text.

126. *See, e.g.*, HUMAN RIGHTS WATCH, supra note 113, at 87–95 (explaining how compassionate release may be consistent with the four purposes of punishment); MOORE, *supra* note 108, at 11 (asserting that adjustments to sentences may be appropriate on retributivist grounds "to relieve the punishment of an offender who has suffered enough, or one whose particular circumstances would make him suffer more than he deserves; or to prevent an unwarranted cruel punishment"); Russell, *supra* note 68, at 833 ("In light of current societal values addressing death with dignity, considerations of punishment, deterrence, and rehabilitation should no longer come into play. The seriousness of the crime is not deprecated if we permit the terminally ill to die outside the hostile confines of prison."); Williams et al., *supra* note 67, at 122 ("[The traditional justifications for punishment of retribution, rehabilitation, deterrence, and incapacitation] may be substantially undermined for prisoners who are too ill or cognitively impaired to be aware of punishment, too sick to participate in rehabilitation, or too functionally compromised to pose a risk to public safety.").

127. *See* Berry, *supra* note 100, at 872–81 ("[I]n most situations, neither retributive nor utilitarian sentencing rationales can satisfactorily supply an independent theoretical basis for compassionate release."). Professor Berry concedes that permanent physical incapacitation may diminish the applicability of incapacitation as a justification for punishment, at least for those prisoners inclined to commit violent crimes, but warns that "this justification acting alone may prove unsatisfying in its application." *See id.* at 880. He also highlights relief of "an unusually disparate impact" of incarceration on an offender as supplying potential grounds for mitigation, but concludes that this principle "is rarely applicable," even in cases of terminal illness or permanent physical impairment, because "the presence of such a condition will rarely alter the definition of a proportionate sentence." *Id.* at 876.

purposes underlying his sentence,[128] particularly the state's need to exact retribution.[129] However, a number of commentators have opined that, in the context of the low risk and high cost of elderly and seriously ill prisoners, other important state considerations—such as cost savings and easing prison overcrowding—should prevail over a loss of retributive or utilitarian goals.[130] Yet, as Professor Elizabeth Rapaport has recognized, "[c]ost reduction arguments [to support early release ultimately] look politically

128. *Id.* at 875–76.

129. *See* CHIU, *supra* note 9, at 10 ("Early release for older inmates has attracted attention because it promises cost savings at relatively low risk to public safety. However, the practice can be at odds with other criminal justice goals, such as retribution or incapacitation."); Beck, *supra* note 73, at 224 (arguing that a "reassessment of the fairness of the original sentence, in light of the new information about the inmate's health status," should include "a reexamination of the criminal justice and sentencing issues involved in setting any criminal punishment" but observing that "[t]he inmate's specific medical state is not relevant" to many of the purposes underlying an inmate's sentence, such as the need for retribution); Habes, *supra* note 118, at 418 (observing that the punishment of some criminals released on compassionate release "may fall short of appropriate retribution"); Markel, *Against Mercy*, *supra* note 108, at 1465–71 (offering an extended retributivist critique of extending compassion-based mercy for ill and dying prisoners).

130. *See, e.g.*, Berry, *supra* note 100, at 885–87 (concluding that the benefit to the state in choosing to mitigate an offender's sentence—on grounds of the inmate's terminal illness, of the inmate's permanent physical impairment, or that the inmate's release is necessary for care of a minor child—will "almost always" significantly outweigh the penological benefit sacrificed by the corresponding sentence reduction); Norris, *supra* note 69, at 1591 ("The additional incarceration that an incurably sick or disabled offender would experience if he or she is not released would have some abstract punishment or retributive value. But this value, even in this case of the most serious offenders, will often be outweighed by the lack of risk to the public, the potential cost savings to the public, and the benefits for the dignity and quality of the life of the offender and his or her family."); Russell, *supra* note 68, at 805 ("When a prisoner is terminally ill, the achievement of penal goals is less critical, the threat to the public is diminished or eliminated, and compassion becomes more important."); *cf.* Fan, *supra* note 16, at 623 (quoting Connecticut legislator Mike Lawlor as stating, "People have to be willing to explain it and get beyond the usual sort of philosophical battles—tough on crime, soft on crime. This is just sort of a fiscal reality not a philosophical choice."). Professor Richard Frase has argued that cost and resource considerations should factor into the proportionality of an offender's sentence through the utilitarian ends-benefits proportionality principle. *See* Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 47 (2008) ("[I]n proportionality analysis, measures should not cost more than the benefits they are expected to produce (including public as well as privately borne costs and burdens), or more than equally effective alternative measures. . . . As a matter of sound public policy, it is . . . unwise, but probably not fundamentally unfair to the defendant, to impose a sentence which costs taxpayers more than the expected benefits are worth, or more than an effective alternative."). For discussion on whether, and how, cost should factor into sentencing, see *infra* notes 204-206, 214 and accompanying text.

tenable only when cost savings do not challenge demands for retribution and public safety."[131]

D. Implications of the Label for Section 305.7

As the preceding discussion suggests, depicting Section 305.7 as a compassionate release measure carries potential hazards. In particular, the branding may effectively elevate a subset of the aims in limiting retributivism while suppressing other considerations.[132] It also may result in restricting the practical reach of the provision to those circumstances and populations currently served by states' compassionate release statutes.[133] Moreover, since jurisdictions' compassionate release laws rarely result in the early release of prisoners,[134] the designation may doom Section 305.7 to underuse, regardless of the breadth of its grounds or accepted rationale.

Recall that Section 305.7 authorizes sentence modification when a compelling reason justifies modification in light of the purposes of sentencing set forth in Section 1.02(2).[135] Section 1.02(2) lists a number of consequentialist objectives that judges may pursue, if reasonably feasible, when sentencing an offender within the bounds of proportionate punishment.[136] These objectives—offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community—are of equal status.[137] In addition, a sentence should be "no more severe than necessary" to achieve the applicable purposes of punishment.[138] Compassionate release laws,

131. Rapaport, *supra* note 74, at 11.

132. *See supra* note 130 and accompanying text.

133. *See supra* notes 68–70 and accompanying text.

134. *See supra* note 99; *infra* note 200.

135. TD-2, *supra* note 10, § 305.7(7).

136. TD-1, *supra* note 13, § 1.02(2)(a)(ii). In addition, cost and prioritization of scarce resources are included as considerations in the administration of the sentencing system under Section 1.02(2)(b)(v). *See id.* § 1.02(2)(b)(v).

137. *See id.* § 1.02(2)(a)(ii).

138. *Id.* § 1.02(2)(a)(iii). For an illustration of how sentencing should proceed under a limiting retributivist framework, see Richard S. Frase, *Punishment Purposes,* 58 STAN. L. REV. 67, 80–81 (2005) ("The first step is to determine whether the top and bottom of the recommended guidelines range need to be adjusted to account for factors which increase or decrease the seriousness of the conviction offense. Applying the parsimony principle, the sentencing judge then begins at the low end of the adjusted range and increases

on the other hand, largely prioritize the crime-control objective of incapacitation and the ancillary purposes of cost savings and correctional management,[139] and do not direct the consideration of other sentencing goals.[140] Thus, the branding of Section 305.7 as a compassionate release measure carries the predictable effects of emphasizing the value of incapacitation and of deflecting attention from other utilitarian purposes and retributive concerns of proportionality.[141] As a result, judges in states with laws similar to Section 305.7 may find it difficult to modify sentences on the basis of offender rehabilitation, for instance, since such orders would contradict the public narrative about the proper use of a compassionate release law.[142] Such difficulty may exist even if a judge were to find a reformed offender unlikely to recidivate, so long as the offender is physically or mentally capable of reoffending.[143]

Moreover, saddling Section 305.7 with the rubric of compassionate release deemphasizes the importance of proportionate punishment to sentence modification within the revised Model Penal Code. Most compassionate release laws do

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sentencing severity until all applicable case-specific utilitarian sentencing purposes have been satisfied.").

139. *See* Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 45–46 (2006) (identifying "administrative concerns for efficiency, cost-effectiveness, and resource management" as "main ancillary functions" of sentencing policy and arguing that a sentencing system should take "realistic account of key management interests"). For a discussion of how systemic concerns might factor into sentencing, see *infra* notes 204–206, 214 and accompanying text.

140. In addition to the regular requirement that an individual pose no threat to public safety, *see supra* notes 72–73 and accompanying text, some states make cost savings an explicit statutory criterion, *see* Klingele, *Changing the Sentence*, *supra* note 9, at 493 & n.128. Compassionate release laws also reflect humanitarian concern for the dying and express respect for the dignity and end-of-life and medical decisions of prisoners. *See supra* notes 118–124 and accompanying text.

141. Commentators have expressed a variety of concerns about back-end relief efforts. *See, e.g.*, ANDREW VON HIRSCH & KATHLEEN J. HANRAHAN, THE QUESTION OF PAROLE 108 (1979) (raising the possibility that "second looks" could undermine front-end assessments and accountability); Frase, *supra* note 10, at 200 (expressing similar concerns as to Section 305.7); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1210 (2005) (arguing that "'backdoor' parole releasing authority applicable to large numbers of offenders may promote efficiency . . . but undermines retributive values, truth in sentencing, the accuracy of resource impact assessments, and the self-restraint policymakers feel when there is no potential backdoor 'safety valve'").

142. *See supra* notes 67–69 and accompanying text.

143. *See supra* notes 69 and 73 accompanying text.

not direct judges to consider the dictates of proportionate punishment,[144] and commentators have identified the potential conflict between compassionate release measures and retributive demands.[145] However, sentence modification under Section 305.7 would only be permissible when consistent with an offender's deserved punishment.[146] As the comments to Section 1.02(2) make clear, "an appeal to utilitarian goals [such as incapacitation] should not support a penalty that is too lenient as a matter of justice to reflect the gravity of the offense, the harm to the victim, and the blameworthiness of the offender."[147] While scholars have identified and sought to address the potential conflict between compassionate release and retributive values,[148] additional theoretical development in this area would be useful to resolve the tension between Section 305.7, limiting retributivism, and the provision's label as a compassionate release measure.[149]

Finally, the consistent criteria of traditional compassionate release statutes and their justifications may impede the extension of sentence modification to populations that have historically been ineligible for relief.[150] Consider, for instance, a prisoner seeking sentence modification on grounds of serious mental illness.[151]

144. *See supra* notes 86–88 and accompanying text.

145. *See supra* notes 127–129 and accompanying text. It is possible that this perceived conflict accounts for the infrequency of releases under compassionate release statutes. *See* HUMAN RIGHTS WATCH & FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 95, at 59–61 (examining the role of retribution in the Bureau of Prisons' compassionate release decisions).

146. *See* TD-2, supra note 10, § 305.7(7); TD-1, *supra* note 13, § 1.02(2)(a)(i) (directing that the sentences of individual offenders must occur "within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders").

147. TD-1, *supra* note 13, § 1.02(2) cmt. a.

148. *See, e.g.*, Berry, *supra* note 100, at 876; Frase, *supra* note 10, at 196, 198. Particularly enlightening on this score are examinations of the coherence of mercy with justice. *See, e.g.*, MOORE, *supra* note 108, at 196, 198; Jacob Adler, *Murphy and Mercy*, 50(4) ANALYSIS 262, 264–68 (1990); Claudia Card, *On Mercy*, 81 PHIL. REV. 182, 182–85, 191–92 (1976); David Dolinko, *Some Naïve Thoughts About Justice and Mercy*, 4 OHIO ST. J. CRIM. L. 349, 353–54, 359 (2007); Markel, *Against Mercy*, *supra* note 108; Jeffrie Murphy, *Mercy and Legal Justice*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 162 (1988); Alwynne Smart, *Mercy*, *in* THE PHILOSOPHY OF PUNISHMENT 212–27 (H.B. Acton ed., 1968).

149. *See infra* notes 210–15 and accompanying text (exploring retributive rationales for sentence modification).

150. *See infra* note 152 and accompanying text.

151. *See* TD-2, *supra* note 10, § 305.7 cmt. b ("Only a minority of compassionate-release laws embrace serious mental infirmities, but the revised Code recommends that

Section 305.7 expressly includes "mental infirmity" as a basis for sentence modification.[152] Although this term suggests age-related mental decline, the comments to the provision appear to equate "mental infirmity" with mental illness.[153] These comments stress the lack of effective treatment for mental illnesses in prisons and the fact that prison conditions may exacerbate inmates' disorders, leaving them unable to cope within the prison environment.[154] Efforts to extend relief to mentally ill prisoners may falter, however, on the recognition that mental disorders often do not correlate with decreased violence or recidivism.[155] If the extension

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this should become the universal practice."); *id.* at rep. n.b(3) (listing state statutes including mental infirmity as a ground for compassionate release).

152. *See id.* § 305.7(1), (7); *see also id.* cmt. b.

153. *See id.* cmt. h ("Section 305.7 is designed to respond to circumstances that arise or are discovered after the time of sentencing, including cases in which the full effects of known conditions, such as a prisoner's physical or mental illness, are not appreciated until a later date."); *id.* cmt. b ("While estimates vary, it is clear that a substantial percentage of inmates in the nation's prisons suffer from mental illnesses. Often, effective treatment is unavailable in prison, conditions of the institution may exacerbate the inmate's condition, and the inmate's impairment may make it impossible to navigate the daily life of the penitentiary."). Of course, even if "mental infirmity" were confined to age-related mental degeneration, mental illness could be a "compelling reason" so long as its presence implicates the purposes of sentencing.

154. *See id.* cmt. b.

155. The weight of the evidence suggests that mental disorder and clinical symptoms typically play a negligible role, if any, in recidivism. *See* E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 564–66, 568 & nn.276–79 (2012) (discussing meta-analyses and other studies); *see also* Donna L. Hall et al., *Predictors of General and Violent Recidivism Among SMI Prisoners Returning to Communities in New York State*, 40 J. AM. ACAD. PSYCHIATRY & L. 221, 229–30 (2012) ("An individual's psychiatric history, in contrast, did not add to the prediction of re-arrest. Diagnoses, level of mental health need before release from prison, or history of psychiatric hospitalization did not differentiate those re-arrested."); Johnston, *supra*, at 573–74 ("Consistent with research showing that mental illness is not a dynamic risk factor for reoffending, evidence shows that the provision of mental health treatment alone is not an effective strategy for reducing the recidivism of offenders with mental illnesses."); Arthur J. Lurigio, *Examining Prevailing Beliefs about People with Serious Mental Illness in the Criminal Justice System*, 75 FED. PROBATION 11, 15 (2011) ("[N]o pathogenesis between mental illness and crime has ever been established. The untreated symptoms of the three most serious mental illnesses (schizophrenia, bipolar disorder, and major depression) suggest either no or a weak casual pathway."); Jason Matejkowski, *Exploring The Moderating Effects of Mental Illness on Parole Release Decisions*, 75 FED. PROBATION 19, 19 (2011) ("Mental illness is not one of the central eight risk factors and, in itself, has been found to have little relation to long-term criminal recidivism."); Jillian Peterson et al., *Analyzing Offense Patterns as a Function of Mental Illness to Test the Criminalization Hypothesis*, 61 PSYCHIATRIC SERVS. 1217 (2010). In addition, compassionate release may be deemed inappropriate given the cyclic and episodic nature of mental illness and the potential difficulty in predicting the course of an inmate's illness. *See* Aldenberg, *supra* note 59, at 553 (noting the difficulty of predicting the course

of Section 305.7 to individuals with mental illnesses will be difficult, its application to individuals without any physical or mental infirmity—such as those offenders whose sentences are arguably excessive given their rehabilitation, their heroic acts, or society's changed perceptions of the gravity of their offenses—will be even more unlikely.[156] These populations are not associated with any inherent loss of recidivist potential or costly medical services, so their release could (in practical terms) pose a threat to public safety and is unlikely to yield the robust cost savings promised by the release of elderly or seriously ill inmates.[157] Unless sentencing commissions, judges, legislators, or commentators construct persuasive, alternative rationales—beyond those inherent in the traditional compassionate release narrative—as to why early release is appropriate, justified, and perhaps necessary for these populations, states may be inclined to exclude them from relief, and judges (particularly those who are elected) may exercise their discretion to release only certain categories of offenders.[158]

IV. THE ANALOGY OF JUDICIAL SENTENCE MODIFICATION

Instead of framing Section 305.7 as a compassionate release measure, the American Legal Institute could have turned to another legal analog: the historical model of judicial sentence modification.[159] Though current rules vary,[160] many states have

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of an inmate's illness, the fact that an inmate can recover, and the consequent threat he may pose to public).

156. *See* Klingele, *Changing the Sentence*, *supra* note 9, at 495–97.

157. *See id.* at 493–95 (discussing the high cost of providing care for mentally ill inmates and the potential savings that would come with early release of such inmates as compared to those who are healthier).

158. *See* Grossman & Shapiro, *supra* note 27, at 1–3 (discussing the history of judicial sentence modification in Maryland); Klingele, *Changing the Sentence*, *supra* note 9, at 529 (discussing the broad discretion that judges are afforded in sentence modification).

159. Interestingly, commentary within and outside of the revised Model Penal Code has noted that the "second look" provision of Section 305.6 bears some similarity to the judicial sentence-reconsideration power that exists in many states. *See* TD-2, *supra* note 10, § 305.6 cmt. d (taking note of states' judicial sentence modification provisions but concluding that Section 305.6 bears "little similarity" to these measures because most statutes only allow judges several months to modify offenders' sentences and none—like Section 305.6—imposes a long delay before the court's authority materializes); *id.* rep. n.d; *see also* Love & Klingele, *supra* note 16, at 875 ("[W]hile it is true that no jurisdiction specifically directs judges to review lengthy sentences after a proscribed period of years, a handful of jurisdictions do permit judicial sentence modification years after a sentence

adopted judicial sentence modification rules similar to the former Federal Rule of Criminal Procedure 35(b).[161] The federal rule, in force until 1987, provided that a trial judge could reduce a sentence for any reason within 120 days of its imposition, either sua sponte or on motion of defense counsel.[162] The motion was "essentially a plea for leniency"[163] and "afford[ed] the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim."[164] Section 305.7 resembles the historical exercise of judicial sentence modification: the provision vests judges with broad discretion—unconstrained by correctional agencies or parole boards—to modify an inmate's sentence when it is unjust or inappropriate, or to otherwise effectuate authorized purposes of punishment.[165] Though states' substantive criteria vary

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has been imposed. Such modifications are often granted in cases where the circumstances surrounding a prisoner's incarceration have changed in ways that would be captured by the standard for modification set forth in Section 305.6—that is, when 'in light of present circumstances . . . the purposes of sentencing . . . would better be served by a modified sentence than the prisoner's completion of the original sentence.'") (quoting MODEL PENAL CODE § 305.6(4)). Arguably, the broadest state judicial sentence modification statutes more closely resemble Section 305.7 than Section 305.6, since Section 305.7 does not delay courts' sentence modification power. Professor Cecelia Klingele, the Associate Reporter of the Model Penal Code: Sentencing project, wrote one of the most important articles on judicial sentence modification. *See* Klingele, *Changing the Sentence*, *supra* note 9.

160. *See* TD-2, *supra* note 10, § 305.6 rep. n.f; Grossman & Shapiro, *supra* note 27, at 10–14 (reviewing state and federal law regarding judicial sentence modification); Klingele, *Changing the Sentence*, *supra* note 9, at 498–512. Some states do not give trial judges the statutory power to reduce legal sentences. *See* Grossman & Shapiro *supra*, at 11 n.76.

161. *See* Grossman & Shapiro, *supra* note 27, at 13 (stating that the rules in a majority of states resemble the former federal rule and that many states' rules were patterned after it); Klingele, *Changing the Sentence*, *supra* note 9, at 500–01.

162. *See* FED. R. CRIM. P. 35(b).

163. Poole v. United States, 250 F.2d 396, 401 (D.C. Cir. 1957).

164. United States v. Ellenbogan, 390 F.2d 537, 543 (2d Cir. 1968).

165. *See* TD-2, *supra* note 10, § 305.7(7) & cmt. a. It is possible, however, that the criterion "compelling" in Section 305.7 will narrow judges' discretion to modify sentences, as compared to the broad "upon reflection" standard applicable to judicial reconsideration in some states. *See, e.g.*, Dist. Attorney for the N. Dist. v. Super. Ct., 172 N.E.2d 245, 250 (Mass. 1961). The comments to Section 305.7 provide little guidance on what meaning should attach to the term "compelling." *See* TD-2, *supra* note 10, § 305.7 cmt. a ("The provision is intended to respond to circumstances that arise or are discovered after the time of sentencing, when those circumstances give compelling reason to reevaluate the original sentence."); *id.* cmt. b (noting the similarity between "the open-ended 'compelling reasons' standard" in Section 305.7 and the "extraordinary and compelling reasons" standard in federal law, as well as two state standards: "the catch-all standard of 'good cause shown,'" and "whether the prisoner is 'a suitable candidate for

somewhat,[166] the most glaring difference between Section 305.7 and states' current judicial sentence modification rules lies in timing: states only allow judges a narrow window to modify legal sentences (often between sixty days and one year),[167] but Section 305.7 authorizes modification at any point during the course of an inmate's imprisonment.[168]

Because states have used judicial sentence modification to recognize a number of sentencing interests,[169] framing Section 305.7 as an extension of states' judicial sentence modification practices would facilitate the expression of the many utilitarian and nonutilitarian sentencing purposes underlying Sections 305.7 and 1.02(2).[170] For instance, some states rely upon sentence

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suspension of sentence,' without elaboration of what counts toward suitability"). It is clear that a "compelling" reason must, at a minimum, call into question the justness or appropriateness of the original sentence, in light of applicable sentencing purposes listed in Section 1.02(2). *See* TD-2, *supra* note 10, § 305.7(7) & cmt. a. It is also clear that a compelling reason need not be extraordinary, *see supra* note 29, and that drafters intended to restrict "compelling" reasons to those that arise, are discovered, or are only fully appreciated postsentencing, *see* TD-2, *supra* note 10, § 305.7, cmts. a & h. *But see supra* note 49 (observing that this limitation does not occur within the text of Section 305.7). The experience of sentence modification in Wisconsin, where courts may modify sentences upon a finding of a "new factor," may be instructive in this regard. *See* Rosado v. State, 234 N.W.2d 69, 73 (Wis. 1975) (defining a "new factor" for purposes of judicial sentence modification). For a discussion of Wisconsin's common law judicial sentence modification power and the new factor test, see Klingele, *Changing the Sentence*, *supra* note 9, at 506–09; Katherine R. Kruse & Kim E. Patterson, Comment, *Wisconsin Sentence Modification: A View from the Trial Court*, 1989 WIS. L. REV. 441, 445–50 (1989) (outlining the development of the new factor test); Jesse J. Norris, *Should States Expand Judicial Sentence Modification? A Cautionary Tale*, 35 HAMLINE L. REV. 101, 109–15, 123–24 (2012).

166. *See* TD-2, *supra* note 10, § 305.6 rep. n.f (observing that "[m]ost sentence-modification provisions do not articulate a theoretical model or substantive criteria for granting a sentence reduction" and listing exceptions that permit modification, for instance, to advance "interests of justice" or in light of "exceptional rehabilitation of the offender").

167. *See* Grossman & Shapiro, *supra* note 27, at 11 & nn.78–81.

168. *See* TD-2, *supra* note 10, § 305.7 cmt. a. In this respect, Section 305.7 somewhat resembles the former Maryland rule, which authorized judges to "reduce a sentence at any time for any reason, as long as the defendant ha[d] filed a motion to modify the sentence within ninety days," Grossman & Shapiro, *supra* note 27, at 1, a requirement that defense attorneys regularly satisfied, *id.* at 45.

169. *See* TD-2, *supra* note 10, § 305.6 rep. n.f; Grossman & Shapiro, *supra* note 27, at 39–42 (reporting that judges consider a combination of objectives in sentencing and may use sentence modification to further multiple goals of punishment).

170. *See* Klingele, *Changing the Sentence*, *supra* note 9, at 519 ("By inviting the sentencing court to revisit the original sentencing decision in light of post-sentencing realities, judicial sentence modification provides the sentencing court with the opportunity to reassess, in light of more accurate information, whether the original sentencing decision was just and whether it entailed a prudent allocation of costly

modification as a means to advance the interests of justice.[171] In the words of the Massachusetts Supreme Court,

> Occasions inevitably will occur where a conscientious judge, after reflection or upon receipt of new probation reports or other information, will feel that he has been too harsh or has failed to give weight to mitigating factors which properly he should have taken into account. In such cases the interests of justice and sound judicial administration will be served by permitting the trial judge to reduce the sentence within a reasonable time.[172]

Section 305.7 would also authorize a judge to modify an offender's sentence to prevent disproportionate punishment.[173]

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correctional resources."); Norris, *supra* note 165, at 103–04 ("Well-crafted judicial sentence modification doctrines may serve to (1) enhance justice by responding to information showing that the full sentence is not necessary or deserved; (2) foster rehabilitation and successful reentry into society by taking into account the progress and circumstances of the defendant; and (3) generate costs savings without endangering public safety.").

171. *See, e.g.*, TENN. R. CRIM P. 35 Advisory Commission Cmt. ("The intent of this rule is to allow modification only in circumstances where an alteration of the sentence may be proper in the interests of justice."); State v. Franklin, 434 N.W.2d 609, 611–12, 614 (Wis. 1989) (identifying "the correction of unjust sentences" as the purpose of sentence modification); Hayes v. State, 175 N.W.2d 625, 631 (Wis. 1970) ("Within reasonable limits we think an unjust sentence should be corrected by the trial court. It is more important to be able to settle a matter right with a little uncertainty than to settle it wrong irrevocably."); *see also* Grossman & Shapiro, *supra* note 27, at 39–40 (indicating that Maryland judges may use sentence modification to reflect the determination that "the defendant [has] been punished enough"). Recognizing the importance of judicial sentence modification for correcting injustice, commentators and the American Bar Association have advocated for an expansion of judicial sentence modification power. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING § 18-7.1 & Commentary (3d ed. 1994) (advocating that trial courts have the opportunity "to reduce the severity of any sentence" for "a specified period after imposition of a sentence" in order to advance the "interests of justice" by allowing the court to "rectify those judgments that it realizes were excessive" and to respond "to new factual information . . . that alters materially the information base on which sentence was imposed.").

172. Dist. Attorney for the N. Dist. v. Super. Ct., 172 N.E.2d 245, 250–51 (Mass. 1961).

173. *See* TD-2, *supra* note 10, § 305.7 cmt. b; Frase, *supra* note 10, at 196 (observing that "advanced age or serious infirmity would justify early release if, [under proposed Model Penal Code § 305.7]," those conditions made "incarceration . . . much more onerous for such an offender, making continued custody disproportionate or even cruel"); Klingele, *supra* note 45, at 455 (suggesting that early release "should remain an option for correcting injustices that come to light after the sentence has commenced" and

Framing Section 305.7 as an extension of states' judicial sentence modification laws would also facilitate conversations about how sentence modification could advance utilitarian goals other than incapacitation.[174] The experience of sentence modification in Maryland may be instructive in this regard. Like Section 305.7, Maryland's former judicial sentence modification rule was quite broad[175]: it authorized judges to "reduce a sentence at any time for any reason, as long as the defendant has filed a motion to modify the sentence within ninety days."[176] In a 2003 survey, Maryland judges, consistent with authorized aims of punishment,[177] indicated that a primary goal of modifying sentences more than ninety days after imposition was to advance the goal of rehabilitation.[178] In particular, judges often sought to ensure "that the defendant would make significant progress or complete a drug or alcohol rehabilitation program."[179] Other goals mentioned by a significant number of judges included "seeing whether the defendant would stay out of trouble in one manner or another," "seeing whether the defendant would complete or make significant progress in an educational program," "determining whether the defendant had been rehabilitated," and "seeing whether the defendant exhibited exemplary conduct while incarcerated."[180] The authors of the

endorsing the draft Model Penal Code provision 305.7 as a means to accomplish that purpose).

174. *See* TD-2, *supra* note 10, § 305.7 cmt. b ("The purposes of sentencing that originally supported a sentence of imprisonment may in some instances become inapplicable to a prisoner who reaches an advanced age while incarcerated, or a prisoner whose physical or mental conditions renders it unnecessary [or] counterproductive . . . to continue a term of confinement."); Frase, *supra* note 10, at 197–98 (identifying and critiquing a number of grounds potentially justifying sentence modification under Section 305.7).

175. *See* MD. CT. R. 4-345. Indeed, Maryland's judicial sentence modification rule bears a striking resemblance to Section 305.7 and may have inspired its creation. *See* Klingele, *Changing the Sentence*, *supra* note 9, at 515, 536 (endorsing and urging the expansion of judicial sentence modification procedures like those in Maryland).

176. Grossman & Shapiro, *supra* note 27, at 1. Defense attorneys filed sentence modification motions as a matter of course. *See id.* at 45. Maryland amended its rule in 2005 to provide that a court "may not revise [a] sentence after the expiration of five years from the date the sentence originally was imposed on the defendant." Klingele, *Changing the Sentence*, *supra* note 9, at 503 (quoting MD. CT. R. 4-345(e)(1)).

177. Rehabilitation was an authorized aim of punishment in Maryland. *See* Grossman & Shapiro, *supra* note 27, at 26.

178. *See id.* at 39.

179. *Id.*

180. *Id.*

study, Professors Steven Grossman and Stephen Shapiro, opined that sentence modification is valuable because the utilitarian goals of rehabilitation, incapacitation, and deterrence "may arguably be implemented better at a time beyond the original imposition of sentence."[181] The professors highlighted relevant sentencing issues that may benefit from post-sentencing assessment in this way:

> How rapidly has the offender's alcohol, drug or psychological counseling progressed in making him less subject to the influences that were at the root of his criminal conduct? Has he or she made restitution, completed community service or fulfilled other obligations imposed by the judge for the betterment of the victim or the offender? Does the offender still pose such a danger to the community that he needs to be separated from it? Has the offender been punished enough so that he will regard the consequences of being apprehended and punished for criminal conduct as outweighing the benefits of such conduct? Many judges and other proponents of sentence revision believe that all of these questions are best answered after observing the defendant for some time after his sentence has begun and that the judge is best positioned to evaluate them.[182]

Similarly, Section 305.7 authorizes judges to reduce a sentence, at any time when its severity exceeds that which is necessary to achieve applicable utilitarian aims, so long as the sentence remains within the boundaries of proportionate punishment.[183]

Critically, framing Section 305.7 as modeled on states' judicial sentence modification rules would allow the public to focus on the dictates of parsimonious, proportionate punishment and avoid unnecessary distractions imposed by the constraining

181. *Id.* at 34.

182. *Id.* at 34–35.

183. *See* TD-2, *supra* note 10, § 305.7(7) & cmt. a (discussing the importance of evaluating sentence modification in light of the principles of limiting retributivism); TD-1, *supra* note 13, § 1.02(2)(a)(iii) & cmt. f (reflecting and explaining the principle of parsimony).

label of compassionate release.[184] Such framing would not remove factors from consideration, but would rather diffuse their seemingly dispositive status. Instead of focusing narrowly on incapacitation and the cost savings that could be realized by releasing certain populations of prisoners, states would be prompted to consider a variety of utilitarian aims, as well as the requirements of desert.[185] States could thus avoid awkward attempts to justify the striking differences between laws modeled on Section 305.7 and traditional compassionate release measures, such as the omission of an incapacity requirement.[186] A general focus on correcting excessive, unwise, and unjust sentences would also facilitate the application of the provision to populations beyond those with permanently debilitating medical conditions or terminal illnesses, and would allow offenders who have committed serious crimes to benefit from the measure.[187] In sum, the template of judicial sentence modification would be flexible enough to allow states to focus on the principle of parsimony and the goal that sentences be no more severe than necessary to achieve utilitarian aims within the range of proportionate punishment.[188]

To be sure, conceptualizing Section 305.7 in this way would not entail neglecting the effect of advanced age or illness in sentencing. Deriving Section 305.7 expressly from Rule 35(b) and its state analogs would naturally lead to discussions, rooted in principles of limiting retributivism, about how excessive punishment may result from advanced age and illness.[189] As previously mentioned, state judicial sentence modification provisions typically allow broad discretion to modify sentences within sixty days to one year of a sentence's imposition.[190] To

184. *See* TD-2, *supra* note 10, § 305.7 cmts. a & b.

185. *See id.* § 305.7(7); TD-1, *supra* note 13, § 1.02(2)(a)–(b).

186. *See, e.g.*, TD-2, *supra* note 10, § 305.7, cmts. b–c (explicating differences between Section 305.7 and existing compassionate release statutes); *supra* Part III.A.

187. *See* Klingele, *Changing the Sentence*, *supra* note 9, at 504 (discussing the reconsideration of sentences by Maryland judges for "a wide range of reasons").

188. *See* TD-1, *supra* note 13, § 1.02(2)(a)(iii); *id.* cmt. f ("Once utilitarian goals and considerations of proportionality have been consulted in individual cases, the penalties imposed should be sufficient but not excessive to serve those objectives.").

189. *See, e.g.*, Frase, *supra* note 10, at 196 ("Incarceration is much more onerous for [offenders of advanced age and serious infirmity], making continued custody disproportionate or even cruel.").

190. *See supra* note 169 and accompanying text.

justify the omission of this temporal limitation, comments could consider how unjustness or excessiveness may manifest late in an offender's sentence.[191] States' compassionate release statutes would be useful to illustrate these concerns, as would judicial sentence modification efforts in those states without a narrow temporal range.[192] However, framing Section 305.7 as a general, undifferentiated measure to address excessive, unjust, and inappropriate sentences would permit a broader discussion of the interests of elderly and ill prisoners (as well as other offenders) and the harms they may experience when incarcerated than is possible, or at least likely, when the conversation starts from the narrow and cramped perspective of existing compassionate release measures.

V. CONCLUSION AND SCHOLARLY AGENDA

While the American Legal Institute could have chosen to frame Section 305.7 within the historical tradition of judicial sentence modification, it did not. Perhaps drafters rejected the analogy because they anticipated that Section 305.7's requirement that reasons underlying sentence modification be "compelling" would restrict judges' discretion in ways materially different from the broad discretion that they enjoy under sentence reconsideration laws.[193] Or perhaps they wanted to reserve the legal analog as the express precursor for other provisions of the

191. In addition to infirmity from age or illness, other factors may also contribute to excessive punishment, such as the failure of an anticipated correctional program to materialize. *See* Kruse & Patterson, *supra* note 165, at 451–53 (discussing the recognition of this factor in Wisconsin).

192. At least to some extent, judges have modified sentences on grounds of advanced age and serious illness. *See, e.g.*, Grossman & Shapiro, *supra* note 27, at 40 (listing sentence modification criteria used in Maryland); Kruse & Patterson, *supra* note 165, at 457–58 (reporting a limited number of successful sentence modification motions in Wisconsin on grounds of defendants' declining health and explaining the relevance of a defendant's health to resentencing in this way: "If an illness is sufficiently life-threatening, the court's original sentence may have increased in severity and become a 'life' sentence. If a defendant's health problem is so debilitating that the defendant will be physically unable to commit further crimes, the defendant's health would be relevant to the need to protect society against him or her."). *But see* Norris, *supra* note 165, at 111–12 (explaining that, while Wisconsin courts have viewed an untreatable psychological condition as a new factor, courts have held that a defendant's declining health and diminished life expectancy may not support sentence modification under a new factor theory).

193. *See supra* note 166.

revised Model Penal Code.[194] Alternatively, they may simply have wanted to avoid the controversy that has surrounded the existence of the few judicial sentence modification statutes with no durational limits.[195] For whatever reason, the American Legal Institute chose to align the provision with more popular compassionate release efforts.[196] Where does this reality leave us?

Because the traditional label of compassionate release does not allow for the full range of possibilities available under—and expressly contemplated by—Section 305.7, we must expand the popular but narrow conception of "compassionate release" and provide persuasive, theoretically sound accounts of when the purposes of punishment and ancillary administrative considerations justify the early release of prisoners.[197] Cogent rationales will be particularly critical both to protect the sentence modification measure from rollback after some beneficiaries commit crimes after release, and to extend sentence modification, in practice, beyond the grounds recognized by most compassionate release laws.[198] A first step in this effort will involve

194. *See supra* note 161; TD-2, *supra* note 10, § 305.6 cmt. f ("The second-look provision is not meant to displace rules concerning sentence reconsideration authorized during the early stages of a prison sentence. The sentencing judge's front-end reconsideration powers should perhaps be expanded beyond existing rules, but this is a separate subject to be taken up in an as-yet- undrafted provision of the revised Code.").

195. *See, e.g.*, Klingele, *Changing the Sentence*, *supra* note 9, at 504.

196. *See supra* Part III.B (exploring possible rationales for affixing the label of compassionate release to Section 305.7).

197. *See* Frase, *supra* note 10, at 197–98 (listing types of circumstances that could support sentence modification under the anticipated "extraordinary and compelling" catchall of Section 305.7). For one approach, which emphasizes data-driven rehabilitative potential and cost savings, see Fan, *supra* note 16, at 633, 637–39 (proposing "rehabilitative pragmatism" as a "successor penal theory").

198. Numerous commentators have remarked upon the backlash that can occur, and has occurred, when an inmate who has been released early commits a crime. *See, e.g.*, Beck, *supra* note 73, at 227 ("Society's compassion for dying inmates will immediately be eliminated if any individual granted a reduction in his/her sentence commits a crime once released."); Fan, *supra* note 16, at 597 ("If even one released offender 'goes berserk' and commits a horrific crime, political careers will end and policy will swing sharply back, perhaps to an even more severe state."); *id.* at 626–33 (exploring the risk of backlash against decision-makers and early release programs when the public perceives programs as jeopardizing public safety and listing examples of crimes by beneficiaries of early programs); Klingele, *supra* note 45, at 432–35 (describing the elimination of early release programs in New Jersey and Illinois after crimes were committed by beneficiaries of early release programs). The fragility and infrequent use of current compassionate release laws suggests that they could benefit from increased theoretical attention. *See, e.g.*, CHIU, *supra* note 9, at 6–7 (discussing the low use of geriatric release mechanisms in states); Murphy, *supra* note 69, at 1696–97 (detailing jurisdictions' varying use of compassionate

identifying circumstances likely to affect the applicability of the utilitarian aims recognized in Section 1.02(2)(a)(ii): rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders in the law-abiding community.[199] States' judicial sentence modification efforts may be instructive in this regard.[200] Scholars should then provide detailed accounts of how and why these circumstances should factor into the calculation of appropriate punishment under the theory of limiting retributivism.[201]

Efforts should not stop there, however. To the extent that cost and resource considerations remain as practical drivers for the early release of prisoners, investigation is also necessary into how the concerns affecting the administration of the sentencing system, listed under Section 1.02(2)(b), should factor into individual sentencing decisions. Specifically, commentary would be useful on whether, and how, to weigh systemic considerations against the purposes of sentencing listed within Section 1.02(2)(a) in crafting individual sentences.[202] It is notable that Section 1.02(2)(a)(iii) directs that sentences should be "no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii)," but resource considerations are not found within those provisions.[203] Rather, the revised Model Penal Code denotes resource considerations—namely, ensuring "that adequate resources are available for carrying out sentences imposed and that rational priorities are established for the use of those resources"—as "matters affecting the administration of the

release programs and concluding that "[o]ften, inmates and taxpayers alike rarely reap the benefits of the legislation," but identifying two states—Texas and Michigan—that have released over 100 inmates per year).

199. *See* Frase, *supra* note 10, at 196–98.

200. Obtaining information on the practice of judicial sentence modification can be difficult. *See* Grossman & Shapiro, *supra* note 27, at 45 (remarking upon the difficulty of obtaining an accurate picture of the use of sentence reduction "due to inadequate record keeping at the county level" and urging judges to transmit, and counties to maintain, a record of each use of the sentence modification power); Klingele, *Changing the Sentence*, *supra* note 9, at 502, 508.

201. *See supra* note 138 (illustrating how judges should sentence under a limiting retributivist framework).

202. *See* TD-1, *supra* note 13, § 1.02(2) cmt. g (discussing the identification and operation of systemic purposes).

203. *See id.* § 1.02(2)(a).

sentencing system" in Section 1.02(2)(b).[204] This language and structure appear to signal that systemic resource considerations should not play a role in individual sentencing decisions. However, Comment g to Section 1.02(2) suggests that sentencing courts should remain sensitive to the systemic considerations listed in Section 1.02(2)(b).[205] No definitive guidance is provided on how judges might factor resource scarcity considerations into the sentencing or resentencing of individual offenders.[206]

Finally, since sentences under Sections 305.7 and 1.02(2) must occur within the range of deserved and proportionate punishment, institutional actors and commentators should consider when an offender's changed circumstances affect retributive concerns or utilitarian principles of proportionality. Mental illness and infirmity, for instance, may implicate a number of concerns along these dimensions. First, an individual's mental infirmity may render him incapable of understanding why he is being punished.[207] When a prisoner lacks a rational understanding of punishment, he may no longer be a fit subject for retributive punishment.[208] Second, prisons may be ill-equipped to provide

204. *Id.* § 1.02(2)(b).

205. *Id.* § 1.02(2) cmt. g ("While § 1.02(2)(a) speaks to the purposes of the sentencing system as applied in individual case decisions, § 1.02(2)(b) addresses purposes applicable to the administration of the system as a whole. The systemic purposes are matters of potential concern to every governmental actor within the system, and not solely to persons with policymaking authority."); *id.* (providing an example of a sentencing court's honoring the goal of uniformity while sentencing an individual offender).

206. *See id.* § 1.02(2) cmt. g (noting that a sentencing commission should "ensure that sentencing policies make the best use of available or funded correctional resources," but failing to articulate whether or how judges might factor such considerations into the sentencing or resentencing of individual offenders). Professor Frase has argued that judges should consider sanctions' costs and adverse collateral consequences—both for the offender, and for society—when imposing sentences. *See* RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 33 (2013) (arguing that the "ends-benefits proportionality principle" should apply "at both the systemic and individual-case levels: Judges should . . . consider these matters when imposing sentence, and should strive to be sure that the benefits of the sentence are not outweighed by its negative effects. . . . [S]anctions have substantial costs, burdens, and undesirable collateral consequences for the offender and others, and all of those consequences—not just the expected benefits—must be taken into account"); *cf.* Frase, *supra* note 138, at 73 (arguing that utilitarian theory requires recognition that, "[i]n a world of limited resources, punishment must also be prioritized[; p]rison beds and other scarce correctional resources should be reserved for the most socially harmful offenses and offenders[; and p]risons must also not be used beyond their effective capacities").

207. *See* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 372 (1981).

208. *See id.*; *id.* at 384–85 ("[C]onsider someone who knowingly and willfully committed a wrong but who since has become insane or has suffered brain damage and so

adequately for the complex needs of very ill inmates, and an inmate's continued confinement in unsuitable and injurious conditions may be inhumane and therefore violate retributivism's prohibition against degrading or dehumanizing punishments.[209] Notably, the commentary to Section 305.7 suggests that inhumane conditions of confinement would justify sentence modification,[210] and commentators have mentioned inhumanity as a possible ground for compassionate release.[211] Third, the harshness of a seriously ill inmate's prison experience may factor into the proportionality of his sentence under retributive or utilitarian

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would be incapable of understanding, if punished, what was being done to him and why. . . . He should not have the penalty visited upon him because he is incapable of being the (knowing) recipient of retributive punishment, and so incapable of being connected (at least by the act of punishment) to correct values qua correct values."); *see also* R.A. DUFF, TRIALS AND PUNISHMENTS 27 (1986); Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 933 (2010); Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1218 (2009). At least two sets of commentators have referenced the importance of inmates' competency to be punished for compassionate release laws. *See* Markel, *Against Mercy*, *supra* note 108, at 1466; Williams et al., *supra* note 67, at 122 ("[The traditional justifications for punishment of retribution, rehabilitation, deterrence, and incapacitation] may be substantially undermined for prisoners who are too ill or cognitively impaired to be aware of punishment, too sick to participate in rehabilitation, or too functionally compromised to pose a risk to public safety.").

209. *See, e.g.*, JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY 233 (1979) (decrying "a punishment which is in itself degrading, which treats the prisoner as an animal instead of a human being, which perhaps even is an attempt to *reduce* him to an animal or a mere thing" as inconsistent with human dignity); Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1054 (1978) ("Because the value underlying modern retributivism is to treat people with the concern and respect due persons, a punishment that violated our current conception of human dignity could not be justified on retributivist grounds.").

210. *See* TD-2, *supra* note 10, § 305.7 cmt. b ("The purposes of sentencing that originally supported a sentence of imprisonment may in some instances become inapplicable to . . . a prisoner whose mental or physical condition renders it . . . inhumane to continue a term of confinement.").

211. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 113, at 87 (arguing that elderly prisoners' human rights may be violated by poor conditions of confinement, including inadequate access to medical treatment); HUMAN RIGHTS WATCH & FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 95, at 75–76 ("To be consistent with human rights, a decision regarding whether a prisoner should remain confined despite, for example, terminal illness or serious incapacitation, should include careful consideration of whether continued imprisonment would be inhumane, degrading, or otherwise inconsistent with human dignity."); Frase, *supra* note 10, at 196 (observing that "advanced age or serious infirmity would justify early release if [under proposed Section 305.7] . . . those conditions made 'incarceration . . . much more onerous for such an offender, making continued custody disproportionate or even cruel'").

conceptions of proportionality.[212] Vulnerability to harm could factor into retributive assessments of punishment severity through the theory of equal impact articulated by Professors Andrew Ashworth, Andrew von Hirsch, and others.[213] Alternatively, the past and likely future suffering of the offender may affect the ends-benefits proportionality of a sentence, a utilitarian principle of proportionality explicated by Professor Richard Frase.[214] Future

212. *See* TD-2, *supra* note 10, § 305.7 cmt. b (observing that "[o]ften . . . effective treatment is unavailable in prison [for inmates with mental illness], conditions of the institution may exacerbate the inmate's condition, and the inmate's impairment may make it impossible to navigate the daily life of the penitentiary" and urging the inclusion of mental infirmity in sentence modification statutes as "the universal practice" on this basis). *But see* TD-2, *supra* note 10, § 305.6 cmt. f (failing to include disproportionality in sentence severity due to increased vulnerability to harm as supporting sentence modification on proportionality grounds under Section 305.6). For a careful differentiation of various retributive and utilitarian principles of proportionality, see Frase, *supra* note 41, at 132–41; Frase, *supra* note 130, at 40–47.

213. *See* ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 172 (2005) (explaining that the theory of equal impact holds that, "when an offender suffers from certain handicaps that would make his punishment significantly more onerous, the sanction should be adjusted in order to avoid its having an undue differential impact on him"); Andrew Ashworth & Elaine Player, *Sentencing, Equal Treatment and the Impact of Sanctions*, *in* FUNDAMENTALS OF SENTENCING THEORY 251, 252–61 (Andrew Ashworth & Martin Wasik eds., 1998) (discussing the principle of equal impact in sentencing); E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 194 n.219, 221–28 (2013) (discussing the equal impact theory and applying it to offenders with serious mental illnesses); *see also* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 199–210 (2009) (arguing that various versions of retributivism must factor subjective experience into sentencing in order to fulfill the proportionality requirement). Professor Berry has observed that the principle of equal impact could theoretically support the compassionate release of certain prisoners but, with little analysis, concluded that this principle "is rarely applicable" in situations involving terminal illnesses or permanent physical or medical conditions. Berry, *supra* note 100, at 875–76; *cf.* MOORE, *supra* note 108, at 173 (arguing that "when the particular circumstances of the offender [such as advanced age or illness] make the usual punishment undeservedly severe, retributive justice calls for clemency"); Frase, *supra* note 10, at 196 (observing that "advanced age or serious infirmity would justify early release if [under proposed Section 305.7] . . . those conditions made "incarceration . . . much more onerous for such an offender, making continued custody disproportionate").

214. Professor Richard Frase has explored the concepts of utilitarian proportionality, including ends-benefits and alternative-means proportionality, in his theoretical writings. *See* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW (2009); Frase, *supra* note 41, at 139–41; Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 592–97 (2005); Frase, *supra* note 130, at 43–47. Under ends-benefits proportionality, "[a] penalty may be disproportionality severe because its costs and burdens outweigh the likely benefits produced by the penalty." Frase, *supra* note 41, at 138. This proportionality equation should include the costs and burdens that a sanction poses to an offender—including his likely suffering—and to society. *See* Frase, *supra* note

work will explore these alternatives in more depth.[215] Building the theoretical case for sentence modification in these circumstances would evidence "compassion for human suffering,"[216] contribute to a more humane and just punishment experience, and allow Model Penal Code § 305.7 to achieve its lofty potential.

214, at 593–94. Professor Frase has observed that Minnesota courts have recognized the ends-benefits proportionality principle in authorizing downward sentencing departures on the basis of anticipated vulnerability to victimization or other harm in prison. *See* Frase, *supra* note 41, at 146.

215. *See* E. Lea Johnston, *Modifying Unjust Sentences* (draft on file with author).

216. *See* Rapaport, *supra* note 74, at 17 ("The good reason to show unearned mercy is compassion for human suffering. The aged or other inflicted prisoner may not have reformed, rehabilitated or otherwise earned consideration for relief. His or her claim to consideration may reside solely in need and suffering.").