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## Do Prison Conditions Change How Much Punishment A Sentence Carries Out? Lessons From Federal Sentence Reduction Rulings During the COVID-19 Pandemic

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# Do Prison Conditions Change How Much Punishment A Sentence Carries Out? Lessons From Federal Sentence Reduction Rulings During the COVID-19 Pandemic

Skylar Albertson\*

## ABSTRACT

*A set of motions filed during the COVID-19 pandemic challenged federal judges to consider whether they should always view the duration of imprisonment—as contrasted with prison conditions—as the sole determinant of how much punishment a sentence carries out. Under 18 U.S.C § 3582(c)(1)(A)(i), federal judges may “reduce” already imposed terms of imprisonment upon finding that “extraordinary and compelling reasons” warrant reductions. Prior to 2019, the Bureau of Prisons (BOP) effectively controlled the scope of a catch-all subcategory of “Other Reasons” justifying sentence reductions. The BOP used this authority almost exclusively for people who were in the final stages of terminal illness. The First Step Act of 2018 (FSA) amended § 3582(c) in a manner that freed federal judges to decide for themselves what types of circumstances meet the “extraordinary and compelling reasons” standard. The FSA also authorized people in federal custody to file motions on their own behalf, instead of permitting only the Director of the BOP to do so. Roughly a year later, the COVID-19 pandemic prompted the increased use of lockdowns and other restrictions inside U.S. prisons. Among the many thousands of people who moved for sentence reductions, several hundred argued that imprisonment with these new restrictions amounted to a greater punishment than pre-pandemic imprisonment. This Article explores the lessons that the decisions adjudicating these motions offer for the design of sentencing laws—including second looks—as well as efforts to increase transparency surrounding life inside prisons.*

**Keywords:** sentence reductions, prison conditions, punitive effect, lockdowns, second looks, COVID-19, First Step Act of 2018, sentencing, compassionate release

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### INTRODUCTION

In March 2020, the Federal Bureau of Prisons (BOP) imposed a nationwide lockdown as part of its response to the COVID-19 pandemic.<sup>1</sup> The BOP's first press release describing this lockdown announced that "the Bureau [had] instituted significant measures," including "temporary restrictions on visitation, restricting inmate movement to only required and mission-essential transfers," and "a mandatory 14-day quarantine" for all people entering custody.<sup>2</sup>

Through lockdowns and other restrictions, the BOP's pandemic response upended life in prison, as did responses in state and local corrections systems. By some accounts, the BOP's initial lockdown confined people to their cells for nearly all hours of the day.<sup>3</sup> Medical and mental health care, visitation, group programs, and other aspects of prison life

<sup>1</sup> Press Release, Fed. Bureau of Prisons, *Bureau of Prisons Update on COVID-19* (Mar. 24, 2020), [https://www.bop.gov/resources/news/pdfs/20200324\\_bop\\_press\\_release\\_covid19\\_update.pdf](https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., United States v. Regas, 3:91-cr-00057-MMD-NA-1-57, 2020 WL 2926457, at \*3 (D. Nev. June 3, 2020) ("Defendant is isolated in his cell for 22.5 hours a day, despite his elderly age and good behavior.").

also underwent dramatic restrictions or suspensions.<sup>4</sup>

Although the simultaneity of these measures in prisons across the United States was a unique result of the pandemic, similar restrictions occurred before the pandemic and will continue in the future. For example, a 2014 investigation revealed that a jail on New York City’s Rikers Island was “frequently . . . placed in locked down status.”<sup>5</sup> In January 2022, the BOP placed the entire federal prison system on “a nationwide lockdown” in response to a deadly fight at a federal prison in Texas.<sup>6</sup>

These types of restrictions changed what it meant to serve a prison sentence. They illustrated that changes in conditions of confinement can alter the experience of imprisonment in a profound manner. As one judge observed, “[a] day spent in prison under extreme lockdown and a legitimate fear of contracting a once-in-a-century deadly virus exacts a price on a prisoner beyond that imposed by an ordinary day in prison.”<sup>7</sup>

When prison conditions undergo these types of changes, does the amount of punishment that a prison sentence carries out change as well? This question has implications for laws requiring that criminal sentences be parsimonious and proportionate. In the federal sentencing system, 18 U.S.C. § 3553(a) commands judges to construct sentences that are “sufficient, but not greater than necessary.”<sup>8</sup>

A 2018 amendment to the federal sentence reduction statute and the arrival of the COVID-19 pandemic combined to create a perfect storm that invited judges to consider whether changes in prison conditions can ever increase how much punishment a prison sentence effects (a sentence’s “punitive effect”). Some judges concluded that, in fact, conditions of confinement do play a role in determining punitive effect. In the words of the Chief Judge of the Fourth Circuit, “[t]here is good reason to believe that, in some cases, a sentence that was ‘sufficient but not greater than necessary’ before the coronavirus pandemic may no longer meet that criteria,” because “[a] day in prison under the current conditions is a qualitatively different type of punishment than one day in prison used to be.”<sup>9</sup>

The First Step Act of 2018 (FSA) broadened the availability of sentence reductions under the federal sentence reduction statute, 18 U.S.C. § 3582(c), just thirteen months

<sup>4</sup> See, e.g., *United States v. Hatcher*, No. 18-CR-454-10 (KPF), 2021 WL 1535310, at \*5 (S.D.N.Y. Apr. 19, 2021) (“[T]he Court did not envision [S.H.] to serve this term of imprisonment in near-total lockdown, without the mental health and other support programs that the Court believes to be critical to her health and ability to reenter society.”).

<sup>5</sup> U.S. ATT’Y S. DIST. N.Y., DEP’T OF JUST., CRIPA INVESTIGATION OF THE NEW YORK CITY DEPARTMENT OF CORRECTION JAILS ON RIKERS ISLAND 8 (Aug. 4, 2014), <https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf> [hereinafter CRIPA INVESTIGATION].

<sup>6</sup> Katie Benner, *Fatal Gang Fight Spurs Nationwide Lockdown of Federal Prison System*, N.Y. TIMES (Jan. 31, 2022), <https://www.nytimes.com/2022/01/31/us/politics/ms13-texas-prison-fight.html>.

<sup>7</sup> *United States v. Robles*, 553 F. Supp. 3d 172, 182 (S.D.N.Y. 2021) (quoting *United States v. Lizardi*, No. 11 Cr. 1032-55 (PAE), 2020 U.S. Dist. LEXIS 188147, at \*10–11 (S.D.N.Y. Oct. 9, 2020)); see also Colleen McMahon, (*Re*)*Views from the Bench: A Judicial Perspective on Second-Look Sentencing in the Federal System*, 58 AM. CRIM. L. REV. 1617, 1623 (2020) (“COVID presented the perfect exceptional and compelling circumstance—potentially a life or death issue when it arises, even though, for most prisoners, it will never arise; an issue that can impact the severity of a sentence even when a prisoner is not sickened by it, both because of the fear factor and because of the isolation that the BOP is imposing on prisoners in an understandable effort to keep the virus from entering or spreading through federal correctional institutions . . .”).

<sup>8</sup> 18 U.S.C. § 3553(a).

<sup>9</sup> *United States v. Kibble*, 992 F.3d 326, 335 (4th Cir. 2021) (Gregory, C.J., concurring).

before the COVID-19 pandemic spread to the United States. Subsection (c)(1)(A)(i) of this statute permits courts to “reduce” federal prison sentences if “extraordinary and compelling reasons warrant such a reduction.”<sup>10</sup> If a person is eligible for a sentence reduction, the court weighs the factors applicable for initial sentencing hearings, codified at 18 U.S.C. § 3553(a), to determine whether to grant a reduction, and, if so, the size of the reduction.<sup>11</sup> These factors include a set of sentencing purposes, such as “the need . . . to protect the public from further crimes of the defendant” and “provide just punishment,” as well as other considerations, such as “the nature and circumstances of the offense.”<sup>12</sup> The FSA shifted § 3582(c) from funneling all motions for sentence reductions by people in federal prisons through the Director of the Bureau of Prisons (BOP), who previously granted very few reductions,<sup>13</sup> to authorizing over 600 federal district judges to grant reductions without the BOP’s approval.<sup>14</sup>

In addition, the FSA’s amendments to § 3582(c)(1)(A)(i) opened the door to more expansive interpretations of the “extraordinary and compelling reasons” standard. Prior to 2018, the BOP controlled the scope of a catch-all subcategory of “Other Reasons” justifying sentence reductions. During this time, the BOP focused on releasing people in the final stages of terminal illness and supported reductions for fewer than thirty people per year.<sup>15</sup> After the enactment of the FSA, eleven federal appellate circuits held that § 3582(c)(1)(A)(i)’s amended text authorized federal district judges to decide for themselves what “extraordinary and compelling reasons” means. In other words, federal judges in much of the country were “freed . . . to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them.”<sup>16</sup>

Not all judges adopted the view that changed prison conditions could justify sentence reductions under § 3582(c)(1)(A)(i). Indeed, most did not. Some judges rejected these types of arguments altogether, reasoning that civil rights actions were the proper vehicles for complaints related to conditions of confinement.<sup>17</sup> Others concluded that changes in prison conditions were not “extraordinary” if they affected most or all people in custody.<sup>18</sup>

However, many judges did endorse some form of the proposition that prison

<sup>10</sup> 18 U.S.C. § 3582(c)(1)(A).

<sup>11</sup> *Id.* §§ 3553(a)(1), 3582(c)(1)(A). As discussed below, the text of § 3582(c) does not state that reductions must result in immediate release. *See* *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020) (“It bears remembering that compassionate release is a misnomer. 18 § 3582(c)(1)(A) in fact speaks of sentence reductions. A district court could, for instance, reduce but not eliminate a defendant’s prison sentence, or end the term of imprisonment but impose a significant term of probation or supervised release in its place.”).

<sup>12</sup> 18 U.S.C. § 3553(a).

<sup>13</sup> EVALUATION & INSPECTIONS DIV., OFF. INSPECTOR GEN., U.S. DEP’T OF JUST., THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM 1 (Apr. 2013), <https://www.oversight.gov/sites/default/files/oig-reports/e1306.pdf> [hereinafter EVALUATION & INSPECTIONS DIV.]

<sup>14</sup> *Compare* 18 U.S.C. § 3582(c)(1)(A), *with* First Step Act of 2018, Pub. L. No. 115–391, § 603, 132 Stat. 5194, 5239 (2018).

<sup>15</sup> *See* EVALUATION & INSPECTIONS DIV., *supra* note 13.

<sup>16</sup> *Brooker*, 976 F.3d at 237.

<sup>17</sup> *E.g.*, *United States v. Carrera*, No. 3:14-CR-367-B-40, 2020 WL 7225997, at \*4 (N.D. Tex. Dec. 7, 2020) (“Insofar as [J.C.] seeks judicial review of his conditions of confinement, including the sufficiency of the medical care he is receiving in prison, he may file a civil-rights complaint.” (internal citations omitted)).

<sup>18</sup> *E.g.*, *United States v. Thomas*, No. 3:17-CR-51 (SLG), 2021 WL 3924724, at \*1 (D. Alaska Sept. 1, 2021).

conditions can change how much punishment a sentence carries out. Some of these judges concluded that changed prison conditions were proper grounds for reductions under § 3582(c)(1)(A)(i) to the extent that they exacerbated specific infirmities or interfered with treatment.<sup>19</sup> The judges who authored these rulings appeared to treat § 3582(c)(1)(A)(i) as a provision for compassionate release, a term that generally refers to release from prison for reasons related to aging or medical ailments.<sup>20</sup> Their approach is consistent with the idea that changed prison conditions are among the set of “extraordinary and compelling reasons” justifying sentence reductions, but it supplied a limiting principle for eligibility.

Although the words “compassionate release” are absent from the text of § 3582(c), aspects of § 3582(c)’s text provide some support for this interpretation. For example, subsection (1)(A)(ii) of § 3582(c), which authorizes reductions for people who are at least seventy years old and have served at least thirty years in prison, closely aligns with the idea of compassionate release.<sup>21</sup> In addition, Congress labeled the section of the FSA that amended § 3582(c) “Increasing the Use and Transparency of Compassionate Release.”<sup>22</sup> However, as one federal appellate court observed, compassionate release may be “a misnomer,” because “§ 3582(c)(1)(A) in fact speaks of sentence reductions,” as opposed to immediate release.<sup>23</sup>

Consistent with this broader characterization of § 3582(c)(1)(A)’s scope, some judges treated changes in prison conditions as cognizable under § 3582(c)(1)(A)(i) without requiring a close fit to a specific ailment. These judges viewed changes in prison conditions during the pandemic as interfering with earlier pairings of culpability and punishment at pre-pandemic initial sentencings—whether or not such changes related to specific medical or mental health conditions or to age.<sup>24</sup> What were once fair sentences had become unfair, and reductions provided these judges with a tool for rebalancing sentences.

Read together, the rulings yield lessons for the design of sentencing systems and, in particular, for the challenges of reconsidering prison sentences. Laws in the United States narrowly circumscribe the situations in which courts may revisit sentencing decisions.<sup>25</sup> This principle of finality promotes certain goals, such as the preservation of

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<sup>19</sup> *E.g.*, United States v. Chavis, No. 1:18-CR-481-3, 2021 WL 2784653, at \*1–2 (M.D.N.C. July 2, 2021) (stating that “[M.C.] has had a uniquely difficult time during his incarceration because of his ulcerative colitis, the delay in diagnosis, and the COVID-19 pandemic,” and that “[t]he deterrent and punitive effect of serving a sentence under these conditions is significantly increased”).

<sup>20</sup> See generally Renagh O’Leary, *Compassionate Release and Decarceration in the States*, 107 IOWA L. REV. 621, 635–40 (2022); Mary Price, *Everywhere and Nowhere: Compassionate Release in the States*, FAMS. AGAINST MANDATORY MINIMUMS (June 2018), <https://fam.org/wp-content/uploads/Exec-Summary-Report.pdf>.

<sup>21</sup> 18 U.S.C. § 3582(c)(1)(A)(ii).

<sup>22</sup> First Step Act of 2018, Pub. L. 115-391, § 603(b), 132 Stat. 5194, 5239 (2018).

<sup>23</sup> United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020).

<sup>24</sup> See *infra* Part I.B.4.

<sup>25</sup> See, e.g., 18 U.S.C. § 3582(b) (providing that “a judgment of conviction that includes . . . a sentence constitutes a final judgment for all other purposes” aside from sentence reductions pursuant to § 3582(c), appeals pursuant to § 3742, and corrections pursuant to Federal Rule of Criminal Procedure 35). Federal Rule of Criminal Procedure 35 permits, “[w]ithin 14 days after sentencing,” corrections of “arithmetical, technical, or other clear error[s],” and reductions for “substantial assistance” to the government. FED. R. CRIM. P. 35; *cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 255 (1973) (Powell, J., concurring) (referencing “[t]he respect shown under common law for the finality of the judgment of a committing court at the time of the Constitution and in the early 19th century”).

judicial resources.<sup>26</sup> For several reasons, including the high number of people imprisoned in the United States, interest in expanding the availability of provisions permitting reconsideration—known as “second looks”—is increasing.<sup>27</sup> For example, in 2017, the reporters of the Model Penal Code proposed authorizing judges to revisit any prison sentence after fifteen years have passed.<sup>28</sup>

Crafting second looks raises layers of difficult questions, including whether, why, when, and how to make them available.<sup>29</sup> The sentence reduction rulings discussing changes in federal prisons during the COVID-19 pandemic bear on each of these questions. The rulings suggest that one potential consideration when revisiting sentences, or one potential ground for initiating reconsideration, is the set of prison conditions that a person has endured while incarcerated. Importantly, the rulings reveal that some judges will be inclined to account for changed prison conditions in this manner, even in the absence of express authorization. The fact that even a small proportion of federal district judges adopted this view—judges responsible for regularly handing down sentences face-to-face—should prompt legislators and others involved in the design of sentencing practices to give serious consideration to this understanding of the relationship between prison conditions and punitive effect.

Unlike initial sentencing proceedings, second looks prompt judges to assess sentences at a time when information about a person’s actual experience in prison is available. Most of the judges who granted § 3582(c)(1)(A)(i) motions were the same judges who had imposed initial sentences in these cases. Upon learning about what people had endured in prison during the COVID-19 pandemic, many judges expressed that they would have imposed shorter prison terms had they been able to foresee these hardships.<sup>30</sup> Their

<sup>26</sup> See Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 383–84 (1964) (listing “finality considerations”); see also Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149, 169 (2015) (arguing that “[t]he best juncture for assessing the seriousness of an offense is the point in time at which the crime was committed” because “[t]he crime was committed against the public at *that* time . . . not against the current public”).

<sup>27</sup> See, e.g., Ryan, *supra* note 26, at 158–61; Richard Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT’G REP. 194, 195–200 (2009); Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 93–99 (2019); Nazgol Ghandnoosh, *A Second Look at Injustice*, SENT’G PROJECT 4 (2021), <https://www.sentencingproject.org/publications/a-second-look-at-injustice/?eType=EmailBlastContent&eId=8fe84748-5d26-4ab8-b029-16fae4e3f957> (“Legislators in 25 states, including Minnesota, Vermont, West Virginia, and Florida, have recently introduced second look bills.”).

<sup>28</sup> MODEL PENAL CODE, app. A: Principles for Legislation § 305.6 cmt. b. (AM. L. INST., Proposed Final Draft Apr. 10, 2017). The reporters’ reasons for this proposal included that, “[a]t the time of the [proposal] . . . the per capita incarceration rate in the United States was the highest in the world,” and that “governments should be especially cautious in the use of . . . penalties that deprive offenders of their liberty for a substantial portion of their adult lives.” *Id.*

<sup>29</sup> See, e.g., Frase, *supra* note 27, at 200 (asking whether “even a narrow second look option [would] unduly burden courts and counsel resources,” “a narrow second look provision [would] prove illusory or freakish in practice,” and “even narrow provisions [would] undermine front-end impact assessments and accountability?”).

<sup>30</sup> See, e.g., *United States v. Newell*, Nos. 1:13-CR-165-1, 1:15-CR-362-1, 1:13-CR-214-2, 2021 WL 3269650, at \*13 (M.D.N.C. July 30, 2021), *appeal dismissed sub nom. United States v. Burr*, No. 21-7193, 2021 WL 9299047 (4th Cir. Sept. 22, 2021) (“[T]he conditions of confinement during this time were substantially more punitive than was contemplated at the time of sentencing.”); *United States v. Hatcher*, No. 18-CR-454-10 (KPF), 2021 WL 1535310, at \*5 (S.D.N.Y. Apr. 19, 2021) (“[T]he Court did not

reactions underscore that, to the extent that prison conditions are understood as a determinant of punitive effect, refraining from any response amounts to a choice to tolerate variations that may render sentence duration a less meaningful measure of the severity of punishment—in other words, a choice to tolerate changes in punitive effect that are not captured in sentence length.

In this way, the decisions reveal that whether to understand prison conditions as a determinant of punitive effect is an important system design choice—and one for which the current federal sentencing scheme does not provide a definitive answer. On the one hand, federal statutes’ designation of imprisonment as a single type of penalty might suggest that judges should not view changes in prison conditions as altering punitive effect. Yet, the text of § 3582(c)(1)(A)(i) complicates this analysis. The statute’s “extraordinary and compelling reasons” standard suggests a broad, equitable power to revisit sentences. Moreover, the availability of probation and supervised release as components of sentences in the federal system underscores that the duration of a penalty is not the sole determinant of its punitive effect.

The rulings also illustrate that reducing sentences in response to changes in prison conditions invites significant implementation challenges. Although the basic proposition that conditions of confinement bear on punitive effect might appear simple, quantifying these changes in terms of days, weeks, or months is highly subjective. The rulings do not reflect an organized framework regarding which people should receive sentence reductions, of what size, and in response to what types of changes. For this reason, whether a given system should use sentence reductions to respond to changes in prison conditions is a challenging question that does not yield easy answers.

The clearest takeaway from the rulings is an urgent need to increase transparency concerning life inside prisons. In particular, the rulings illustrate that judges viewed changes related to lockdowns, medical and mental health care, and social contact as altering punitive effect. Collecting data on these aspects of life inside prisons is a prerequisite for making informed decisions about whether to offer sentence reductions in these circumstances. When “the practical and philosophical problems of developing a coherent sentencing system” threatened to stymie the creation of the first Federal Guidelines Manual, the U.S. Sentencing Commission turned to an “empirical approach”—effectively reverse-engineering much of the Guidelines from past sentencing data.<sup>31</sup> Similarly, it is only through broad, ongoing data collection that a legislature or government agency could fully understand the problems that sentence reductions responding to prison conditions would seek to address. Even in systems that choose not to make sentence reductions available for changed prison conditions, minimizing such changes should remain a priority, so that people who formally receive the same penalty are unlikely to experience objectively

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envison [S.H.] to serve this term of imprisonment in near-total lockdown, without the mental health and other support programs that the Court believes to be critical to her health and ability to reenter society.”); *United States v. Pacheco*, No. 12-CR-408 (JMF), 2020 WL 4350257, at \*2 (S.D.N.Y. July 29, 2020) (“On February 12, 2020, the Court found that an eight-month sentence was sufficient, but no greater than necessary, to achieve the purposes of sentencing,” but “[t]he balance weighs differently . . . in the current circumstances.”); *United States v. Mel*, No. 18-CR-571 (TDC), 2020 WL 2041674, at \*1 (D. Md. Apr. 28, 2020) (“Indeed, the actual severity of the sentence as a result of the COVID-19 outbreak exceeds what the Court anticipated at the time of sentencing.”).

<sup>31</sup> U.S. SENT’G GUIDELINES MANUAL, ch. 1, pt. A (U.S. SENT’G COMM’N 2018).

different punishments.<sup>32</sup>

As of August 2022, the U.S. Sentencing Commission has a quorum for the first time in over three years.<sup>33</sup> Pursuant to 28 U.S. § 991, the Commission is responsible for “establish[ing] sentencing policies and practices for the Federal criminal justice system” and “develop[ing] means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2).”<sup>34</sup> In October 2022, the Commission published its priorities for amendments to the Sentencing Guidelines and listed updates to the policy statement on sentence reductions first.<sup>35</sup> As part of this effort, the Commission should develop a plan for an informed, deliberate approach to assessing whether sentence reductions should ever take prison conditions into account. To begin this process, the Commission should gather data on lockdowns, the delivery of medical and mental healthcare, and social contact in BOP facilities. Congress, the BOP, and the Sentencing Commission should also give serious consideration to using standardized sentence credits to grant reductions for time spent in facility- or unit-wide lockdowns. For aspects of prison that are less readily measurable, the Sentencing Commission should consider providing judges with ranges of recommended reductions. Even if the Sentencing Commission concludes that changed prison conditions are not proper bases for reductions, the Commission should work with Congress and the BOP to develop metrics for tracking significant fluctuations in certain prison conditions.

Part I of this Article summarizes the history of the federal sentence reduction statute, including the 2018 amendments that were part of the FSA. Part I then surveys the different approaches that federal judges employed in response to sentence reduction motions citing changed prison conditions as grounds for relief. Part II examines the choices and challenges these rulings unearthed for the design of sentencing systems. Part II then explores how these rulings recast efforts to increase transparency surrounding prison conditions as related to the fairness of sentences.

## I. THE FEDERAL SENTENCE REDUCTION STATUTE & THE COVID-19 PANDEMIC

The First Step Act of 2018 (FSA) amended the federal sentence reduction statute in a manner that opened the door to more expansive understandings of who should receive reductions and for what reasons, just thirteen months before the arrival of the COVID-19 pandemic in the United States. These convergent shocks to the federal sentencing system set the stage for judges to consider whether they should view changes in prison conditions as altering the punitive effect of prison sentences.

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<sup>32</sup> This Article focuses on changes in prison conditions that alter the objective experience of prison—for example, isolation in a cell for twenty-two hours per day with limited social contact is an objectively different day-to-day experience than being able to leave one’s cell for most of the day and interact with other people. This Article does not argue that two people with different subjective experiences of the same restrictions receive different punishments. However, the Author of this Article also acknowledges that how to define the line between subjective and objective experiences of imprisonment is not always clear.

<sup>33</sup> Press Release, U.S. Sent’g Comm’n, *Acting Chair Judge Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners* (Aug. 5, 2022), <https://www.ussc.gov/about/news/press-releases/august-5-2022> [hereinafter *Applaud Senate Confirmation*].

<sup>34</sup> 28 U.S.C. § 991.

<sup>35</sup> U.S. SENT’G COMM’N, FINAL PRIORITIES FOR AMENDMENT CYCLE (Nov. 9, 2022), at 2–3.

### A. *The Federal Sentence Reduction Statute Before the First Step Act of 2018*

The contemporary federal sentence reduction statute, 18 U.S.C. § 3582(c), has authorized judges to “reduce” prison sentences since 1987. Legislative history regarding this provision is sparse, but it indicates that at least some members of Congress viewed § 3582(c) as a “safety valve” to counterbalance new laws eliminating federal parole and requiring people to serve larger portions of their sentences in prison. For many years, however, very few people obtained relief under this provision. From 1987 until late 2018, the BOP possessed sole authority to move for sentence reductions under § 3582(c). Moreover, the U.S. Sentencing Commission entrusted the BOP with defining the catch-all category of “Other Reasons” that could justify reductions. During this time, the BOP used this authority almost exclusively for people in the final stages of terminal illness.<sup>36</sup>

When § 3582(c) was enacted in 1984,<sup>37</sup> it created a mechanism for revisiting prison sentences at a time when Congress was overhauling the federal sentencing system to make prison terms more “determinate.”<sup>38</sup> From 1910 until the Sentencing Reform Act of 1984 (SRA) took effect in 1987, the portion of a federal criminal sentence that a person served in prison, *i.e.*, the “term of imprisonment,” was not fixed at the time of sentencing.<sup>39</sup> Instead, people serving federal sentences could obtain release from prison to parole supervision after serving a minimum term of imprisonment. For most offenses, this minimum term of imprisonment was one-third of the total term of imprisonment.<sup>40</sup> For example, a person sentenced to three years in prison in 1980 would become eligible for parole in 1981, one year into the three-year term of imprisonment. A federal agency, the U.S. Parole Commission, was responsible for adjudicating parole requests.

Under the version of the federal parole system in place between 1976 and the implementation of the SRA, people who had not yet completed their minimum terms of imprisonment could nevertheless obtain immediate release to parole if both the BOP and their sentencing courts supported their release. Title 18, Section 4205(g), which the SRA repealed, provided that, “[a]t any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served.”<sup>41</sup> The legislative history

<sup>36</sup> See EVALUATION & INSPECTIONS DIV., *supra* note 13, at 1–2.

<sup>37</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1837, 1998 (1984).

<sup>38</sup> *But see* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 960, 1016 (2013) (arguing that “supervised release, as it has evolved, has usurped the determinacy revolution by making federal prison terms ‘indeterminate,’ or indefinite, in length” because, “[i]n practical terms, given the possibility of revocation, and the frequency of reimprisonment, no one who receives supervised release receives a determinate sentence,” and “almost everyone receives supervised release”); *see also* Kevin R. Reitz, Edward E. Rhine, Allegra Lukac, & Melanie Griffith, *American Prison-Release Systems*, ROBINA INST. 1 (Apr. 2022), [https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-05/american\\_prison-release\\_systems.pdf](https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-05/american_prison-release_systems.pdf) (summarizing the “mechanics of indeterminacy”). Whether or not the Sentencing Reform Act of 1984 succeeded in making the federal sentencing system determinate, it is clear that the Act was intended to create a more determinate system. *See* Doherty, *supra* note 38, at 996 (“Federal parole was consigned history, inaugurating a new era of determinate sentencing—or so everyone believed at the time.” (citing S. REP. NO. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221)).

<sup>39</sup> *See* 18 U.S.C. § 4205(a) (repealed 1987); *see generally* Doherty, *supra* note 38, at 984–90; ISAAC FULWOOD, U.S. PAROLE COMM’N, DEP’T OF JUST., HISTORY OF THE FEDERAL PAROLE SYSTEM 1–34 (May 2003), <https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf>.

<sup>40</sup> 18 U.S.C. § 4205(a) (repealed 1987).

<sup>41</sup> *Id.* § 4205(g).

of § 4205(g) offers little guidance as to how Congress envisioned that the BOP and courts would exercise this power,<sup>42</sup> and it is unclear how many people obtained release in this manner.<sup>43</sup>

The SRA replaced the federal parole system with a more determinate sentencing scheme. People who received federal prison sentences would now be required to serve the entirety, or—after application of sentence credits for “satisfactory behavior”—close to the entirety of their terms of imprisonment behind bars.<sup>44</sup> Judges could also impose terms of supervised release, which begin upon a person’s release from prison.<sup>45</sup> Proponents of these changes offered varying reasons for the shift to more determinate sentences, including that indeterminate sentences permitted people who had committed serious harm to leave prison before receiving sufficient punishment,<sup>46</sup> and that the broad discretion wielded by the U.S. Parole Commission led to unfair and racially disparate outcomes.<sup>47</sup>

Although the SRA eliminated federal parole, it also created new mechanisms for modifying the duration of already-imposed federal prison terms. As noted above, the Act provided for “credit[s] . . . for satisfactory behavior,” or what are known colloquially as

<sup>42</sup> See Bryant S. Green, Comment, *As the Pendulum Swings: The Reformation of Compassionate Release to Accommodate Changing Perceptions of Corrections*, 46 U. TOL. L. REV. 123, 126 (2014) (citing H.R. REP. NO. 94-838, at 20 (1975)). The Bureau of Prisons would later refer to § 4205(g) as “compassionate release.” See EVALUATION & INSPECTIONS DIV., *supra* note 13, at 1. However, the term “compassionate release” is absent from the text of § 4205(g). Moreover, there were some instances in the late 1970s when the BOP moved for, and courts granted, release under this provision for non-medical reasons, such as sentencing disparities between co-defendants and positive behavior in prison. See Hopwood, *supra* note 27, at 100–01 (citing *United States v. Diaco*, 457 F. Supp. 371, 375 (D.N.J. 1978) and *United States v. Banks*, 428 F. Supp. 1088, 1089 (E.D. Mich. 1977)).

<sup>43</sup> As discussed below, a report by the Department of Justice’s Inspector General found that, “on average, only 24 inmates [were] released each year through the BOP’s compassionate release program” from 2006 through 2011. EVALUATION & INSPECTIONS DIV., *supra* note 13, at 1. During these years, the BOP’s “compassionate release program” relied on both § 4205(g) and § 3582(c). Although the SRA repealed § 4205(g), this provision still applies to sentences imposed before 1987. *Id.* It is not clear whether there is publicly accessible data showing how many people received release under § 4205(g) before the SRA went into effect in 1987.

<sup>44</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a), 98 Stat. 1837, 2007 (1984).

<sup>45</sup> *Id.* at 1999. Violations of the conditions of supervised release can result in new terms of imprisonment. Initially, a court needed to “treat a violation of a condition of a term of supervised release as contempt of court” in order to re-imprison a person. *Id.* at 2000. However, federal law now authorizes a court to “require the defendant to serve in prison all or part of the term of supervised release authorized by statute . . . if the court . . . finds by a preponderance of the evidence that the defendant violated a condition of supervised release.” 18 U.S.C. § 3583(e)(3).

<sup>46</sup> See Doherty, *supra* note 38, at 991–95.

<sup>47</sup> See *id.* at 991; Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227 (1993) (“Beginning in the 1950s, liberal reformers developed three fundamental criticisms of the prevailing regime of indeterminate prison sentencing and parole,” including that indeterminate sentencing “was . . . fundamentally at odds with ideals of equality and the rule of law,” because “permitting judges and parole officials to exercise unguided discretion assertedly resulted in ‘unwarranted disparity’ (including alleged bias against minorities) in criminal sentences.”); see also *Race and Noncapital Sentencing*, 101 HARV. L. REV. 1626, 1627 (1988) (“Like capital sentencing systems, most noncapital systems are rife with racial bias. To reduce the potential for racial discrimination in the sentencing process, states should establish sentencing systems that curb or eliminate discretionary procedures.”). Racially disparate parole outcomes continue to be a problem in contemporary state systems. See Michael Winerip, Michael Schwartz, & Robert Gebeloff, *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES (Dec. 4, 2016), <https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html>.

good-time credits.<sup>48</sup> Under the version of the federal good-time credit system enacted in the SRA, every person serving a federal term of imprisonment of more than one year and less than a life term could receive a fifty-four-day credit at the end of each year spent in prison.<sup>49</sup> The Act vested the BOP with authority to withhold or revoke credits if it “determine[d]” that a person had “not satisfactorily complied with [ ] institutional disciplinary regulations.”<sup>50</sup> Credits advance prisoners’ release dates, effectively shortening the duration of their prison terms.<sup>51</sup>

In addition to good-time credits, the Act created a trio of “sentence modification provisions” and charged the newly formed U.S. Sentencing Commission with issuing “general policy statements” regarding “the appropriate use” of these provisions.<sup>52</sup> The first of these three provisions, 18 U.S.C. § 3563(c), authorized federal courts to “modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation” after conducting a hearing.<sup>53</sup> The second provision, 18 U.S.C. § 3573, permitted a person whose federal sentence included payment of a fine to petition for modification or remission of the fine upon a showing of changed circumstances and “a good faith effort to comply with the terms of the sentence.”<sup>54</sup>

The third provision, 18 U.S.C. § 3582(c), permitted federal judges to “reduce [a] term of imprisonment” if either of two sets of conditions were present. First, if the U.S. Sentencing Commission lowered the sentencing range applicable to a person’s federal prison sentence after a court imposed a sentence, then either the imprisoned person or the Director of the BOP could move for a reduction.<sup>55</sup> A court considering such a motion could grant a sentence reduction “after considering [(1)] the factors set forth in section 3553(a) to the extent that they are applicable” and (2) whether “a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”<sup>56</sup> As discussed in Part II.A, *infra*, § 3553(a) instructs federal sentencing courts to construct sentences that are “sufficient, but not greater than necessary, to comply with” enumerated sentencing purposes, such as “the need . . . to protect the public from further crimes of the defendant.”<sup>57</sup> Unlike § 4205(g), which had authorized judges to “reduce any minimum term to the time the defendant has served,”<sup>58</sup> the text of § 3582(c) did not specify that reductions should result in immediate release.<sup>59</sup>

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<sup>48</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1837, 2008–09 (1984).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* § 217(a), 98 Stat. at 2019. The SRA also authorized courts to “terminate” or “extend a term of supervised release” or “modify, reduce, or enlarge the conditions of supervised release” after considering a subset of the § 3553(a) factors. *Id.* § 212(a)(2), 98 Stat. at 2000. However, the SRA did not refer to this provision as a “sentence modification provision[.]” *See id.* § 217(a), 98 Stat. at 2019.

<sup>53</sup> *Id.* § 212(a)(2), 98 Stat. at 1994.

<sup>54</sup> *Id.* at 1997.

<sup>55</sup> *Id.* at 1998–99.

<sup>56</sup> *Id.* at 1999.

<sup>57</sup> 18 U.S.C. § 3553(a).

<sup>58</sup> 18 U.S.C. § 4205(g) (repealed 1987).

<sup>59</sup> Sentencing Reform Act of 1984, § 212(a)(2), 98 Stat. at 1998–99. *See United States v. Brooker*, 976 F.3d 228, 237 (2020) (“It bears remembering that compassionate release is a misnomer. 18 U.S.C. § 3582(c)(1)(A) in fact speaks of sentence reductions. A district court could, for instance, reduce but not eliminate a defendant’s prison sentence, or end the term of imprisonment but impose a significant term of probation or supervised release in its place.”).

Second, the Director of the BOP could also move for a reduction under § 3582(c) for “extraordinary and compelling reasons.”<sup>60</sup> A court considering this type of motion would also need to find that a reduction was “consistent with” the U.S. Sentencing Commission’s policy statements and any applicable § 3553(a) factors.<sup>61</sup> Accordingly, the SRA directed the Sentencing Commission to “promulgat[e] general policy statements regarding the sentencing modification provisions” and “describe what should be considered extraordinary and compelling reasons for sentence reductions, including the criteria to be applied and a list of specific examples.”<sup>62</sup> Consistent with the SRA’s project of dismantling federal parole, this part of the SRA specified that “[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.”<sup>63</sup> In other words, judges who favored the old indeterminate system could not re-create it through § 3582(c) by identifying rehabilitation, a goal of the parole system, as sufficient under the new extraordinary and compelling reasons standard.

Legislative history materials discussing § 3582(c) are sparse. The Senate Judiciary Committee’s September 1983 report on the Sentencing Reform Act of 1983—an earlier draft of the SRA—offers a glimpse into how members of Congress might have understood § 3582(c). The report described what would become § 3582(c) as creating “safety valves.”<sup>64</sup> The report stated that the “safety valve” for “extraordinary compelling reasons” would “appl[y], regardless of the length of sentence, to the unusual case in which the defendant’s circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner.”<sup>65</sup> According to the report, “[t]he value of the forms of ‘safety valves’ . . . lies in the fact that they . . . keep[ ] the sentencing power in the judiciary where it belongs,”—a reference to the U.S. Parole Commission—“yet permit[ ] later review of sentences in particularly compelling situations.”<sup>66</sup> Although § 3582(c) bears some similarities to § 4205(g), which the SRA repealed, legislative history materials do not appear to draw a connection between these two provisions.

Despite the SRA’s instructions to the Sentencing Commission, early versions of the Federal Sentencing Guidelines Manual did not include policy statements addressing the “extraordinary and compelling reasons” standard.<sup>67</sup> Instead, the BOP was the first agency to issue pertinent regulations. In January 1994, the BOP published a final rule concerning implementation of § 3582(c)(1)(A), the statutory subdivision containing the “extraordinary and compelling reasons” standard.<sup>68</sup> The rule stated that the BOP would move for a reduction “only when there are particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing.”<sup>69</sup> The rule instructed people in BOP custody to submit written requests to wardens setting

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<sup>60</sup> Sentencing Reform Act of 1984, § 212(a)(2), 98 Stat. at 1999.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* § 217(a), 98 Stat. at 2023.

<sup>63</sup> *Id.*

<sup>64</sup> S. REP. NO. 98-223, at 118 (1983).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> The Federal Sentencing Guidelines Manual, also known as the Sentencing Guidelines, provides judges with tables of recommended penalties to guide judges’ decision-making at sentencings. *See infra* pp. 30–31 and notes 222–226.

<sup>68</sup> Control, Custody, Care, Treatment, and Instruction of Inmates; Compassionate Release, 59 Fed. Reg. 1238, 1238 (Jan. 7, 1994).

<sup>69</sup> *Id.* at 1238–39.

out “[t]he extraordinary or compelling circumstances that the inmate believes warrant consideration”; “release plans”; and, “if the basis for the request involves the inmate’s health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment.”<sup>70</sup> Written requests for § 3582 motions would then be reviewed “by the Warden, the Regional Director, the General Counsel, and either the Medical Director for medical referrals or the Assistant Director, Correctional Programs Division for non-medical referrals, and with the approval of the Director.”<sup>71</sup>

Not long thereafter, in July 1994, the Director of the BOP issued a memorandum outlining the Bureau’s approach to filing motions under § 3582(c)(1)(A).<sup>72</sup> The memorandum noted that the BOP “has historically taken a conservative approach” to filing motions under § 3582(c)(1)(A) or § 4205(g), which the memorandum treated as interchangeable forms of “compassionate release requests.”<sup>73</sup> The memorandum did not acknowledge the difference between § 4205(g)’s authorization for reductions “to the time the defendant has served”<sup>74</sup> and § 3582(c)’s broader instruction for judges to “reduce the term of imprisonment.”<sup>75</sup> According to the memorandum, the BOP exercised its authority to file motions only in “cases [that] . . . f[e]ll within the medical arena.”<sup>76</sup>

The memorandum also reflected a narrow focus on releasing people who were in the very final stages of their lives. The memorandum recounted that the BOP’s “general guideline [had been] to recommend release of an inmate only in cases of terminal illness when life expectancy was six months or less,” and that the BOP recently had “extended the time limit to a one-year life expectancy as long as medical staff felt comfortable with the accuracy of their prediction.”<sup>77</sup> The memorandum also listed several factors for BOP staff to consider when weighing whether to refer requests for § 3582(c)(1)(A) motions to the Director of the BOP. These factors included medical criteria, such as “the nature and severity of the inmate’s illness”; factors borrowed from the language of § 3553(a);<sup>78</sup> and other considerations, such as “the length of the inmate’s sentence and the amount of time left to serve.”<sup>79</sup>

Later that year, in September 1994, Congress amended § 3582(c)(1)(A) to include an additional ground for sentence reductions. Under the revised statute, subsection (c)(1)(A)(ii) provided that a court could reduce a term of imprisonment for a person who was “at least 70 years of age, ha[d] served at least 30 years in prison” and was “not a danger to the safety of any other person or the community.”<sup>80</sup> The “extraordinary compelling reasons” route for sentence reductions was renumbered as § 3582(c)(1)(A)(i)—where it

<sup>70</sup> *Id.* at 1239.

<sup>71</sup> *Id.*

<sup>72</sup> EVALUATION & INSPECTIONS DIV., *supra* note 13, app. 3, at 67–68. Although the SRA repealed § 4205(g), this provision remained in effect for people in BOP custody whose sentencing hearings had occurred before 1987. *See* 28 C.F.R. § 572.40 (2022).

<sup>73</sup> EVALUATION & INSPECTIONS DIV., *supra* note 13, at 67.

<sup>74</sup> 18 U.S.C. § 4205(g) (repealed 1987).

<sup>75</sup> 18 U.S.C. § 3582(c)(1)(A).

<sup>76</sup> EVALUATION & INSPECTIONS DIV., *supra* note 13, app. 3, at 67.

<sup>77</sup> *Id.*

<sup>78</sup> The considerations borrowed from § 3553(a) included factors such as “the nature and circumstances of the offense.” *Compare id.* with 18 U.S.C. § 3553(a).

<sup>79</sup> EVALUATION & INSPECTIONS DIV., *supra* note 13, app. 3, at 68.

<sup>80</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, § 70002, 108 Stat. 1796, 1984–85 (1994).

remains today. In the case of either type of reduction, only the Director of the BOP could file a motion, and a judge would still need to find that § 3553(a) factors weighed in favor of a reduction.<sup>81</sup>

The U.S. Sentencing Commission did not publish a policy statement addressing § 3582(c)(1)(A) until the 2006 Guidelines Manual. The main text of the policy statement, numbered § 1B1.13, restated the language of § 3582(c)(1)(A).<sup>82</sup> The statement's application notes reiterated the statutory command that "rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason" and announced that "[t]he Commission intends to develop further criteria to be applied and a list of specific examples."<sup>83</sup> In the meantime, the application notes to this policy statement authorized the BOP to move for sentence reductions based on its own interpretation of the "extraordinary and compelling reasons" standard, stating that "[a] determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such."<sup>84</sup>

The following year, the Sentencing Commission specified four types of "extraordinary and compelling reasons" in the application notes for Policy Statement § 1B1.13. These were:

- (i) The defendant is suffering from a terminal illness.
- (ii) The defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.
- (iii) The death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children.
- (iv) As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), (ii), and (iii).<sup>85</sup>

As detailed in a 2013 report published by the U.S. Department of Justice's Office of the Inspector General (OIG), few people obtained sentence reductions under this version of § 3582(c)(1)(A), the BOP's regulations, and policy statement § 1B1.13. The OIG found that, from 2006 through 2011, an average of twenty-four people obtained release from prison each year under § 3582(c) and § 4205(g).<sup>86</sup> The OIG report took issue with several

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<sup>81</sup> *See id.*; 18 U.S.C. § 3582(c) (1994).

<sup>82</sup> U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2006).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> EVALUATION & INSPECTIONS DIV., *supra* note 13, at 1 n.9. Likewise, a report by Human Rights Watch and Families Against Mandatory Minimums found that "from 1992 through November 2012, the BOP

aspects of the BOP’s process for filing motions under § 3582(c), which the report referred to as “the BOP’s compassionate release program.”<sup>87</sup> The first of the report’s eleven recommendations was for the BOP to “[c]onsider appropriately expanding the use of the compassionate release program . . . to cover both medical and non-medical conditions for inmates who do not present a threat to the community and who present a minimal risk of recidivism.”<sup>88</sup> A more recent study that examined data from 2013 to 2017 found that the BOP “approved six percent of the 5,400 applications received” during these years, and that “266 inmates who requested compassionate release died in custody.”<sup>89</sup>

In 2016, the U.S. Sentencing Commission amended the application notes to policy statement § 1B1.13 to include additional guidance regarding the “extraordinary and compelling reasons” standard. Regarding terminal illness, the revised application notes explained that “[a] specific prognosis of life expectancy . . . is not required” and listed “metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia” as examples of medical conditions that would constitute “extraordinary and compelling reasons.”<sup>90</sup> The application notes also stated that “a serious physical or medical condition . . . serious functional or cognitive impairment . . . [or] deteriorating physical or mental health because of the aging process” would meet the § 3582(c)(1)(A)(i) standard if a person’s “ability . . . to provide self-care” was “substantially diminishe[d]” and the person was “not expected to recover.”<sup>91</sup> In addition, the application notes listed “[t]he incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver for the spousal registered partner” as an example of “extraordinary and compelling reasons.”<sup>92</sup> Other changes to the application notes included a statement that “an extraordinary and compelling reason need not have been unforeseen at the time of sentencing.”<sup>93</sup>

The revised application notes also reiterated that “[a] reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A).”<sup>94</sup> As in the previous versions, the application notes authorized the BOP to “determine[] . . . [if] there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons” listed in the application notes.<sup>95</sup> The combination of these two application notes would soon play an important role in cases interpreting amendments to § 3582(c).

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made only 492 motions for compassionate release, an annual average of about two dozen.” *The Answer Is No: Too Little Compassionate Release in U.S. Federal Prisons*, HUM RTS. WATCH & FAMS. AGAINST MANDATORY MINIMUMS 34 (Nov. 2012), <https://www.hrw.org/sites/default/files/reports/us1112ForUploadSm.pdf>. Although the Sentencing Reform Act of 1987 repealed § 4205(g), this provision remains in effect for people in BOP custody whose sentencing hearings occurred before 1987. *See* 28 C.F.R. § 572.40 (2022).

<sup>87</sup> EVALUATION & INSPECTIONS DIV., *supra* note 13, at 1 n.6.

<sup>88</sup> *Id.* at 55.

<sup>89</sup> Christie Thompson, *Old, Sick and Dying in Shackles*, MARSHALL PROJECT (Mar. 7, 2018, 5:00 AM), <https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles>.

<sup>90</sup> U.S. SENT’G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)(i) (U.S. SENT’G COMM’N 2016).

<sup>91</sup> *Id.* § 1B1.13 cmt. n.1(A)(ii).

<sup>92</sup> *Id.* §§ 1B1.13 cmt. n. 1(C), 1(D).

<sup>93</sup> *Id.* § 1B1.13 cmt. n.2.

<sup>94</sup> *Id.* § 1B1.13 cmt. n.4.

<sup>95</sup> *Id.* § 1B1.13 cmt. n.1(D).

### B. *The First Step Act of 2018 and the COVID-19 Pandemic*

This was the state of the federal sentence reduction statute when the First Step Act of 2018 (FSA) shifted § 3582(c)(1)(A) from funneling requests for reductions through the Director of the BOP to authorizing the over 600 federal district judges across the country to grant reductions without BOP approval.<sup>96</sup> This change also freed district judges in much of the country to determine for themselves what reasons justified reductions, instead of following the BOP’s narrow interpretation of “extraordinary and compelling reasons.” When the arrival of COVID-19 upended life inside U.S. prisons in early 2020, thousands of people in federal custody began filing motions for sentence reductions. Several hundreds of these motions included arguments grounded in the pandemic’s dual impact—not only the risks of serious illness and death, but also the lockdowns, suspensions of visits, and other restrictions that officials imposed to curb the spread of infections.

In a section titled “Increasing the Use and Transparency of Compassionate Release,” the FSA amended § 3582(c)(1)(A) to state that federal courts could reduce federal prison sentences upon a motion by either (1) the Director of the BOP or (2) an imprisoned person, after meeting a modest administrative exhaustion requirement.<sup>97</sup> The FSA also defined “terminal illness” as “a disease or condition with an end-of-life trajectory” and required the BOP to notify imprisoned people about § 3582(c)(1)(A), process requests for motions promptly, and report data related to requests, motions, and releases from prison.<sup>98</sup> Aside from a few passing comments that the FSA would “expand” or “enhance[ ] . . . compassionate release,”<sup>99</sup> the legislative record does not indicate that these changes to § 3582(c)(1)(A) received much attention in Congress prior to the FSA’s passage.

Beyond increasing the number of decision-makers who could act on requests for sentence reductions, the FSA also diluted the authority of the BOP and the Sentencing Commission to interpret the scope of § 3582(c)(1)(A)(i)’s “extraordinary and compelling reasons” standard.<sup>100</sup> The FSA left unchanged language in § 3582(c)(1)(A) requiring judges to find that “any reduction” under either subdivision (i) or (ii) “is consistent with applicable policy statements issued by the Sentencing Commission.”<sup>101</sup> Policy Statement § 1B1.13’s application notes, in turn, continued to authorize reductions under § 3582(c)(1)(A)(i) for “Other Reasons” beyond the specific examples listed in the application notes and specified that these reasons would be “determined by the Director of the Bureau

<sup>96</sup> The amended text still required people in BOP custody to exhaust administrative remedies by first requesting that the Director of the BOP file a motion. First Step Act of 2018, Pub. L. 115-391, § 603(b), 132 Stat. 5194, 5239 (2018).

<sup>97</sup> The relevant text states that a motion may be filed directly by “the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such request by the warden of the defendant’s facility, whichever is earlier.” *Id.* Under the BOP’s current regulations, the BOP will only file a motion after review and approval by “[a] Warden, the General Counsel [of the BOP] . . . either the Medical Director for medical referrals or the Assistant Director, Correctional Programs Division for non-medical referrals, and . . . the Director [of the BOP].” Approval of Request, 28 C.F.R. § 571.62(a) (2022).

<sup>98</sup> First Step Act of 2018 § 603(b), 132 Stat. at 5239–41.

<sup>99</sup> See 164 CONG. REC. H4311 (May 22, 2018) (statement of Rep. Jerry Nadler); 164 CONG. REC. S7774 (Dec. 18, 2018) (statement of Sen. Benjamin Cardin).

<sup>100</sup> See 18 U.S.C. § 3582(c)(1)(A)(i).

<sup>101</sup> See *id.* § 3582(c)(1)(A).

of Prisons.”<sup>102</sup> The application notes, however, were not updated to address motions filed directly by imprisoned people. Rather, the application notes still stated that, “[a] reduction under this policy statement may be granted *only* upon motion by the Director of the Bureau of Prisons.”<sup>103</sup> Between September 2020 and early 2022, eleven federal circuit courts held that the application notes to policy statement § 1B1.13 therefore applied only to § 3582(c)(1)(A) motions filed by the Director of the BOP and not to motions filed directly by people serving federal prison sentences.<sup>104</sup> In other words, when imprisoned people filed motions directly, the BOP was not in charge of deciding what sorts of “Other Reasons” could justify release under § 3582(c)(1)(A)(i). Instead, federal district judges reviewing motions for sentence reductions in much of the country were “freed . . . to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them.”<sup>105</sup>

Barely a year after the FSA amended § 3582(c) in December 2018, the arrival of the COVID-19 pandemic in the United States in early 2020 rapidly changed conditions of confinement in prisons across the country. The spread of COVID-19, along with officials’ efforts to curb the spread of infections, changed what imprisonment entailed in two respects. First, the congregate settings within prisons made social distancing difficult or impossible, exposing imprisoned people to high risks of infection, serious illness, and death.<sup>106</sup> By July 2022, the BOP reported that over 55,000 people held in federal prisons and jails had tested positive for COVID-19, and over 300 had died from illnesses caused by COVID-19.<sup>107</sup> The full toll of the COVID-19 pandemic on incarcerated people across the United States is much larger; one estimate puts the total number of infections and deaths in state and federal prisons, jails, and detention facilities at over 600,000 and 3,000, respectively.<sup>108</sup> Second, “lockdowns” and other restrictions on movement within prisons meant that people were locked in their cells or housing units for most or all of each day, and that access to everything from showers and medical attention to educational programming and family visits was suspended or curtailed.<sup>109</sup>

Beginning in March 2020, the BOP implemented restrictions on movement, programming, and services within its facilities in order to curb the spread of COVID-19. The BOP’s first press release on these measures announced that “[o]n March 13, 2020, the

<sup>102</sup> U.S. SENT’G GUIDELINES MANUAL § 1B1.13 cmt. n.1(D) (U.S. SENT’G COMM’N 2016).

<sup>103</sup> *Id.* (emphasis added).

<sup>104</sup> *United States v. Ruvalcaba*, 26 F.4th 14, 20–21 (1st Cir. 2022); *United States v. Andrews*, 12 F.4th 255, 259–60 (3rd Cir. 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021); *United States v. Maumau*, 993 F.3d 821, 836–37 (10th Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1109–11 (6th Cir. 2020); *United States v. Brooker*, 976 F.3d 228, 235–37 (2d Cir. 2020). *But see* *United States v. Bryant*, 996 F.3d 1243, 1263–65 (11th Cir. 2021).

<sup>105</sup> *Brooker*, 976 F.3d at 237.

<sup>106</sup> *See* Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CAL. L. REV. 117, 123–31 (2022).

<sup>107</sup> *COVID-19 Coronavirus*, FED. BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/> (last visited July 19, 2022).

<sup>108</sup> *COVID Behind Bars Data Project*, U.C.L.A. L., <https://uclacovidbehindbars.org/> (last visited July 19, 2022).

<sup>109</sup> *See, e.g., Bureau of Prisons Update on COVID-19*, *supra* note 1; *Foster v. Comm’r of Corr.*, 146 N.E.3d 372, 382 (Mass. 2020); Keri Blakinger, *What Happens When More Than 300,000 Prisoners Are Locked Down?*, MARSHALL PROJECT (Apr. 15, 2020), <https://www.themarshallproject.org/2020/04/15/what-happens-when-more-than-300-000-prisoners-are-locked-down>.

Bureau instituted significant measures,” including “temporary restrictions on visitation, restricting inmate movement to only required and mission-essential transfers,” and “a mandatory 14-day quarantine for all new inmates.”<sup>110</sup> Nearly a year later, in January 2021, the BOP issued a press release acknowledging that, “[f]or the majority of the past twelve months, the BOP has been operating under a modified operational model,” and that “this pandemic has placed a heavy burden on inmates and their families in terms of limited movement and the public’s restrictions and being able to freely visit with loved ones.”<sup>111</sup> At the end of 2021, the BOP’s website stated that it was continuing to follow “modified operations,” including permitting people to move within prisons only “in small numbers” and for the following purposes: “A. Commissary B. Laundry C. Showers three times each week D. Telephone” and “when necessary, for the provision of required mental health or medical care.”<sup>112</sup> These policies have meant that, during much of the pandemic, people in BOP custody have lived under burdensome restrictions, including being confined in their cells or housing units for most hours of the day.<sup>113</sup>

Arguments grounded in the pandemic’s dual impact on prison conditions soon made their way into motions for sentence reductions under § 3582(c)(1)(A)(i). Imprisoned people linked these changes to both the “extraordinary and compelling reasons” standard and the § 3553(a) sentencing factors. Arguments relating to the “extraordinary and compelling reasons” standard framed the pandemic as a drastic reordering of prison life that justified eligibility for sentence reductions. Arguments relating to the § 3553(a) sentencing factors urged judges to weigh the hardships caused by pandemic-era prison conditions as part of the rebalancing of sentencing purposes required by § 3582(c)(1)(A)(i).

Precisely how many § 3582(c)(1)(A)(i) motions and decisions discussed changes in prison conditions in this manner is unclear. Most motions citing the pandemic as a reason for accelerated release focused on the narrow, technical issue of whether individuals met the criteria for increased risk of severe illness published by the Centers for Disease Control and Prevention (CDC).<sup>114</sup> A report published by the U.S. Sentencing Commission in September 2021 detailed that, from January 2020 through June 2021, federal judges granted 3,608 requests for sentence reductions and denied 16,957 requests.<sup>115</sup> The statistics

<sup>110</sup> *Bureau of Prisons Update on COVID-19*, *supra* note 1.

<sup>111</sup> *Temporary Security Measures Implemented*, FED. BUREAU OF PRISONS (Jan. 16, 2021, 5:00 AM), [https://www.bop.gov/resources/news/20210116\\_precaution.jsp](https://www.bop.gov/resources/news/20210116_precaution.jsp).

<sup>112</sup> *BOP Modified Operations*, FED. BUREAU OF PRISONS (Nov. 25, 2020), [https://www.bop.gov/coronavirus/covid19\\_status.jsp](https://www.bop.gov/coronavirus/covid19_status.jsp).

<sup>113</sup> *See, e.g.*, *United States v. Regas*, 3:91-cr-00057-MMD-NA-1-57, 2020 WL 2926457, at \*3 (D. Nev. June 3, 2020) (“Defendant is isolated in his cell for 22.5 hours a day, despite his elderly age and good behavior.”). People confined in state prisons and jails, as well as people held in immigration detention facilities, faced similar hardships. This Article focuses on people in BOP custody, because the FSA’s amendments to the federal sentence reduction statute only affected people serving federal sentences.

<sup>114</sup> *See, e.g.*, *United States v. Williams*, 509 F. Supp. 3d 616, 622–23 (S.D. W. Va. 2020) (granting motion because “[b]oth obesity and severe obesity are on the CDC’s list of conditions that put someone at increased risk for severe illness from COVID-19) (citing *Coronavirus Disease 2019 (COVID-19): People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 2, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>). In addition—and, understandably, given pressures of time, limited information, and rapid infections and hospitalizations—some judges ruled on § 3582(c)(1)(A)(i) motions through unpublished orders or on the record during hearings. As a result, some decisions might not be available via online legal databases.

<sup>115</sup> *U.S. Sentencing Commission Compassionate Release Data Report: Calendar Years 2020 to 2021*, U.S.

in this report included demographic information, sentence length, offense of conviction, and “Selected Sentencing Factors for Offenders Receiving Compassionate Release,” but they did not track whether or how judges discussed changes in prison conditions.<sup>116</sup>

In March 2022, the Sentencing Commission published a report focused on the impact of the pandemic on § 3582(c) rulings during federal fiscal year 2020.<sup>117</sup> According to this report, federal judges granted sentence reductions to 1,805 out of 7,014 people (25.7%) during the fiscal year 2020—up from 145 people in the first year after the enactment of the First Step Act.<sup>118</sup> The report also found that, among decisions that granted relief, 59.6% cited “the risk of contracting or experiencing serious illness from COVID-19” as the sole basis for relief, and 11.9% cited “COVID-19 and Other Reasons.”<sup>119</sup> The report did not state whether these reasons included changed prison conditions apart from increased risks of infections. The report concluded that “[a]n offender’s age, the length of original sentence imposed, and the amount of time the offender had already served emerged as the central factors that impacted the likelihood an offender would be granted relief.”<sup>120</sup> Additionally, the report documented that, among decisions that denied relief, 47.9% “cited either the 18 U.S.C. § 3553(a) factors or danger to the public (or both) as at least one reason for denial.”<sup>121</sup>

This Article estimates that a relatively small number of § 3582(c)(1)(A) rulings—at least a few hundred—addressed arguments that changed prison conditions beyond increased risks of illness and death constituted grounds for reductions.<sup>122</sup> A smaller subset of decisions—at least eighty-five—granted motions for reasons that included some form of this argument, and at least a dozen more decisions endorsed this proposition while concluding that the § 3553(a) factors weighed against reductions. Roughly half of the decisions granting reductions came from the Southern and Eastern Districts of New York.<sup>123</sup> The below overview does not seek to illustrate which types of rulings were more

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SENT’G COMM’N tbl. 5. (Sept. 2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf> [hereinafter *Compassionate Release Data Report*].

<sup>116</sup> *Id.*

<sup>117</sup> U.S. SENT’G COMM’N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC (Mar. 2022), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310\\_compassionate-release.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf).

<sup>118</sup> *Id.* at 3.

<sup>119</sup> *Id.* at 32, 49.

<sup>120</sup> *Id.* at 4.

<sup>121</sup> *Id.* at 45.

<sup>122</sup> The following search string, when applied to all federal decisions available in WestLaw’s online database as of July 2022, yielded 686 results: “3582(c)(1)(A) AND (pandemic or COVID-19) /p (harsh! OR intended OR punitive).” A slightly shorter search string, when applied to all federal decisions available in WestLaw’s online database, yielded 486 results: “3582(c)(1)(A) AND (pandemic or COVID-19) /p (harsh! OR punitive).” Some of the results of these search strings were not relevant to this Article’s discussion (*e.g.*, cases discussing what Congress “intended” regarding the FSA’s exhaustion requirement or characterizing the initial duration of a sentence as “harsh”). A broader search string yielded 1,615 results: “3582(c)(1)(A) AND (pandemic or COVID-19) /p (harsh! OR punitive OR severity).” However, this third search string yielded many cases that discussed the “severity” of medical conditions in relation to the narrow, technical issue of whether a medical condition met the CDC’s criteria for increased risk for severe illness.

<sup>123</sup> There are a number of potential reasons for this apparent clustering of rulings in these districts,

widespread but rather attempts to summarize the full array of approaches that were used by judges confronting the pandemic's dual impact.<sup>124</sup>

A brief note is also in order regarding judges' use of the terms "punitive effect" or "severity" to refer to the total amount or degree of punishment that a sentence carries out. As discussed in Part II.A, *infra*, the main federal sentencing statute, 18 U.S.C. § 3553(a), imposes a parsimony requirement; it commands judges to craft sentences that are "sufficient, but not greater than necessary, to comply with" a set of enumerated sentencing purposes.<sup>125</sup> The sets of penalties available to judges dictate how judges comply with this requirement, and the contemporary federal sentencing scheme formally designates imprisonment as a single type of penalty. Thus, judges do not select between more or less restrictive forms of imprisonment at sentencing proceedings. Rather, their sentencing decisions regarding prison are limited to (i) whether to include a term of imprisonment, and, if so, (ii) the duration of a term of imprisonment.<sup>126</sup>

Federal statutes are silent as to whether judges can ever consider more than the duration of a term of imprisonment when assessing how much punishment a term of imprisonment carries out. Some of the rulings discussed below used terms such as "punitive effect" and "severity" to describe the idea that both the conditions and duration of confinement play roles in determining how much punishment a term of imprisonment represents. For the most part, these rulings did not cite pre-pandemic judicial precedents or academic literature when discussing these ideas. However, these ideas have surfaced sporadically in the past in both settings. For example, Justice Blackmun once reasoned that "a period of confinement" in "a prison characterized by rampant violence and terror" would be "a more extreme punishment" than the same amount of time in "a relatively safe, well-managed prison."<sup>127</sup> In addition, when the Sentencing Guidelines were still mandatory, the

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including proximity to people experiencing serious illness caused by COVID-19, proximity to front-line medical professionals (*e.g.*, judges with emergency medicine health professionals or epidemiologists in their families or social circles), and the degree to which judges in a particular district may be more or less likely to find their peers' decisions persuasive (*i.e.*, in some districts, an early decision by one judge granting release may have had a greater impact on that judges' peers than it would have in other districts). Identifying the full range of these potential reasons and investigating which reasons were more likely to have caused this apparent clustering of rulings is beyond the scope of this Article.

<sup>124</sup> In the year between the enactment of the First Step Act and the arrival of the COVID-19 pandemic in the United States, at least two judges employed similar reasoning in § 3582(c) rulings that considered the implications of serious illness for § 3553(a)'s sentencing purposes and parsimony requirement. *See* *United States v. Beck*, 425 F. Supp. 3d 573, 586 (M.D.N.C. 2019) ("She has served nearly two years of her [prison] term with invasive breast cancer, and the BOP has repeatedly mismanaged her care, including delaying medical appointments for so long that neither chemo nor radiation therapy would be effective . . . . 'This means that [her] sentence has been significantly more laborious than that served by most inmates . . . . [and] further incarceration in [her] condition would [therefore] be greater than necessary to serve the purposes of punishment set forth in § 3553(a).'" (citation omitted)); *United States v. Gray*, 416 F. Supp. 3d 784, 790 (S.D. Ind. 2019) ("Mr. Gray has served much of his sentence while seriously ill. This means that his sentence has been significantly more laborious and difficult than that served by most inmates . . . [and] further incarceration in his condition would [therefore] be greater than necessary to serve the purposes of punishment set forth in § 3553(a).").

<sup>125</sup> 18 U.S.C. § 3553(a).

<sup>126</sup> *See* 18 U.S.C. §§ 3551, 3553. An exception to this framework is that federal judges can make non-binding recommendations to the BOP at initial sentencings for assignments to specific prisons. These recommendations often concern placing people in facilities that are closer to family members or that feature specific rehabilitative programs.

<sup>127</sup> *Farmer v. Brennan*, 511 U.S. 825, 855 (1994) (Blackmun, J., dissenting).

Supreme Court held that federal judges could impose shorter, below-Guidelines sentences upon finding that people were “particularly likely to be targets of abuse during their incarceration.”<sup>128</sup> In the academic context, Judge Richard Posner theorized that “the severity of punishment can be varied other than by varying the length of imprisonment” by taking into account aspects of life in prison, such as the “[s]ize of prison cell, temperature [of a cell,] and quality of food.”<sup>129</sup> Further, Professors Sharon Dolovich and Alex Reinert have argued that prison conditions should be considered punishment for the purposes of Eighth Amendment claims.<sup>130</sup> Part II.A, *infra*, examines these concepts in more detail.

Moreover, although federal courts primarily use the term “punitive effect” in cases examining whether a purportedly civil regulation constitutes punishment and therefore triggers constitutional protections (*i.e.*, judges assess whether a statute has “a punitive effect”),<sup>131</sup> a small number of federal judges have used “punitive effect” to describe the amount of punishment a sentence carries out. For example, a judge on the Second Circuit has used the term in the course of explaining a rule requiring that sentencing courts know the duration of all relevant sentences before imposing a consecutive sentence, “so that the punitive effect of the consecutive sentences is carefully considered.”<sup>132</sup> The same Second Circuit judge has also used “punitive effect” to explain the principle that a sentencing court may increase the amount of a fine on remand from an appellate decision vacating a term of imprisonment. In the judge’s words, “[i]n selecting \$25,000 as the appropriate fine [at initial sentencing], we think it reasonable to assume that [the sentencing judge] had in mind the aggregate punitive effect of [the] sentence,” but “[n]ow that the twenty-one-month term of imprisonment is being set aside, the sentencing judge should have the option of considering whether to make an upward adjustment in the amount of the fine.”<sup>133</sup> Chief Justice Burger also once used “punitive effect” to describe the idea that the marginal amount of punishment associated with a year in prison decreases as prison terms increase in duration. Specifically, Chief Justice Burger argued in a dissenting opinion that the Eighth Amendment permits states to execute people who commit serious offenses while already

<sup>128</sup> *Koon v. United States*, 518 U.S. 81, 112 (1996).

<sup>129</sup> Richard A. Posner, *An Economic Theory of the Criminal Law*, 83 COLUM. L. REV. 1193, 1212 (1985).

<sup>130</sup> See *infra* pp. 37–38 and notes 263–272.

<sup>131</sup> See, e.g., *Doe v. Settle*, 24 F.4th 932, 947 (4th Cir. 2022) (“To assess punitive effect, we look to the list of seven factors first compiled in *Kennedy v. Mendoza-Martinez*, 372 US. [144] 168–69 [(1963)] . . . . These factors have been used in a handful of constitutional contexts—Ex Post Facto Clause, Sixth Amendment, and Eighth Amendment—and they create a framework for [determining whether a civil regulation is] . . . a ‘punishment.’”).

<sup>132</sup> *Salley v. United States*, 786 F.2d 546, 548 (2d Cir. 1986) (Newman, J., concurring). At least one district judge within the Second Circuit has used the term punitive effect in the same manner when citing this opinion for this proposition. *Germaine v. United States*, 760 F. Supp. 41, 42 (E.D.N.Y. 1991) (“[I]t is incumbent upon a sentencing judge to consider the length of other sentences, as well as the punitive effect on the defendant, before imposing a consecutive sentence.” (citing *Salley*, 786 F.3d at 548 (Newman, J., concurring))). In addition, at least one other district judge has used the term “punitive effect” to explain a decision to include a conviction for a lesser-included offense within a criminal judgment, without a corresponding sentence, in order to anticipate the potential for vacatur on appeal. *United States v. Fuentes*, 729 F. Supp. 487, 493 (E.D. Va. 1989) (“[L]eaving the [lesser-included offense] conviction intact . . . minimizes the risk that the defendant’s criminal conduct will go unpunished . . . . Any inherent punitive effect flowing from the continuing existence of the merged lesser-included offense conviction, even without a sentence, is outweighed by the interest in ensuring that those convicted of serious crimes do not unjustifiably escape punishment.”).

<sup>133</sup> *United States v. Versaglio*, 85 F.3d 943, 949 (2d Cir. 1996).

serving lengthy sentences, because “the imposition of additional periods of imprisonment would have no incremental punitive effect.”<sup>134</sup>

1. Rulings rejecting arguments that prison conditions should be included among the reasons for sentence reductions

Many judges rejected the notion that changes in prison conditions were cognizable as “extraordinary and compelling reasons” under § 3582(c)(1)(A)(i). Some of these judges concluded that sentence reductions were not the proper legal mechanism for addressing conditions of confinement, while others reasoned that changes could not be “extraordinary” if they affected most or all people in federal prisons. H.S.,<sup>135</sup> who was serving a twenty-year sentence in a private prison in Texas that had contracted with the BOP, moved for a sentence reduction in March 2020.<sup>136</sup> H.S. argued that his status as a seventy-three-year-old with diabetes placed him at heightened risk for serious illness or death if he contracted COVID-19, and that “various conditions of his confinement, including lack of visitation, threats, and the unavailability of a proper diabetic diet” supplied additional “reasons warranting a sentence reduction.”<sup>137</sup> The court denied H.S.’s motion and stated in its decision that § 3582(c)(1)(A)(i) was not “the proper avenue to challenge those alleged conditions.”<sup>138</sup>

J.C., who was serving a 170-month sentence at Beaumont Federal Correctional Institution (FCI) in Texas, moved twice for a sentence reduction on the grounds that he was experiencing persistent symptoms after contracting COVID-19, had received inadequate medical care, and “had been placed in prolonged isolation due to his diagnosis, which affect[ed] his mental health.”<sup>139</sup> The court denied J.C.’s motion and commented that, “[i]nsofar as [J.C.] seeks judicial review of his conditions of confinement . . . he may file a civil rights complaint.”<sup>140</sup>

L.T., who was serving a seven-year sentence at FCI Sheridan in Oregon, moved for release under § 3582(c)(1)(A)(i) in November 2020 and again in July 2021.<sup>141</sup> L.T.’s motion cited his Hepatitis C diagnosis and the fact that the BOP’s “attempt to control the virus in the crowded world of prisons has led to isolation, denial of recreation and programming, and denial of visits and even phone calls.”<sup>142</sup> The court acknowledged that “nearly every incarcerated person . . . has experienced limitations on their ability to communicate, exercise, gain an education, and receive job skills training during the COVID-19 pandemic.”<sup>143</sup> However, the court concluded that “[c]onditions that are shared

<sup>134</sup> *Coker v. Georgia*, 433 U.S. 584, 606 (1977) (Burger, J., dissenting).

<sup>135</sup> The names of the people whose cases this Article discusses are matters of public record. Nevertheless, the main text of this Article identifies individuals by their initials out of recognition that the public nature of § 3582(c)(1)(A)(i) motions compelled people to reveal highly personal information about the hardships they faced while incarcerated during the pandemic.

<sup>136</sup> *United States v. Stevens*, 459 F. Supp. 3d 478, 479–80 (W.D.N.Y. 2020).

<sup>137</sup> *Id.* at 487.

<sup>138</sup> *Id.*

<sup>139</sup> *United States v. Carrera*, No. 3:14-CR-367 (JJB), 2020 WL 7225997, at \*1 (N.D. Tex. Dec. 7, 2020).

<sup>140</sup> *Id.* at \*4 (citing *Melot v. Bergami*, 970 F.3d 596, 599 (5th Cir. 2020)).

<sup>141</sup> *United States v. Thomas*, No. 3:17-CR-51 (SLG), 2021 WL 3924724, at \*1 (D. Alaska Sept. 1, 2021).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at \*2.

by nearly every inmate in the country are not ‘extraordinary and compelling.’”<sup>144</sup>

M.F., who was serving a ten-year sentence at FCI Milan in Michigan, argued in his second motion for a sentence reduction that his body mass index (BMI) of 31 and asthma diagnosis heightened his risk of severe illness or death, and that he had “experienced varying forms of quarantine,” including both “dorm-style quarantines” and “solitary confinement.”<sup>145</sup> The court denied M.F.’s motion and stated that M.F.’s argument “that the pandemic has created a harsher punishment than was intended at sentencing” was “entirely unpersuasive.”<sup>146</sup> The court remarked that “[n]early all Americans experienced some sort of lockdown during the pandemic,” and reasoned that, because “[l]ockdown and related efforts, such as social distancing were necessary steps to minimize the spread of the virus,” M.F.’s arguments relating to changed prison conditions “undercut his position that he fears contracting the virus while incarcerated.”<sup>147</sup>

## 2. Rulings treating changed prison conditions as cognizable but insufficient to justify relief

Some judges indicated that they would be open to treating changes in prison conditions as cognizable under § 3582(c)(1)(A)(ii) but determined that the facts raised in the particular cases before them were insufficient to meet the “extraordinary compelling reasons” standard or outweigh competing § 3553(a) factors. J.A., who was serving a roughly ten-year sentence at FCI Otisville in New York, argued that his obesity and diabetes diagnoses justified his release.<sup>148</sup> In addition, J.A. “request[ed] in the alternative that his sentence be reduced to a time short of time served” because “the conditions of his incarceration have been more harsh – with more confinement and isolation and less programming – as a result of the pandemic.”<sup>149</sup> Regarding J.A.’s argument about the impact of the pandemic on prison conditions, the court stated that it did “not disagree with that assertion as far as it goes.”<sup>150</sup> However, turning to the § 3553(a) sentencing factors, the court reasoned that “the threat [J.A.] poses to public safety by returning to his old ways” weighed “decidedly against a reduction.”<sup>151</sup> The court also commented that, “[t]o reduce J.A.’s sentence, which was at the bottom of the sentencing guidelines range, would not be just punishment and would introduce unwarranted sentencing disparities.”<sup>152</sup> For these reasons, the court concluded that “[r]educing [J.A.]’s sentence because he suffered somewhat harsher conditions than anticipated for what will likely be a year of his term is not consistent with the Court’s obligation, under Section 3553(a), to protect the public and deter the defendant.”<sup>153</sup>

A.F., who was serving a thirty-year sentence at FCI Gilmer in West Virginia, moved for a sentence reduction on grounds that included a spike in COVID-19 infections and

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<sup>144</sup> *Id.*

<sup>145</sup> United States v. Farnsworth, No. 15-CR-20095 (MAG), 2021 WL 4962135, at \*4–5 (E.D. Mich. Oct. 26, 2021).

<sup>146</sup> *Id.* at \*5.

<sup>147</sup> *Id.*

<sup>148</sup> United States v. Agosto, No. 3:17-CR-98, 2021 WL 82088, at \*4–5 (D. Conn. Jan. 11, 2021).

<sup>149</sup> *Id.* at \*5.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

restrictions on movement.<sup>154</sup> The court observed that “[t]he proliferation of COVID-19 cases at FCI Gilm[er] has resulted in conditions more punitive than one otherwise would have expected.”<sup>155</sup> According to the court, this fact, in combination with changes in A.F.’s family circumstances and personal rehabilitation, met the “extraordinary compelling reasons” standard.<sup>156</sup> However, because A.F. “was personally involved in two murders, including the fatal shooting of a person [A.F.] knew to be a confidential informant,” the court concluded that “the 3553(a) factors weigh[ed] against his release or reduction in his sentence.”<sup>157</sup>

### 3. Rulings requiring a close fit between prison conditions and specific medical conditions or ailments

Some judges treated changes in prison conditions as relevant to the extent that they exacerbated specific medical risks or ailments. M.C., who was serving a roughly six-year sentence at FCI Petersburg in Virginia, contended that pandemic-related restrictions had interfered with his treatment for ulcerative colitis.<sup>158</sup> The court agreed that M.C. “had a uniquely difficult time during his incarceration because of his ulcerative colitis, the delay in diagnosis, and the COVID-19 pandemic.”<sup>159</sup> In the court’s view, this meant that “[t]he deterrent and punitive effect of serving a sentence under these conditions is significantly increased.”<sup>160</sup> According to the court, M.C.’s records revealed that “he experienced significant problems from his ulcerative colitis for months before the BOP referred him to a GI specialist.”<sup>161</sup> Specifically, “[e]ven after this referral, nothing happened for three months, and he only obtained the test necessary to accurately diagnose his condition after being hospitalized for acute medical emergency.”<sup>162</sup> As a result, “[h]e lost 15 pounds within a few weeks and he was so dehydrated that doctors contemplated a blood transfusion.”<sup>163</sup> The court stated that M.C.’s “case presents difficult questions,” because “if every defendant who experiences this hardship during their incarceration is entitled to a finding of extraordinary and compelling circumstances, compassionate release would become the exception that swallows the general rule of finality.”<sup>164</sup> Ultimately, the court found that M.C. met the “extraordinary and compelling reasons” standard because his “motion [was] based on the combination and confluence of circumstances surrounding his medical crisis during the pandemic, not on the pandemic alone.”<sup>165</sup>

Turning to the § 3553(a) factors, the court again treated the severity of M.C.’s experience of imprisonment as relevant. The court viewed the “nature and circumstances” of M.C.’s robbery conviction to be “appalling.”<sup>166</sup> However, the court concluded that a

<sup>154</sup> United States v. Flores, No. 97-CR-817 (DC), 2021 WL 368-2054, at \*1–2 (S.D.N.Y. Aug. 19, 2021).

<sup>155</sup> *Id.* at \*2.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at \*3.

<sup>158</sup> United States v. Chavis, No. 1:18-CR-481, 2021 WL 2784653, at \*1–2 (M.D.N.C. July 2, 2021).

<sup>159</sup> *Id.* at \*4.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at \*3.

<sup>165</sup> *Id.* at \*4.

<sup>166</sup> *Id.*

sentence reduction was appropriate because “the length and severity of [M.C.’s] symptoms” meant that “[h]is incarceration has been significantly more punitive than that experienced by most inmates.”<sup>167</sup>

S.H., who was serving a four-and-a-half-year sentence in multiple federal facilities, argued that the combination of several medical conditions and changed prison conditions justified a sentence reduction.<sup>168</sup> Notably, S.H. was vaccinated for COVID-19 by the time the court took up her motion in April 2021.<sup>169</sup> Acknowledging that “the risk to her health posed by COVID-19 may have diminished,” S.H. nevertheless argued that “the conditions of her imprisonment over the last thirteen months constitute[d] ‘extraordinary compelling reasons.’”<sup>170</sup> The court agreed and explained that, “due to the extreme lockdown conditions at the MCC and the MDC, [S.H.] has been unable to receive mental health care, drug abuse treatment, and other important services that the Court envisioned her receiving while incarcerated.”<sup>171</sup> The court reasoned that “harsh conditions of confinement alone are insufficient” under § 3582(c)(1)(A)(i) but concluded that, “given [S.H.]’s serious mental and physical health issues, deprivation of these services for such a prolonged period of time rises to the level of ‘extraordinary compelling reasons’ for compassionate release.”<sup>172</sup> The court also treated these facts as relevant under § 3553(a), stating that “[S.H.]’s offense was serious and deserving of the 52-month term of the prison that she received[, b]ut . . . the Court did not envision [S.H.] to serve this term of imprisonment in near-total lockdown.”<sup>173</sup>

M.Q., who was roughly twenty-one years into a mandatory life sentence, moved for a sentence reduction for reasons that included his hypertension and pre-diabetes diagnoses.<sup>174</sup> As the court observed, “[h]e had been managing these conditions through diet and exercise but prolonged lockdown at Otisville . . . prevented him from following his regimen, leading to increased blood pressure.”<sup>175</sup> Around the same time, M.Q. experienced “chest pain” and “heart irregularities,” and testing revealed the possibility of damaged tissue in his heart.<sup>176</sup> In concluding that M.Q. demonstrated “extraordinary compelling reasons,” the court found that “Otisville’s lockdown—which has lasted in one form or another for 16 months—has prevented [M.Q.] from adequately managing his hypertension and pre-diabetes,” leading in turn “to high blood pressure readings and complaints of chest pain and heart irregularities.”<sup>177</sup> The court reduced M.Q.’s term of imprisonment to time served (approximately twenty-one years), but did not discuss these considerations in connection with the § 3553(a) factors, focusing instead on M.Q.’s record of rehabilitation

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<sup>167</sup> *Id.* at \*5.

<sup>168</sup> *United States v. Hatcher*, No. 18-CR-454-10 (KPF), 2021 WL 1535310, at \*1 (S.D.N.Y. Apr. 19, 2021).

<sup>169</sup> *Id.* at \*2.

<sup>170</sup> *Id.* at \*3.

<sup>171</sup> *Id.* at \*4.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at \*5.

<sup>174</sup> *United States v. Qadar*, No. 00-CR-603 (ARR), 2021 WL 3087956, at \*1–5 (E.D.N.Y. July 22, 2021). The Second Circuit subsequently held that “a mandatory minimum does not preclude a district court from reducing a term of imprisonment on a [§ 3582(c)(1)] motion.” *United States v. Halvon*, 26 F.4th 566, 570 (2d Cir. 2022). The Second Circuit’s opinion noted that “[m]ultiple other circuits have reached the same conclusion implicitly.” *Id.* (citing *United States v. Owens*, 996 F.3d 755 (6th Cir. 2021), and *United States v. Black*, 999 F.3d 1071 (7th Cir. 2021)).

<sup>175</sup> *Qadar*, 2021 WL 3087956, at \*5.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at \*9.

in prison.<sup>178</sup>

#### 4. Rulings treating changed prison conditions as cognizable without requiring connections to specific conditions or ailments

Some judges did not require a close fit between changed prison conditions and specific medical diagnoses. The first decision of this type appears to be the case of L.M., who was less than one month from completing a one-year sentence at FCI Danbury in Connecticut when she obtained release.<sup>179</sup> In reviewing the § 3553(a) factors, the court reasoned that, “[a]lthough the original sentence appropriately balanced the purposes of sentencing,” a reduction would “not diminish the seriousness of the offense or respect for the law.”<sup>180</sup> As the court explained, “[t]he fact that [L.M.] has been incarcerated at FCI-Danbury during a serious outbreak of COVID-19 inside the facility sufficiently increased the severity of the sentence beyond what was originally anticipated.”<sup>181</sup>

Later decisions expanded on this approach and discussed changed prison conditions in more detail. Many of these decisions treated prison conditions as one factor to be considered in combination with medical conditions that, on their own, would not justify release (often because they did not meet the CDC’s criteria for increased risk of serious illness). D.R., who was roughly twenty years into a life sentence at FCI Allenwood in Pennsylvania, obtained a reduction to thirty years in September 2020.<sup>182</sup> The court found that D.R. “suffers from a number of documented health conditions” that “put him at a high risk of severe illness from COVID-19” and therefore “constitute extraordinary and compelling reasons.”<sup>183</sup> The court acknowledged that “[i]t might seem” that D.R.’s vulnerability to serious illness would “support a claim for immediate release,” but “diminish in importance once the pandemic was over.”<sup>184</sup> However, the court reasoned that “this is not entirely so,” because “the pandemic, aside from posing a threat to [D.R.]’s health, has made [D.R.]’s incarceration harsher and more punitive than would otherwise have been the case.”<sup>185</sup> As the court explained, “federal prisons, as ‘prime candidates’ for the spread of the virus . . . have had to impose onerous lockdowns and restrictions that have made the incarceration of prisoners far harsher than normal.”<sup>186</sup>

The court concluded that D.R.’s “risk of suffering severe health consequences . . . coupled [with] the severe conditions imposed by the concomitant lockdowns and restrictions,” caused “the actual severity of [D.R.]’s sentence . . . [to] exceed[ ] what the Court anticipated at the time of sentencing.”<sup>187</sup> According to the court, “[w]hile insufficient on its own,” the impact of these restrictions “weighs in favor of a finding of extraordinary and compelling reasons.”<sup>188</sup>

The court returned to this point when it analyzed the § 3553(a) factors. Although the

<sup>178</sup> *See id.* at \*11–12.

<sup>179</sup> *United States v. Mel*, No. CR TDC-18-0571, 2020 WL 2041674, at \*1–3 (D. Md. Apr. 28, 2020).

<sup>180</sup> *Id.* at \*3.

<sup>181</sup> *Id.*

<sup>182</sup> *United States v. Rodriguez*, 492 F. Supp. 3d 306, 308, 317 (S.D.N.Y. 2020).

<sup>183</sup> *Id.* at 310.

<sup>184</sup> *Id.* at 311.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* (internal citations omitted).

<sup>188</sup> *Id.*

court rejected D.R.’s request for immediate release, the court concluded that a reduction to thirty years was warranted because “the pandemic has rendered [D.R.]’s sentence far harsher and more punitive than the Court had anticipated at sentencing.”<sup>189</sup>

Roughly a year later, a court reduced the sentences of three people imprisoned at FCI Fort Dix in New Jersey based on findings that, “during the COVID-19 pandemic, the conditions of confinement at FCI Fort Dix have been extremely difficult.”<sup>190</sup> As the court explained, all three people contracted COVID-19, but “[e]ven before their positive diagnoses, the situation at Fort Dix in the fall caused emotional suffering and distress,” and “the situation ha[d] been compounded by isolation from the outside world.”<sup>191</sup> According to the court, “[a]ccess to telephone calls” at Fort Dix was “so limited as to be almost non-existent during the pandemic.”<sup>192</sup> The court’s discussions of both the extraordinary and compelling reasons standard and the § 3553(a) factors invoked the idea that “conditions of confinement during this time were substantially more punitive than was contemplated at the time of sentencing.”<sup>193</sup>

Ultimately, the court reduced the three men’s sentences from 181 to 172 months, 240 to 231 months, and 210 to 204 months.<sup>194</sup> The court explained that the person who received a six-month reduction had “a significant criminal history for violence.”<sup>195</sup> Additionally, the court noted that “[h]is bout with the virus was not severe, and there is nothing to indicate that he had other medical needs that were ignored during the pandemic.”<sup>196</sup>

Around the same time, J.R., who was serving a thirty-five-year sentence at FCI Fort Dix, obtained a sentence reduction after the court found that “the pandemic ha[d] spawned conditions of confinement far more punishing than what could have been expected at the time of [J.R.]’s sentencing.”<sup>197</sup> As the court observed, the BOP’s response to COVID-19 “limited inmates’ access to visitors such as family, to counsel, and to rehabilitative, therapeutic, and recreational programs,” and included “onerous lockdowns.”<sup>198</sup> In the court’s view, “[a] day spent in prison under extreme lockdown and a legitimate fear of contracting a once-in-a-century deadly virus exacts a price on a prisoner beyond that imposed by an ordinary day in prison.”<sup>199</sup> The court reasoned that, “[w]hile such conditions are not intended as punishment, incarceration in such circumstances is, unavoidably, experienced as more punishing.”<sup>200</sup> The court found that J.R. had met the “extraordinary and compelling reasons” standard and directed counsel for J.R. and the government to submit briefs on the size of the reduction.

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<sup>189</sup> *Id.* at 316.

<sup>190</sup> *United States v. Newell*, Nos. 1:13-CR-165-1, 1:15-CR-362-1, 1:13-CR-214-2, 2021 WL 3269650, at \*1 (M.D.N.C. July 30, 2021), *appeal dismissed sub nom.* *United States v. Burr*, No. 21-7193, 2021 WL 9299047 (4th Cir. Sept. 22, 2021).

<sup>191</sup> *Id.* at \*3–4.

<sup>192</sup> *Id.* at \*4.

<sup>193</sup> *Id.* at \*5, \*13.

<sup>194</sup> *Id.* at \*13.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *United States v. Robles*, 553 F. Supp. 3d 172, 182 (S.D.N.Y. 2021).

<sup>198</sup> *Id.* at 182–83 (citing *United States v. Salemo*, No. 11-CR-65-01, 2020 WL 2521555, at \*2 (S.D.N.Y. May 17, 2020)).

<sup>199</sup> *Robles*, 553 F. Supp. 3d at 182 (quoting *United States v. Lizardi*, No. 11 Cr. 1032-55 (PAE), 2020 U.S. Dist. LEXIS 188147, at \*10–11 (S.D.N.Y. Oct. 9, 2020)).

<sup>200</sup> *Robles*, 553 F. Supp. 3d at 182 (quoting *Lizardi*, 2020 U.S. Dist. LEXIS 188147, at \*10–11).

One judge went so far as to indicate that burdensome restrictions within prison were more salient than other considerations.<sup>201</sup> J.J.R., who was twenty-seven years into a life sentence at FCI Herlong in California, moved for a sentence reduction on June 3, 2020, for reasons that included his age (seventy-seven years), his vulnerability to infection, and a prison lockdown that had been in effect since March 24, 2020.<sup>202</sup> After discussing J.J.R.’s risk of infection, the court wrote: “More importantly, the Court finds that placing Defendant in solitary confinement for the indefinite future to protect him from contracting COVID-19 is a severe and extreme measure under these circumstances.”<sup>203</sup> As the court recounted, J.J.R. was “isolated in his cell for 22.5 hours a day, despite his elderly age and good behavior.”<sup>204</sup> The court reduced J.J.R.’s life sentence to time served, resulting in his release from prison, and imposed a three-year term of supervised release.<sup>205</sup>

In addition to these decisions by federal district judges, a judge on the Fourth Circuit discussed changed prison conditions in a concurrence for a case addressing the standard of review for § 3582(c)(1)(A)(i) rulings. This judge remarked that “[t]here is good reason to believe that, in some cases, a sentence that was ‘sufficient but not greater than necessary’ before the coronavirus pandemic may no longer meet that criteria.”<sup>206</sup> Echoing the decisions discussed above, the judge wrote that “[a] day in prison under the current conditions is a qualitatively different type of punishment than one day in prison used to be.”<sup>207</sup> As he explained, “[s]ome facilities house inmates who now serve their sentences knowing that they are not equipped to guard against the virus that may result in serious illness or death,” and “[o]ther facilities keep COVID-19 at bay by placing inmates in solitary confinement, ending prison programs, restricting visitation, and limiting access to nonessential medical care.”<sup>208</sup> According to this judge, “[t]hese conditions, not contemplated by the original sentencing court, undoubtedly increase a prison sentence’s punitive effect.”<sup>209</sup>

## II. IMPLICATIONS & LESSONS

The convergence of COVID-19’s arrival in the United States and the FSA’s revisions to the federal sentence reduction statute prompted judges to consider whether prison conditions can change how much punishment a sentence carries out. Title 18, Section 3553(a) commands judges to impose sentences that are “sufficient, but not greater than necessary,” to comply with enumerated sentencing purposes.<sup>210</sup> As summarized above, after hearing of the changes that occurred inside prisons during the pandemic, some judges concluded that the balances they struck under § 3553(a) at initial sentencings had been upended. The § 3582(c)(1)(A)(i) rulings discussing prison conditions thus provide an entry

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<sup>201</sup> *United States v. Regas*, No. 3:91-CR-00057-MMD-NA-1, 2020 WL 2926457, at \*3 (D. Nev. June 3, 2020).

<sup>202</sup> *Id.* at \*1.

<sup>203</sup> *Id.* at \*3.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at \*5.

<sup>206</sup> *United States v. Kibble*, 992 F.3d 326, 335 (4th Cir. 2021) (Gregory, C.J., concurring).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 336.

<sup>210</sup> 18 U.S.C. § 3553(a).

point for examining the relationship between prison conditions and punitive effect. These decisions also supply a rationale for viewing transparency concerning prison conditions as relating to the fairness of sentences.

*A. Whether to Understand Prison Conditions as a Determinant of Punitive Effect Is a System Design Choice*

The sentence reduction rulings that discussed changes in prison conditions during the pandemic unearth important but often overlooked choices for sentencing systems: (1) whether to understand conditions of confinement as a determinant of punitive effect, and, if so, (2) how to respond when conditions become more restrictive. These questions implicate federal law’s requirements of parsimony and proportionality. However, federal statutes’ formal designation of imprisonment as a single type of penalty provided judges with ambiguous guidance on how to proceed. Comparing judges’ approaches during the COVID-19 pandemic reveals the challenges that result from different responses to these questions.

1. Sentencing purposes, parsimony, and proportionality

The contemporary federal sentencing system combines aspects of multiple theories of punishment. Federal law commands judges to craft sentences that will deter future criminal conduct, incapacitate people convicted of crimes to protect the safety of others, facilitate rehabilitation, and provide for “just punishment,” *i.e.*, retribution.<sup>211</sup>

A subsection of the main federal sentencing statute, 18 U.S.C. § 3553(a)(2), translates these ideas into four sets of sentencing “purposes.”<sup>212</sup> The statute does not direct judges to prioritize one set of purposes over the others.<sup>213</sup> Instead, § 3553(a) instructs judges to “consider . . . the need for the sentence imposed—”

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]<sup>214</sup>

Judges weigh these sentencing purposes in connection with other sentencing “factors,” including (1) “the nature and circumstances of the offense,” (2) “the history and

<sup>211</sup> U.S. SENT’G GUIDELINES MANUAL, ch. 1, pt. A (U.S. SENT’G COMM’N 2018).

<sup>212</sup> 18 U.S.C. § 3553(a)(2).

<sup>213</sup> *Id.* § 3553(a).

<sup>214</sup> *Id.* § 3553(a)(2). Notably, § 3582(a) prohibits judges from invoking rehabilitation as a reason for sentencing someone to prison. *Id.* § 3582(a) (“The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”).

characteristics of the defendant,” (3) “the kinds of sentences available,” (4) the applicable ranges of recommended penalties in the U.S. Sentencing Guidelines, (5) policy statements issued by the U.S. Sentencing Commission, (6) “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” and (7) “the need to provide restitution to any victims.”<sup>215</sup>

Federal law requires judges to craft sentences that, measured by these purposes and factors, are parsimonious and proportionate. The parsimony requirement comes directly from the text of § 3553(a), which states that judges must “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [§ 3553(a)(2).]”<sup>216</sup> The U.S. Supreme Court has interpreted the Eighth Amendment’s prohibition on “cruel and unusual punishments” as implying a “narrow proportionality principle” that “forbids only extreme sentences that are ‘grossly disproportionate.’”<sup>217</sup>

The sets of penalties available dictate how federal judges calibrate sentences to meet these requirements. Judges decide how much punishment is sufficient first by selecting between or combining terms of imprisonment, probation, or supervised release.<sup>218</sup> Judges then use the duration of these terms to measure the magnitude or severity of punishment. For terms of probation or supervised release, judges possess discretion to set specific conditions, such as restrictions on travel or requirements to obtain employment or undergo drug testing.<sup>219</sup> Judges also set the amounts of fines and, when applicable, restitution payments.<sup>220</sup>

Most federal criminal sentences include terms of imprisonment, and the duration of a term of imprisonment is therefore the focus of most federal sentencing proceedings. In the fiscal year 2021, there were over 57,000 federal criminal sentences; over 91% of these sentences included a term of imprisonment.<sup>221</sup> In other words, the duration of imprisonment is federal judges’ primary tool for measuring the severity of punishment.

Federal statutes and the Sentencing Guidelines provide structure to help judges craft sentences that are parsimonious and proportionate. Statutes addressing the authorized penalties for specific offenses, known as statutes of conviction, authorize increasing ranges of penalties for more serious offenses. The Sentencing Guidelines provide narrower ranges of recommended penalties through sentencing tables that match two types of case-specific

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<sup>215</sup> *Id.* § 3553(a).

<sup>216</sup> *Id.*

<sup>217</sup> *See* Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring). The Court rarely finds sentences to be disproportionate as a matter of constitutional doctrine. For example, the Court held in 2003 that a twenty-five-year term of imprisonment for stealing three golf clubs worth approximately \$1,200 in total was not disproportionate under the Eighth Amendment, because the person sentenced had prior felony convictions. *Ewing v. California*, 538 U.S. 11, 17–20 (2003).

<sup>218</sup> *See* 18 U.S.C. § 3551. For certain offenses, including all Class A and B felonies, federal law prohibits terms of probation. *Id.* § 3561. In addition, some statutes of conviction require mandatory minimum prison terms. *See, e.g., id.* § 924(c) (requiring mandatory minimum prison terms for weapons possession offenses committed “during and in relation to any crime of violence or drug trafficking crime”). As noted above, terms of supervised release commence upon the conclusion of a term of imprisonment, and violations of the rules of supervised release can lead to reimprisonment. *Id.* § 3583.

<sup>219</sup> *Id.* §§ 3563, 3583(d).

<sup>220</sup> *Id.* §§ 3571, 3663.

<sup>221</sup> U.S. SENT’G COMM’N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 46 tbl. 4, 61 fig. 6 (2022), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021\\_Annual\\_Report\\_and\\_Sourcebook.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf).

“points”—criminal history points and offense levels—with ranges of penalties (terms of probation, imprisonment, and supervised release, as well as amounts of fines).<sup>222</sup> Criminal history points relate to a person’s prior involvement with the criminal legal system, such as past convictions.<sup>223</sup> Offense levels relate to the details of a particular offense, such as the statute of conviction, or whether a weapon was used.<sup>224</sup> The recommended penalty tables use a person’s “criminal history category” as the x-axis and “offense level” as the y-axis to chart recommended sentences.<sup>225</sup> For example, the Guidelines table for terms of imprisonment recommends 24–30 months in prison for a person with a criminal history category of III and an offense level of 15; the recommendation increases to 30–37 months if the criminal history category is IV, or to 27–33 months if the offense level is 16.<sup>226</sup>

Even with this structure, assessing whether a given sentence meets the requirements of parsimony and proportionality is an imprecise task. The different sentencing purposes specified in § 3553(a)(2) correspond with different ways of understanding the magnitude of punishment that a sentence carries out.<sup>227</sup> The durations of terms of imprisonment, probation, and supervised release—as well as the amounts of fines—communicate greater or lesser messages of deterrence and of moral approbation. A longer term of imprisonment also incapacitates a person from causing direct physical harm to people outside prison. Meanwhile, terms of probation and supervised release also further incapacitation, albeit in a different manner.<sup>228</sup> Specific supervision conditions, such as a prohibition on holding an accounting job for a person convicted of fraud, implement different forms and degrees of incapacitation. As to rehabilitation, depending on the resources available inside or outside of prisons, terms of imprisonment or probation provide different degrees of support. At the same time, § 3553(a)(1)’s requirement that judges consider “the nature and circumstances of the offense and the history and characteristics of the defendant” instructs judges to individualize the evaluation of sentencing purposes in each case. In this way, the contemporary federal sentencing framework leaves judges with considerable latitude to focus on different facts or sentencing purposes when measuring the appropriate penalties in specific cases.

<sup>222</sup> 18 U.S.C. § 3559. In 2005, the U.S. Supreme Court held that the tables of recommended penalties in the Sentencing Guidelines are not binding on federal judges. *United States v. Booker*, 543 U.S. 220, 245–46 (2005).

<sup>223</sup> U.S. SENT’G GUIDELINES MANUAL §§ 1B1.1, 4A1.1 (U.S. SENT’G COMM’N 2018).

<sup>224</sup> *See, e.g., id.* § 2A4.1.

<sup>225</sup> *Id.* at ch. 5, pt. A.

<sup>226</sup> *Id.*

<sup>227</sup> The original introduction to the Sentencing Guidelines recounts that the Sentencing Commission struggled “to reconcile the differing perceptions of the purposes of criminal punishment.” *Id.* at ch. 1, pt. A. According to the Guidelines, some people urged the Commission to designate “just deserts,” *i.e.*, retribution, as the primary sentencing purpose, while “[o]thers argue[d] that punishment should be imposed primarily on the basis of practical ‘crime control’ considerations,” *i.e.*, deterrence, incapacitation, and rehabilitation. *See id.*; *see also* Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 470–71 (1992) (observing that “[d]ifferent kinds of sentences will be better or worse at achieving different purposes,” and proposing that the “[Sentencing] Commission could provide guidance by exploring the comparative strengths and weaknesses of different sanctions in achieving different goals”); Richard Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 75–78 (2005) (discussing “conflicts” between different sentencing purposes).

<sup>228</sup> *See* Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 194–96 (2003) (noting that the “variety of sentencing options . . . available to probation decision-makers . . . serv[e], purposefully so, retributive, deterrent, and incapacitative goals”).

## 2. The ambiguous status of imprisonment as a single type of penalty

Contemporary federal statutes appear to designate imprisonment as a single type of penalty, creating an ambiguity that generally goes unnoticed at sentencing proceedings. During initial sentencing hearings, judges measure sentence duration by comparing a person’s conduct and criminal history against the facts underlying sentences handed down in other cases and against the Sentencing Guidelines. In this framework, judges have little reason to pause and consider the conditions of confinement a person might experience.<sup>229</sup> In other words, the question at the forefront of judges’ minds is some form of “should this sentence be as long as the sentence imposed in another case”—not, “what does the experience of imprisonment entail?”

However, understanding imprisonment as effecting a single type or degree of punishment is not a necessary feature of sentencing systems. The BOP uses five “security levels” to categorize federal prisons: minimum, low, medium, high, and administrative.<sup>230</sup> The BOP’s security levels correspond with different degrees of restrictions on movement and access to services. For instance, the BOP describes minimum-security facilities, also called Federal Prison Camps, as featuring “dormitory housing” and “limited or no perimeter fencing.”<sup>231</sup> The BOP also states that minimum-security facilities are “work- and program-oriented.”<sup>232</sup> By contrast, high-security facilities, also known as United States Penitentiaries, “have highly secured perimeters” and feature “close control of inmate movement.”<sup>233</sup>

Currently, the BOP assigns people to prisons after a court imposes a sentence.<sup>234</sup> However, Congress could enact a statute that brings security levels more directly into the sentencing process and within judges’ purview. For example, Congress could authorize higher security levels only for certain convictions, require sentencing courts to make decisions about prison security levels, or mandate that the BOP provide sentencing judges with detailed information about the conditions in prisons to which people are likely to serve their sentences.<sup>235</sup>

Moreover, federal and state statutes have authorized judges to specify certain conditions of confinement as parts of sentences in the past. Although these examples involve authority to impose suffering, they illustrate that treating imprisonment as a single form of punishment is not an inevitable feature of sentencing systems. From 1798 through 1909, federal statutes authorized judges to sentence people to imprisonment at hard labor,

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<sup>229</sup> As discussed below, even if federal judges wanted to envision what conditions of confinement particular people will face, it would be difficult for judges to do this in much detail under current practices. The BOP assigns people to specific facilities only after sentencings have concluded.

<sup>230</sup> *About Our Facilities*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/facilities/federal\\_prisons.jsp](https://www.bop.gov/about/facilities/federal_prisons.jsp) (last visited July 19, 2022).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *See Program Statement 5100.08: Inmate Security Designation and Custody Classification*, FED. BUREAU OF PRISONS (Sept. 4, 2019), [https://www.bop.gov/policy/progstat/5100\\_008cn.pdf](https://www.bop.gov/policy/progstat/5100_008cn.pdf).

<sup>235</sup> Currently, federal judges can recommend assignment to a particular prison or type of prison, but these recommendations are not binding on the BOP. *See* 18 U.S.C. § 3582(a) (permitting courts “to make a recommendation concerning the type of prison facility appropriate for the defendant”).

*i.e.*, forced—and brutal—physical labor.<sup>236</sup> This statutory framework meant that prison conditions sometimes took on legal significance in a manner that treated different forms of imprisonment as different forms of punishment. For example, in *Ex Parte Wilson*, the U.S. Supreme Court held that hard labor is an “infamous punishment” within the meaning of the Fifth Amendment and therefore triggers the right to presentment or indictment by a grand jury.<sup>237</sup> For similar reasons, the Supreme Court held in *In re Bonner* that it was unlawful to imprison a person serving a federal sentence in a state penitentiary unless imprisonment in a state penitentiary is “specifically prescribed, or where the imprisonment ordered is for a period longer than one year, or at hard labor.”<sup>238</sup> According to the Court, the government’s proposition that a valid conviction negates challenges to the place of imprisonment was “certainly not to be tolerated.”<sup>239</sup> As the Court explained, the government’s position would mean that “[i]mprisonment might be accompanied with inconceivable misery and mental suffering, by its solitary character, or other attending circumstances.”<sup>240</sup> In addition to hard labor, some states authorized judges in the past to specify solitary confinement or diets of bread and water as components of sentences.<sup>241</sup>

In a more recent set of cases, federal judges relied on a provision of the Sentencing Guidelines to impose shorter prison terms at initial sentencing in response to violent incidents or predictions about vulnerability to violence. By doing so, these judges treated imprisonment that includes certain types of violent acts, or risks of violence, as imposing more punishment than imprisonment that involves less violence. For these judges, federal statutes’ designation of imprisonment as a single type of penalty did not mean that imprisonment always carries out the same amount of punishment.

In 1989, for example, a judge imposed a shorter sentence upon finding that a person “look[ed] sixteen [years old]” and would therefore be “particularly vulnerable” to attacks by other imprisoned people.<sup>242</sup> According to the sentencing court, officials at the jail in

<sup>236</sup> See *United States v. Ramirez*, 556 F.2d 909, 911–15 (9th Cir. 1976); Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 409–15 (2009).

<sup>237</sup> *Ex parte Wilson*, 114 U.S. 417, 427–29 (1885).

<sup>238</sup> *In re Bonner*, 151 U.S. 242, 254, 261–62 (1894).

<sup>239</sup> *Id.* at 258.

<sup>240</sup> *Id.*

<sup>241</sup> *E.g.*, WASH. REV. CODE § 10.64.060 (2016) (“In every case where imprisonment in the penitentiary is awarded against any convict . . . he or she [may] be punished by confinement at hard labor; and he or she may also be sentenced to solitary imprisonment for such term as the court shall direct, not exceeding twenty days at any one time; and in the execution of such punishment the solitary shall precede the punishment by hard labor, unless the court shall otherwise order.”); NEB. REV. STAT. § 569 (1913) (“When any court or magistrate shall sentence any convict to imprisonment in the jail of the county . . . , the judgment and sentence shall require that the convict be . . . kept at hard labor in the jail; and when the imprisonment is to be without labor, the sentence may require the convict to be fed on bread and water only, the whole or any part of the term of imprisonment.”). I am grateful to Wynne Muscatine Graham for sharing her research on this topic.

<sup>242</sup> *United States v. Lara*, 905 F.2d 599, 601–02 (2d Cir. 1990); see also *United States v. Parish*, 308 F.3d 1025, 1033 (9th Cir. 2002) (affirming the district court’s application of a downward departure upon finding that a person “was susceptible to abuse in prison because of a ‘combination’ of factors,” including “his stature, his demeanor, [and] his naivete”); *United States v. Mateo*, 299 F. Supp. 2d 201, 211–12 (S.D.N.Y. 2004) (departing downward because a person had experienced “sexual abuse by a prison guard and the birth of a child without medical attention” while detained pretrial); *United States v. Francis*, 129 F. Supp. 2d 612, 614–20 (S.D.N.Y. 2001) (departing downward because a person had endured “physical attacks, significant weight loss, stress, depression, insomnia, and fear” while detained pretrial).

which the person was detained pending trial had resorted to “placing [the person] in solitary confinement,” for fear that the person would be attacked if held elsewhere in the jail.<sup>243</sup> At the time, the Sentencing Guidelines were binding on federal judges, and judges could hand down sentences shorter than what the Guidelines’ sentencing tables recommended only upon finding: (1) a basis for a “downward departure” enumerated in the Guidelines; or (2) “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the . . . [G]uidelines.”<sup>244</sup> The court concluded that “[e]xtreme vulnerability of criminal defendants is a factor that was not adequately considered by the Commission and a proper ground for departure.”<sup>245</sup>

In 1996, the Supreme Court endorsed this approach when it upheld the application of downward departures for the former police officers who beat Rodney King.<sup>246</sup> According to the Court, the sentencing judge had acted in accordance with the Guidelines when concluding that the former officers were “particularly likely to be targets of abuse during their incarceration” and should therefore serve shorter prison terms.<sup>247</sup>

The impact of the COVID-19 pandemic on U.S. prisons and the FSA’s amendments to § 3582(c) created a perfect storm that laid bare, in a more sweeping fashion, the puzzles that result from federal statutes’ treatment of imprisonment as a single type of penalty. By prompting judges to reassess prison sentences at a time when information about people’s actual experiences in prison was available,<sup>248</sup> § 3582(c) invited judges to expand the proposition underlying the vulnerability cases—that certain aspects of life inside prison can turn a sentence into a greater punishment. The life-or-death stakes involved, together with the short amount of time between the enactment of the FSA and the arrival of the pandemic, meant that judges needed to act quickly and without the benefit of a large body of judicial precedents interpreting the “extraordinary and compelling reasons” standard. Further, by instructing judges “to reduce” sentences, § 3582(c)’s text shifted the question of the appropriate remedy from whether a court should order immediate release to how much of a reduction was warranted.<sup>249</sup> Finally, the ubiquity of the pandemic and the consensus that prisons were uniquely vulnerable to outbreaks of infections may have made judges more receptive to complaints about conditions of confinement than they would have otherwise been.

The § 3582(c)(1)(A)(i) rulings thus emphasized to judges, in an unprecedented manner, the reality that prison sentences do not come with uniform conditions of confinement, and that the day-to-day experience of prison life can change significantly after a judge has handed down a sentence. A strict insistence on defining imprisonment

<sup>243</sup> *Lara*, 905 F.2d at 601.

<sup>244</sup> *See id.* at 601–02 (citing 18 U.S.C. § 3553(b) (1988)).

<sup>245</sup> *Id.* at 605.

<sup>246</sup> *Koon v. United States*, 518 U.S. 81, 111–12 (1996).

<sup>247</sup> *Id.*

<sup>248</sup> *See Sarah French Russell, Second Looks at Sentences Under the First Step Act*, 32 FED. SENT’G REP. 76, 81 (2019) (“In reviewing First Step Act motions, judges will also learn more about the realities of prison sentences . . . Judges may hear about prisoners’ lack of access to adequate medical care and rehabilitative programs, about exposure to violence in the prison, and about time spent locked down in cells or isolated in solitary confinement.”).

<sup>249</sup> *See United States v. Brooker*, 976 F.3d 228, 237 (2020) (“It bears remembering that compassionate release is a misnomer. 18 U.S.C. § 3582(c)(1)(A) in fact speaks of sentence reductions. A district court could, for instance, reduce but not eliminate a defendant’s prison sentence, or end the term of imprisonment but impose a significant term of probation or supervised release in its place.”).

without regard to conditions of confinement does not make this reality go away. On the other hand, achieving consistency and fairness between cases in a system that recognizes a connection between prison conditions and punitive effect will be challenging as a matter of design and administration.

Sentencing systems can define imprisonment as including all variations in conditions of confinement, such that exposure to these variations in conditions is part of what it means to be punished by imprisonment. In other words, a one-year prison term in this framework might be described more accurately as a year in prison featuring whatever conditions of confinement happen to unfold.

By contrast, a system could choose instead to define imprisonment in a manner that encompasses an understanding that changes in prison conditions correspond with changes in the amount of punishment that prison carries out. Thus, under this definition of imprisonment as punishment, both the duration and conditions of a prison term play a role in determining punitive effect. As discussed below, however, this definition of imprisonment raises thorny questions regarding how to compare changes in conditions and duration.

Contemporary federal law does not provide a definite answer between these views of the relationship between prison conditions and punitive effect, and the judges in the cases summarized above were forced to grapple with this puzzle amid extraordinary pressures. The judges who rejected the idea that § 3582(c)(1)(A)(i) motions are an appropriate vehicle for responding to changes in prison conditions described a system in which changes in conditions of confinement never bear on the severity or proportionality of a prison sentence in a manner that is legally cognizable.<sup>250</sup> In this model of federal sentencing, the determinants of punitive effect are the form of a penalty, as specified in a statute, and the penalty's duration (or, in the case of a fine or restitution, the amount). To the extent that prison conditions might be understood as bearing on how much punishment imprisonment carries out in this model, such relationships are viewed as unquantifiable or, at the very least, too challenging to measure to justify doing so.

In other words, under this approach, changes in prison conditions may alter the objective experience of prison, but such changes definitionally cannot alter a sentence's punitive effect. If conditions of confinement violate the Eighth Amendment or statutory protections, imprisoned people may be entitled to damages or injunctive relief. Thus, when J.C. moved for a reduction on grounds that included inadequate medical care and "prolonged isolation . . . which affected his mental health," the court responded that, "[i]nsofar as [J.C.] seeks judicial review of his conditions of confinement . . . he may file a civil rights complaint."<sup>251</sup> However, if a person were to obtain release from prison through an injunction, this would not be because prison turned into too severe of a punishment in the sense of inflicting too much of a lawful punishment, but rather that imprisonment had included or become an altogether unlawful form of punishment.<sup>252</sup>

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<sup>250</sup> See *supra* Part I.B.1.

<sup>251</sup> United States v. Carrera, No. 3:14-CR-367 (JJB), 2020 WL 7225997, at \*4 (N.D. Tex. Dec. 7, 2020). (citing *Merlot v. Bergami*, 2020 WL 4782058, at \*2 (5th Cir. 2020)).

<sup>252</sup> Cf. *Brown v. Plata*, 563 U.S. 493, 511 (2011) ("A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."); *id.* at 539–45 (upholding an injunction capping California's prison population at 137.5% of its prison system's design capacity because overcrowding was preventing California's prison system from providing constitutionally adequate medical care).

Accordingly, sentence reductions are not an appropriate remedy for changed prison conditions in this model.

By contrast, the judges who viewed changes in prison conditions as cognizable in § 3582(c)(1)(A)(i) proceedings—both the judges who required a fit between changed prison conditions and a specific medical condition and those who did not—described a system in which conditions of confinement play a role in determining punitive effect. The judges who required connections to specific medical ailments used the concept of compassionate release to supply a limiting principle for which people could receive sentence reductions.<sup>253</sup> However, both sets of judges endorsed the idea that certain departures outside a normal or standard range of prison conditions can increase a sentence’s punitive effect and thereby justify a rebalancing of sentencing purposes to meet § 3553(a)’s parsimony requirement.

All of these interpretations were reasonably available to judges, given federal law’s silence on the relationship between prison conditions and punitive effect.<sup>254</sup> On the one hand, federal statutes’ designation of imprisonment as a single type of penalty can be read to suggest that judges should never understand changes in prison conditions as altering punitive effect. However, the existence of a “safety valve” provision such as § 3582(c)(1)(A)(i) complicates this analysis. The text of § 3582(c)(1)(A)(i) implies a broad, equitable power and thereby opens the door to interpretations of “extraordinary and compelling reasons” for sentence reductions as including changes in prison conditions understood by Congress, judges, the BOP, and/or the Sentencing Commission to increase punitive effect. Given the deference that federal law customarily affords to federal judges for discretionary sentencing matters, interpreting the “extraordinary and compelling reasons” standard as encompassing at least some of the drastic changes that occurred during the pandemic was a reasonable application of this text.<sup>255</sup>

Further, even without § 3582(c)(1)(A)(i)’s reference to “extraordinary and compelling” circumstances, the availability of probation as a penalty impliedly recognizes that something more than duration determines punitive effect. A year in prison is a greater punishment than a year of probation because the restrictions and hardships that imprisonment entails are more severe than those associated with probation. Justice Blackmun once made an analogous observation, remarking that a term of imprisonment served in “a prison characterized by rampant violence and terror” is “a more extreme punishment” than the same amount of time spent in “a relatively safe, well-managed

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<sup>253</sup> See *supra* Part I.B.3.

<sup>254</sup> This is not an Article about which reading of § 3582(c)(1)(A)(i) was superior as a matter of statutory interpretation. Rather, this Article aims to derive lessons from considering the full set of interpretations together.

<sup>255</sup> See *Pepper v. United States*, 562 U.S. 476, 480 (2011) (“This Court has long recognized that sentencing judges ‘exercise a wide discretion’ in the types of evidence they may consider when imposing sentence . . . .” (quoting *Williams v. New York*, 337 U.S. 241, 246–47 (1949))). In July 2022, after the rulings discussed in Part I.B of this Article had been decided, the Supreme Court held that federal judges presiding over resentencing proceedings pursuant to § 404 of the First Step Act may “consider intervening changes of law or fact in exercising their discretion to reduce a sentence,” unless statutory language specifically prohibits such consideration. *Concepcion v. United States*, 142 S. Ct. 2389, 2400–04 (2022). Section 404 of the First Step Act responded to decreases in the authorized prison terms for crimes involving crack cocaine by permitting federal judges to “impose a reduced sentence” for people whose initial sentences had been the product of the old statutes that called for longer sentences. *Id.* at 2396–97 (citing First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018)).

prison.”<sup>256</sup> Moreover, as noted above, the cases granting downward departures for vulnerability to violence—including a decision upheld by the Supreme Court—treated prison terms that involve certain incidents or risks as carrying out more punishment than imprisonment that does not include such conditions.<sup>257</sup>

Some of the rulings summarized above expressly connected changes in prison conditions to the purposes enumerated in § 3553(a) and thereby constructed theoretical accounts for why prison conditions might impact punitive effect under federal law.<sup>258</sup> For example, the court that granted M.C.’s motion reasoned that M.C.’s experience dealing with ulcerative colitis amidst pandemic-era restrictions within prison “significantly increased [the] deterrent and punitive effect of serving a sentence.”<sup>259</sup> In other words, changes in prison conditions can alter the deterrent message of imprisonment.

Similarly, changes in prison conditions that make the experience of imprisonment substantially more severe can be understood as increasing a sentence’s retributive effect. The court that granted D.R.’s motion reasoned that, although immediate release “would not reflect the seriousness of, or provide just punishment for, his egregious participation in a brutal murder,” a reduction to a 30-year term of imprisonment would satisfy these purposes.<sup>260</sup>

Perhaps most obviously, changes in prison conditions can impact a prison term’s capacity to facilitate rehabilitation and provide medical and mental health care. For example, the court that granted S.H.’s motion emphasized in its discussion of the § 3553(a) factors that “the Court did not envision [S.H.] to serve this term of imprisonment in near-total lockdown, without the mental health and other support programs that the Court believes to be critical to her health and ability to reenter society.”<sup>261</sup> Likewise, the court that granted M.Q.’s motion observed that M.Q. “struggled to receive a follow-up cardiologist appointment for several months,” frustrating “the need for . . . medical care, or other correctional treatment.”<sup>262</sup>

Though these rulings did not involve constitutional claims—and a discussion of whether the Constitution would ever require sentence reductions is beyond the scope of this Article—it bears noting that some of the literature discussing the Supreme Court’s Eighth Amendment proportionality jurisprudence has raised the idea that conditions of confinement can alter punitive effect. For example, Professor Alexander Reinert has written that judges should release or grant sentence reductions to people who have

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<sup>256</sup> *Farmer v. Brennan*, 511 U.S. 825, 855 (1994) (Blackmun, J., dissenting). Similarly, a member of the U.S. Sentencing Commission once observed that, “[m]y own experience as a correctional administrator ma[d]e[] me aware that one month in an institution previously operated by me and one month in some other institution even in the same state would not result in an equivalent period of time.” Helen G. Corrothers, *The Federal Offender: A Program of Intermediate Punishments*, 4 FED. SENT’G REP. 23, 25 (199).

<sup>257</sup> See *Koon v. United States*, 518 U.S. 81, 111–12 (1996) (holding that it was within the district court’s discretion to grant a downward departure for “susceptibility to abuse in prison”).

<sup>258</sup> Professor Alexander Reinert includes similar points in support of his argument that release and sentence reductions should be available as remedies for past Eighth Amendment violations. See Reinert, *infra* note, 263, at 1608–22.

<sup>259</sup> *United States v. Chavis*, No. 1:18-CR-481, 2021 WL 2784653, at \*4 (M.D.N.C. July 2, 2021).

<sup>260</sup> *United States v. Rodriguez*, 492 F. Supp. 3d 306, 308, 313 (S.D.N.Y. 2020).

<sup>261</sup> *United States v. Hatcher*, No. 18-CR-454-10 (KPF), 2021 WL 1535310, at \*5 (S.D.N.Y. Apr. 19, 2021).

<sup>262</sup> *United States v. Qadar*, No. 00-CR-603 (ARR), 2021 WL 308-7956, at \*12 (E.D.N.Y. July 22, 2021).

experienced conditions that violate the Eighth Amendment.<sup>263</sup> Professor Reinert uses a hypothetical statute specifying imprisonment with an unconstitutional condition of confinement to support his argument.<sup>264</sup> Under prevailing Eighth Amendment doctrine, a judge could strike down such a statute, at least in part, prior to the start of a prison sentence.<sup>265</sup> However, a person who experienced the same unconstitutional condition of confinement, but who could not show that it was ongoing, would not obtain release or a sentence reduction under current doctrine.<sup>266</sup> Professor Reinert argues that courts should interpret the Eighth Amendment to authorize such an individual to obtain release or a reduction, because certain types of Eighth Amendment violations “exhaust the State’s authority or capacity to punish.”<sup>267</sup>

Similarly, Professor Sharon Dolovich has argued that the deliberate indifference standard fails to recognize the role of prison conditions as punishment. Under the Supreme Court’s current interpretation of the Eighth Amendment’s text, a prison condition only counts as punishment for the purposes of an Eighth Amendment claim if it is “inflicted”<sup>268</sup>—meaning that it is “formally meted out *as punishment*” or results from the “deliberate indifference” of correctional officers.<sup>269</sup> As Dolovich observes, this standard ignores that, “once a person is sentenced to prison . . . she is consigned to the custody of prison officials whose acts or omissions will determine the conditions under which she will serve her sentence.”<sup>270</sup> In Dolovich’s view, “[i]t is thus implausible to suggest that, because the particular conditions of . . . confinement are determined by prison officials after the fact and not by the legislature or the judge . . . those conditions are somehow not part of the penalty the sentence represents.”<sup>271</sup> As a result, although “[w]e are used to thinking of prison sentences in terms of length . . . the severity of the punishment ultimately depends on the conditions of confinement.”<sup>272</sup>

These critiques of the Supreme Court’s Eighth Amendment jurisprudence reflect that the idea that prison conditions are a determinant of punitive effect is not novel. However, the Court’s particular interpretation of the word “inflicted,” as it is used in the Eighth Amendment, has stymied further exploration of this idea in this context. By contrast, and as noted above, sentencing is an area in which federal district judges possess considerable discretion, and the Supreme Court has endorsed consideration of at least

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<sup>263</sup> Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575, 1578 (2012); see also Julia A. Torti, Note, *Accounting for Punishment in Proportionality Review*, 88 N.Y.U. L. REV. 1908, 1945–49 (2013) (arguing that the test articulated by the U.S. Supreme Court for assessing proportionality under the Eighth Amendment should encompass conditions of confinement because “analyzing the nature of a punishment as if it were separable from a sentence’s length is not faithful to the lived experience of a prison sentence.”).

<sup>264</sup> Reinert, *supra* note 263, at 1603–07.

<sup>265</sup> *Id.* at 1603.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> The full text of the Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

<sup>269</sup> *Wilson v. Seiter*, 501 U.S. 294, 299–303 (1991).

<sup>270</sup> Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 900 (2009).

<sup>271</sup> *Id.* at 900–01.

<sup>272</sup> *Id.* at 913; see also Torti, *supra* note 263, at 1934 (“The conditions in which a sentence is served and the experiences of an inmate in prison both contribute to a sentence’s harshness.”).

certain prison conditions under § 3553(a).<sup>273</sup>

### 3. Challenges for sentence reductions

For systems that choose to offer sentence reductions in response to changes in prison conditions, the pandemic-era § 3582(c)(1)(A)(i) rulings highlighted the complexity of measuring and comparing how changes in prison conditions impact punitive effect. The cases underscore that, while the proposition that prison conditions bear on how much punishment a sentence carries out might appear simple, quantifying how much particular changes alter punitive effect is highly subjective.<sup>274</sup>

Although judges acknowledged that all people in federal custody endured the hardships of lockdowns and other pandemic-related restrictions, no judge interpreted the “extraordinary and compelling reasons” standard as applying to all people held in federal prisons. Instead, judges sought to articulate reasons that distinguished the experiences of certain people as justifying sentence reductions. However, the rulings do not reflect an organized framework regarding which people should receive sentence reductions, of what size, and in response to what types of changes.<sup>275</sup> For example, the rulings do not attempt to articulate a rule for translating time spent in lockdowns into the size of sentence reductions. One judge wrote that “[a] two-week confinement in solitary quarantine in a higher security facility is the equivalent of two months in [a minimum-security] Camp,” but provided no methodology or rationale for this conclusion.<sup>276</sup>

Further, § 3582(c)(1)(A)’s requirement that judges reassess the § 3553(a) factors meant that the same changes in prison conditions could justify sentence reductions for some people but not for others. Many judges, after finding that a person demonstrated “extraordinary and compelling reasons” through changed prison conditions, declined to

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<sup>273</sup> See *Koon v. United States*, 518 U.S. 81, 111–12 (1996). In addition, “[a]lthough the modern Supreme Court has not engaged in a rigorous analysis of conditions of confinement during proportionality review, some historical precedents can be read as engaging in this type of analysis, and no decisions have foreclosed it.” Torti, *supra* note 263, at 1936 (discussing *Weems v. United States*, 217 U.S. 349 (1910), and *Rummel v. Estelle*, 445 U.S. 263 (1980)).

<sup>274</sup> The subjective nature of this inquiry creates opportunities for biased or otherwise arbitrary decision-making. As noted above, critics of the federal parole system argued that the broad discretion afforded to the U.S. Parole Commission led to racially disparate outcomes, and reports have documented racially disparate outcomes in contemporary state parole systems. See Stith & Koh, *supra* note 47; *Race and Noncapital Sentencing*, *supra* note 47; Winerip, Schwirtz, & Gebeloff, *supra* note 47.

<sup>275</sup> This problem of inconsistent application is not unique to § 3582(c)(1)(A)(i) rulings that treat changes in prison conditions as a determinant of punitive effect. According to the U.S. Sentencing Commission’s Data Report for all § 3582(c)(1)(A) rulings during 2020 and 2021, grant rates varied considerably by federal judicial district. Among districts with over 200 such rulings, grant rates ranged from 1.7% (Southern District of Mississippi: 12 out of 207 motions granted) to 40.0% (District of Connecticut: 86 of 215). The range of grant rates was also broad among the seven districts with over 500 rulings, ranging from 4.6% (Northern District of Texas: 25 of 542) to 34.2% (District of Maryland: 193 of 564). *Compassionate Release Data Report*, *supra* note 115, at 5 tbl. 2. In certain districts, such as Connecticut, higher grant rates resulted, at least in part, from large outbreaks of infections at nearby BOP facilities. See *Memorandum for Director of Bureau of Prison: Increasing Use of Home Confinement at Institutions Most Affected by COVID-19*, OFF. OF ATT’Y GEN., DEP’T OF JUSTICE (Apr. 3, 2020), <https://www.justice.gov/file/1266661/download> (identifying FCI Danbury, located in Connecticut, as among the BOP facilities “experiencing significant levels of infection”).

<sup>276</sup> *United States v. MacFarlane*, 438 F. Supp. 3d 125, 127 (D. Mass. 2020).

order sentence reductions upon finding that other § 3553(a) factors predominated.<sup>277</sup>

In the ruling addressing motions filed by three people held at FCI Fort Dix, conditions at the same prison during the same time period did not correspond with equal reductions. According to the court, all three people contracted COVID-19 due in part to the missteps of correctional officials, “endured terrible living conditions . . . [for] several months,” and faced barriers to communicating with the outside world.<sup>278</sup> Yet, the court determined, through application of the § 3553(a) factors, that a six-month reduction was warranted for one of the three people—instead of the nine-month reductions ordered for the other two—because the third person “ha[d] a significant criminal history for violence” and “[h]is bout with the virus was not severe.”<sup>279</sup>

Judge Posner anticipated analogous challenges in his article, *An Economic Theory of the Criminal Law*. In the course of theorizing how to construct optimally efficient criminal penalties, Judge Posner observes that “the severity of punishment can be varied other than by varying the length of imprisonment” by accounting for certain aspects of life in prison, such as “[s]ize of prison cell, temperature, and quality of food.”<sup>280</sup> However, Judge Posner concludes that, “this would make information about sanctions very costly, because there would be so many dimensions to evaluate.”<sup>281</sup> In contrast, “[t]ime has the attractive characteristic of being one-dimensional.”<sup>282</sup>

Likewise, Professor Reinert refers to the challenge of translating the magnitude of Eighth Amendment violations into the duration of reductions as “the commensurability problem.”<sup>283</sup> Relying on the vulnerability-to-violence decisions for support, Reinert reasons that “[c]ommensurability is a complex problem, but it is not impossible to resolve judicially.”<sup>284</sup> According to Reinert, “[c]ourts might rely on a framework similar to the Federal Sentencing Guidelines so that particular kinds of mistreatment are associated with different levels of reductions.”<sup>285</sup>

Of course, whether to authorize sentence reductions for changes in prison conditions is not an all-or-nothing proposition. A comparison to federal law concerning the duration of prison sentences is instructive. Statutory limits strictly circumscribe the duration of terms of imprisonment; one day over a statutory limit is illegal.<sup>286</sup> In addition, the Supreme Court has interpreted the Sixth Amendment as requiring juries to find any facts that alter statutory durational ranges.<sup>287</sup> When compared with these strict rules governing the duration of imprisonment, offering reductions for at least certain types of changes in prison conditions might represent a modest effort to enforce parsimony and proportionality.

<sup>277</sup> See *supra* Part I.B.2.

<sup>278</sup> *United States v. Newell*, Nos. 1:13-CR-165-1, 1:15-CR-362-1, 1:13-CR-214-2, 2021 WL 3269650, at \*2–4, \*9, \*13 (M.D.N.C. July 30, 2021), *appeal dismissed sub nom.* *United States v. Burr*, No. 21-7193, 2021 WL 9299047 (4th Cir. Sept. 22, 2021).

<sup>279</sup> *Id.* at \*13.

<sup>280</sup> Posner, *supra* note 129, at 1212.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> Reinert, *supra* note 263, at 1628–30.

<sup>284</sup> *Id.* (citing *United States v. Francis*, 129 F. Supp. 2d 612, 619–20 (S.D.N.Y. 2001); *United States v. Pressley*, 345 F.3d 1205, 1219 (11th Cir. 2003); and *United States v. Rodriguez*, 213 F. Supp. 2d 1298, 1303 (M.D. Ala. 2002)) (other citations omitted).

<sup>285</sup> Reinert, *supra* note 263, at 1623.

<sup>286</sup> See *Alleyne v. United States*, 570 U.S. 99, 103 (2013).

<sup>287</sup> *Id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000)).

Compassionate release mechanisms with clear criteria for immediate release are one piece of this puzzle. These types of provisions advance parsimony by identifying people for whom any continued imprisonment would be too great of a punishment. The BOP appeared to have this type of mechanism in mind when it issued memoranda and regulations implementing § 3582(c). Although the OIG report found that the BOP's criteria were unduly stringent, the push for clear criteria reflects an appropriate concern for avoiding inconsistent or arbitrary outcomes across cases.

A statute enacted in New Jersey and bill proposed in Delaware raise the possibility of using standardized sentence credits to address certain prison conditions.<sup>288</sup> Under New Jersey's statute, if a declared public health emergency causes "substantial modifications to department-wide correctional facility operations," then people who are within 365 days of release receive "public health emergency credits" for "122 days for each month . . . served during the declared emergency."<sup>289</sup> The statute caps credits at 244 days and excludes people convicted of certain offenses from receiving credits.<sup>290</sup> In effect, the statute represents a legislative judgment that a day in prison during a public health emergency is equivalent to approximately four days in prison under normal circumstances. When the statute first went into effect in November 2020, over 2,000 people became eligible for release.<sup>291</sup> Delaware's bill, introduced in December 2020, would have awarded "Public health emergency credits" to reduce sentences by "182 days for each month, or portion thereof served during the declared [COVID-19] emergency."<sup>292</sup> However, the bill did not reach a full vote.<sup>293</sup>

These types of provisions could be adapted to automate sentence credits for more easily measurable aspects of prison life, such as lockdowns. Once more is known about the frequency, nature, and causes of these types of restrictions, legislators could consider using this information to expand existing sentence credit systems to address time spent in facility- or unit-wide lockdowns. One potential organizing principle would be to link credits to the number of hours people are confined to their cells. For example, if people in a particular prison system are generally permitted to be outside of their cells for up to 15 hours each day, then each day spent with only three hours permitted out of cell might result in a four-day credit (treating the day spent with only three hours out of cell as equivalent to five days in prison not under lockdown). Alternatively, a credit system could grant different types of lockdown credits depending on which aspects of prison life are suspended during the

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<sup>288</sup> In addition, the California Department of Corrections and Rehabilitation ordered a one-time award of credits for time spent in prison during the COVID-19 pandemic. Memorandum, *Positive Programming Credits*, CAL. DEP'T OF CORR. & REHAB. (July 9, 2020), <https://www.cdcr.ca.gov/covid19/memo-positive-programming-credits/>. However, this policy did not respond directly to the harshness of living under lockdowns but instead to the fact that lockdowns had prevented people from completing credit-bearing programs. *See id.*; *see also* Emily Widra & Wanda Bertram, *More States Need to Use Their "Good Time" Systems to Get People Out of Prison During COVID-19*, PRISON POL'Y INITIATIVE (Jan. 12, 2021), <https://www.prisonpolicy.org/blog/2021/01/12/good-time/>.

<sup>289</sup> N.J. STAT. ANN. § 30:4-123.100(a) (2020).

<sup>290</sup> *Id.* at (c)–(d).

<sup>291</sup> *See* Tracey Tully, 2,258 *N.J. Prisoners Will Be Released in a Single Day*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/nyregion/nj-prisoner-release-covid.html>.

<sup>292</sup> An Act to Amend Title 11 of the Delaware Code Relating to Public Health Emergency Credits, H.B. 37, 151st Gen. Assemb. (Del. 2020), <https://legis.delaware.gov/BillDetail?LegislationId=48220>.

<sup>293</sup> *Id.* (reflecting no events under "Action History" after "4/1/21," the date of which corresponds to the last action of "Assigned to Appropriations Committee in House") (last visited July 20, 2022).

lockdown. For example, a lockdown that interferes with the provision of medical care or visits from friends and family might trigger more credits than a lockdown that does not interfere with these aspects of imprisonment.

Moreover, the fact that some aspects of prison life, such as the hardships of living with a serious illness, are less conducive to comparative measurement does not mean that sentence reductions could never take them into account. Much of sentencing involves a degree of arbitrary line-drawing—whether at the moment a legislature decides that the maximum term for a given offense should be set at fifteen years, as opposed to ten or twenty years; or when a judge determines that a person’s “history and characteristics”<sup>294</sup> justify a slightly shorter prison term. For aspects of prison life that require a greater amount of subjective decision-making, legislators and other policymakers should consider recommended sentencing ranges of the type used in the Federal Sentencing Guidelines.<sup>295</sup> As discussed below, however, thorough data collection and analysis concerning prison conditions is a prerequisite for informed decisions regarding whether and how to respond to changes within prisons.

### *B. Transparency Surrounding Prison Conditions Relates to the Fairness of Sentences*

The rulings discussed in this Article illustrate that information about prison conditions matters not only for the wellbeing of incarcerated people and enforcing constitutional and statutory protections, but also for ensuring parsimony and proportionality in sentencing. As summarized above, several of the judges who addressed § 3582(c)(1)(A)(i) motions—including judges who denied such requests—determined that changes in prison conditions during the pandemic upended the balances they had struck at initial sentencings.<sup>296</sup> Thus, in systems that recognize prison conditions as a determinant of punitive effect, a clear understanding of conditions of confinement is a prerequisite for ensuring that sentences do not become greater punishments after they commence. Moreover, by highlighting the aspects of the pandemic’s impact that judges connected to

<sup>294</sup> 18 U.S.C. § 3553(a)(1).

<sup>295</sup> The Sentencing Commission once considered including “exchange rates” in the Guidelines Manual comparing time spent in “intermediate punishments” with time spent in prison. *See Corrothers, supra* note 256, at 24–25. For example, “Home Detention” would have had the “equivalency to imprisonment of 2 days to 1 day of prison,” and a six-month “Regimented Discipline Unit (Shock Incarceration/Boot Camp)” would have served as a “substitute for the period of from 12 to 30 months in prison.” *Id.* at 24.

<sup>296</sup> *See, e.g., United States v. Olawoye*, 477 F. Supp. 3d 1159, 1166 (D. Or. 2020) (“The sentence defendant has served has undoubtedly been harsher than the one originally contemplated at the time of sentencing.”); *United States v. Newell*, Nos. 1:13-CR-165-1, 1:15-CR-362-1, 1:13-CR-214-2, 2021 WL 3269650, at \*13 (M.D.N.C. July 30, 2021) *appeal dismissed sub nom.* *United States v. Burr*, No. 21-7193, 2021 WL 9299047 (4th Cir. Sept. 22, 2021) (“[T]he conditions of confinement during this time were substantially more punitive than was contemplated at the time of sentencing.”); *United States v. Hatcher*, No. 18 Cr. 454-10 (KPF), 2021 WL 1535310, at \*5 (S.D.N.Y. Apr. 19, 2021) (“[T]he Court did not envision [S.H.] to serve this term of imprisonment in near-total lockdown, without the mental health and other support programs that the Court believes to be critical to her health and ability to reenter society.”); *United States v. Pacheco*, No. 12-CR-408 (JMF), 2020 WL 4350257, at \*2 (S.D.N.Y. July 29, 2020) (“On February 12, 2020, the Court found that an eight-month sentence was sufficient, but no greater than necessary, to achieve the purposes of sentencing,” but “[t]he balance weighs differently . . . in the current circumstances.”); *United States v. Mel*, No. TDC-18-0571, 2020 WL 2041674, at \*3 (D. Md. Apr. 28, 2020) (“Indeed, the actual severity of the sentence as a result of the COVID-19 outbreak exceeds what the Court anticipated at the time of sentencing.”).

punitive effect, the rulings suggest priorities for data collection.

This rationale for increased transparency is also consistent with at least some frameworks that choose to define punitive effect solely by duration. If a sentencing system’s motivation for adopting a narrow definition of punitive effect is to avoid the challenges of administering remedies, then minimizing fluctuations in conditions should remain a policy priority. In other words, if policymakers adopt some version of Judge Posner’s thesis—that many aspects of prison life might moderate how much punishment imprisonment carries out, but quantifying this relationship is not feasible—they should still seek to minimize situations where a person receives a greater punishment than what a sentencing judge intended.

Below, this Part discusses three interrelated aspects of the pandemic’s consequences for life in prison that stand out from the rulings that granted reductions: lockdowns, medical care, and social contact. Increasing transparency regarding these aspects of prison life will remain important even after the impact of the COVID-19 pandemic fades. Although the simultaneity of changes in prisons across the United States was a unique result of the pandemic, the types of changes that captured judges’ attention occurred before the pandemic and will reoccur in the future.

Additionally, thorough data collection is an important step toward incorporating prison conditions into the Sentencing Guidelines, should Congress or the Sentencing Commission choose to do so in the future. When “the practical and philosophical problems of developing a coherent sentencing system” threatened to stymie the creation of the first Guidelines Manual, the Sentencing Commission turned to an “empirical approach”—effectively reverse-engineering much of the Guidelines from past sentencing data.<sup>297</sup> Similarly, it is only through broad, ongoing data collection that an entity such as the Sentencing Commission could fully understand the problems that reductions for prison conditions would seek to address.

### 1. Lockdowns and other restrictions on movement

The first aspect of the pandemic’s impact that stands out in the rulings is the degree to which officials restricted movement within prisons. The most extreme forms of this type of restriction are known as facility- or unit-wide “lockdowns.” The idea that restrictions on movement within prisons might transform imprisonment into a different type of punishment is consistent with existing distinctions in federal law between imprisonment; probation or supervised release with restrictions on movement (such as curfews or home confinement), which require additional judicial findings<sup>298</sup>; and probation or supervised release without such restrictions. These distinctions are premised on degrees of restriction on movement. Further, as discussed above, the BOP classifies prisons according to “security levels” corresponding with degrees of control over movement. Similar ideas also appear in the context of federal habeas corpus doctrine, with some circuits authorizing writs “[i]f the prisoner is seeking what can fairly be described as a quantum change in the level

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<sup>297</sup> U.S. SENT’G GUIDELINES MANUAL, ch. 1, pt. A (U.S. SENT’G COMM’N 2018).

<sup>298</sup> 18 U.S.C. §§ 3563(b) (requiring additional findings for discretionary conditions of probation), 3583(d) (requiring additional findings for the imposition of § 3563(b) conditions as conditions of supervised release).

of custody.”<sup>299</sup> These decisions reflect an understanding that different degrees of restrictions on movement correspond with objectively different experiences of incarceration.<sup>300</sup>

In the § 3582(c)(1)(A)(i) rulings, judges expressed concern regarding both the toll that isolation and restrictions on movement might cause directly and the ways in which such restrictions interfere with medical care.<sup>301</sup> For example, the court in M.Q.’s case observed that “Otisville’s lockdown—which has lasted in one form or another for 16 months—has prevented [M.Q.] from adequately managing his hypertension and pre-diabetes.”<sup>302</sup> However, given that federal courts have interpreted federal law as permitting the use of solitary confinement for safety and discipline within prisons,<sup>303</sup> an important caveat is in order: judges were concerned with restrictions on movement that did not result from accusations or findings of misconduct. The court in J.J.R.’s case made this distinction explicit, stating: “More importantly, [placing] Defendant in solitary confinement for the indefinite future to protect him from contracting COVID-19 is a severe and extreme measure . . . . Defendant is isolated in his cell for 22.5 hours a day, despite his elderly age and good behavior.”<sup>304</sup>

The scale, duration, and precise nature of lockdowns in prisons across the United States during the pandemic remain unclear. Reports and details of lockdowns during the pandemic made their way into media reports and some judicial decisions, but there does not appear to be any systematic, empirical accounting of the lockdowns. For example, the Massachusetts Supreme Judicial Court, in an opinion published on June 2, 2020, stated that “the commissioner [of the Massachusetts Department of Correction] initiated a system-wide lockdown” on April 3, 2020, and “[s]ince then, inmates who live in cells have been spending twenty-three hours per day in their cells, while inmates living in dormitory-style housing have been unable to leave their units.”<sup>305</sup> Yet, information about the duration of this lockdown and other details of its impact do not appear to be readily accessible to the public. Likewise, when a November 2020 press release announced that the Massachusetts Department of Correction was reinstating “modified operations,” the press release did not explain the nature of these restrictions, such as how many hours per day people would be confined to their cells or units.<sup>306</sup>

<sup>299</sup> See, e.g., *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 873–74 (1st Cir. 2010) (quoting *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991)).

<sup>300</sup> See *Graham*, 922 F.2d at 381 (describing “a quantum change in the level of custody” as a change in the level of custody that implicates “outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation, or the run of the prison in contrast to the approximation to solitary confinement that is disciplinary segregation”).

<sup>301</sup> See *supra* Part I.B.3, 4.

<sup>302</sup> *United States v. Qadar*, No. 00-CR-603 (ARR), 2021 WL 3087956, at \*9 (E.D.N.Y. July 22, 2021).

<sup>303</sup> See, e.g., *Hutto v. Finney*, 437 U.S. 678, 685–86 (1978) (endorsing the district court’s statement that “punitive isolation ‘is not necessarily unconstitutional, but it may be, depending on the duration of the confinement and the conditions thereof’” (quoting *Finney v. Hutto*, 410 F. Supp. 251, 275 (E.D. Ark. 1976))).

<sup>304</sup> *United States v. Regas*, 3:91-cr-00057-MMD-NA-1, 2020 WL 2926457, at \*3 (D. Nev. June 3, 2020).

<sup>305</sup> *Foster v. Comm’r of Corr.*, 146 N.E.3d 372, 382 (Mass. 2020).

<sup>306</sup> *DOC Implements Modified Operations at Facilities Statewide: Comprehensive COVID-19 Testing is Ongoing for All Inmates and Staff*, MASS. DEP’T OF CORR. (Nov. 14, 2020), <https://www.mass.gov/news/doc-implements-modified-operations-at-facilities-statewide>. Other prison

Lockdowns were frequent occurrences at many prisons before the pandemic—for reasons that included staffing shortages, maintenance problems, and violence—and will continue to occur after the pandemic. For example, a 2014 investigation by the Department of Justice “into the treatment of adolescent male inmates, between the ages of 16 and 18” at jails on New York City’s Rikers Island documented that one of the jails “frequently [was] placed in locked down status and inmates are confined to their cells.”<sup>307</sup> According to the report, “[i]n FY 2013 alone, there were 1,118 responses to emergency alarms” in two of the jails, “or an average of more than three alarms each day.”<sup>308</sup> From late January into early February 2019, people detained at a federal jail in Brooklyn “were held on partial lockdown” after “plummeting temperatures caused parts of the heating system to fail,” and an electrical fire “put the facility on ‘emergency power.’”<sup>309</sup> In 1983, U.S. Penitentiary Marion was put into a lockdown that would last over twenty years—effectively converting the prison from a medium- to a maximum-security facility—following multiple homicides.<sup>310</sup> More recently, in early 2022, the BOP placed the entire federal prison system on “a nationwide lockdown” in response to a deadly fight at a federal prison in Texas that officials suspected was related to gang involvement.<sup>311</sup> That lockdown lasted at least a week at all BOP prisons and extended for multiple weeks at some prisons.<sup>312</sup> However, little information is available regarding the frequency and causes of lockdowns outside of sporadic reports.

The dearth of public information about lockdowns parallels the limited availability of information about solitary confinement in the United States. Since 2014, the Correctional Leaders Association and the Liman Center for Public Interest Law at Yale Law School have conducted biennial surveys on the use of “restrictive housing,” defined as the practice of isolating a person in a cell for twenty-two or more hours per day on

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systems have published less information about the impact of the pandemic on their prisons. See MICHELE DEITCH & WILLIAM BUCKNALL, COVID, CORRECTIONS, AND OVERSIGHT PROJECT, HIDDEN FIGURES: RATING THE COVID DATA TRANSPARENCY OF PRISONS, JAILS & JUVENILE AGENCIES (Mar. 2021), <https://law.utexas.edu/faculty/publications/2021-hidden-figures--rating-the-covid-data-transparency-of-prisons-jails-and-juvenile-agencies/download> (rating the transparency of state prison systems’ COVID data dashboards). Indeed, current data transparency efforts by the Massachusetts Department of Correction for certain metrics might be a model for other U.S. prison systems. The Department’s website features an interactive “DOC COVID-19 Cell Housing Dashboard” that provides information, by prison, on the number of people “who are housed in a cell: (i) alone; (ii) with one . . . other person; or (iii) with two . . . or more other people.” *DOC COVID-19 Institution Cell Housing Dashboard*, MASS. DEP’T OF CORR., <https://www.mass.gov/info-details/doc-covid-19-institution-cell-housing-dashboard> (last visited July 21, 2022). The site is updated weekly, and site visitors can browse past data for each day since the launch of the dashboard. See *id.* Including metrics pertaining to lockdowns in data dashboards of this kind would present an important step forward for transparency surrounding life in prison.

<sup>307</sup> CRIPA INVESTIGATION, *supra* note 5, at 8.

<sup>308</sup> *Id.*

<sup>309</sup> Benjamin Weiser & Annie Correal, *Brooklyn Jail to Be Visited by Federal Judge After Heat and Power Crisis*, N.Y. TIMES (Feb. 4, 2019), <https://www.nytimes.com/2019/02/04/nyregion/lawsuit-brooklyn-jail.html>.

<sup>310</sup> Stephen C. Richard, *USP Marion: The First Federal Supermax*, 88 PRISON J. 6, 9–10 (2008).

<sup>311</sup> Katie Benner, *Fatal Gang Fight Spurs Nationwide Lockdown of Federal Prison System*, N.Y. TIMES (Jan. 31, 2022), <https://www.nytimes.com/2022/01/31/us/politics/ms13-texas-prison-fight.html>.

<sup>312</sup> *Temporary Security Measures Lifted: Facilities Returned to Modified Operational Status*, FED. BUREAU OF PRISONS (Feb. 24, 2022, 12:09 PM), [https://www.bop.gov/resources/news/20220201\\_security\\_measures.jsp](https://www.bop.gov/resources/news/20220201_security_measures.jsp).

average and for fifteen or more consecutive days, in prisons across the United States.<sup>313</sup> These surveys are among a small group of efforts to create national counts of the use of solitary confinement in the United States.<sup>314</sup> However, their voluntary nature comes with limitations. The surveys rely on self-reported data from correctional agencies without a mechanism for corroborating responses, and not all prison systems participate.<sup>315</sup>

Yet, efforts to track the use of solitary confinement may also provide cause for optimism when it comes to increasing transparency concerning lockdowns. The CLA-Liman surveys asked prison systems whether they regularly kept and reviewed data relating to solitary confinement, and, if so, when they began tracking this data.<sup>316</sup> Survey responses indicated that several jurisdictions that once did not track how they used solitary confinement began producing and monitoring this type of data in recent years.<sup>317</sup> In addition, legislatures across the country have proposed bills that would require prison systems to collect and publish data on the use of solitary confinement, and at least fourteen states have enacted such statutes since 2018.<sup>318</sup> In the federal system, the FSA included a provision requiring the BOP to report “the number of prisoners who have been placed in solitary confinement at any time during the previous year.”<sup>319</sup> Similar efforts focused on lockdowns could lead to improved practices with respect to the collection and publication of data related to lockdowns. In fact, two of the newest pieces of enacted legislation addressing solitary confinement include provisions that will also require prison officials to report information about lockdowns.<sup>320</sup>

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<sup>313</sup> See CORR. LEADERS ASS’N & ARTHUR LIMAN CTR. FOR PUB. INT. L. AT YALE L. SCH., *TIME-IN-CELL 2021: A SNAPSHOT OF RESTRICTIVE HOUSING BASED ON A NATIONWIDE SURVEY OF U.S. PRISON SYSTEMS 1–4* (Aug. 2022), [https://law.yale.edu/sites/default/files/area/center/liman/document/time\\_in\\_cell\\_2021.pdf](https://law.yale.edu/sites/default/files/area/center/liman/document/time_in_cell_2021.pdf) [hereinafter SNAPSHOT].

<sup>314</sup> The Vera Institute of Justice has collected data on the use of isolation in U.S. Jails. See CHASE MONTAGNET, JENNIFER PEIRCE, & DAVID PITTS, VERA INST. OF JUST., *MAPPING U.S. JAILS’ USE OF RESTRICTIVE HOUSING: TRENDS, DISPARITIES, AND OTHER FORMS OF LOCKDOWN* (Apr. 2021), <https://www.vera.org/downloads/publications/mapping-us-jails-use-of-restrictive-housing.pdf>.

<sup>315</sup> SNAPSHOT, *supra* note 313, at 2–4.

<sup>316</sup> *Id.* at 12–13.

<sup>317</sup> *See id.*

<sup>318</sup> Judith Resnik, Jenny Carroll, Skylar Albertson, & Sarita Benesch, *Legislative Regulation of Isolation in Prison: 2018-2021*, SSRN (Dec. 22, 2021), <https://ssrn.com/abstract=3914942>.

<sup>319</sup> First Step Act of 2018, Pub. L. No. 115-391, § 610(a)(2), 132 Stat. 5194, 5246 (2018).

<sup>320</sup> Connecticut’s PROTECT Act defines a “lockdown” as “the enforced detainment of all incarcerated persons within such persons’ cells imposed upon an entire correctional facility or part of such facility, other than for the purpose of administrative meetings.” Conn. Pub. Act. No. 22-18 §§ (a)(7)(C)(8) (2022). Under the terms of the PROTECT Act, Connecticut’s Department of Correction must report, by January 1, 2024, “measures taken by the department to address . . . [t]he frequency, cause and duration of lockdowns.” *Id.* § (h)(1). In addition, the PROTECT Act limits lockdowns imposed “for purposes of training department staff” to no more than “twenty-four cumulative hours during any thirty-day period.” *Id.* § (g). Voters in Allegheny County, Pennsylvania, approved a ballot initiative that imposed limits and reporting requirements for lockdowns at the Allegheny County Jail, one of the largest jails in the United States. See ALLEGHENY CNTY., *REPORT TO THE JAIL OVERSIGHT BOARD PURSUANT TO ALLEGHENY CNTY CODE CHAPTER SECTION 205-30 FOR THE MONTH OF FEBRUARY 2022*, at 2 (Feb. 2022), [https://www.alleghenycounty.us/uploadedFiles/Allegheny\\_Home/Dept-Content/Jail/Docs/Reports/JOB%20Segregated%20Housing%20Report%20February%202022.pdf](https://www.alleghenycounty.us/uploadedFiles/Allegheny_Home/Dept-Content/Jail/Docs/Reports/JOB%20Segregated%20Housing%20Report%20February%202022.pdf). Reports published pursuant to the new requirement have documented the continued use of lockdowns in response to new waves of COVID-19 infections. *Id.* at 5 (“The jail continued to be in full lockdown from February 1 through February 28, during which time all incarcerated individuals experienced limited time out-of-cell.”).

## 2. Medical and mental health care

The second interrelated dimension of prison that stands out from the § 3582(c)(1)(A)(i) rulings is the delivery of medical and mental health services. For example, the judge in S.H.’s case emphasized that, “due to the extreme lockdown conditions at the MCC and the MDC, S.H. has been unable to receive mental health care, drug abuse treatment, and other important services that the Court envisioned her receiving.”<sup>321</sup> Similarly, the judge in M.C.’s case reasoned that delays in the diagnosis and treatment of M.C.’s medical conditions played a role in “significantly increas[ing]” the “deterrent and punitive effect” of his prison sentence.<sup>322</sup> These judges’ statements reflect an understanding that officials’ ability to provide adequate medical and mental health care plays an important role in constituting prison as punishment.

Ongoing efforts by many actors and institutions focus on medical and mental health care in prisons, including the specific problem of barriers to information. For example, the organization Incarceration Transparency, led by Professor Andrea Armstrong, collected and analyzed data on the number of people who died in Louisiana prisons between 2015 and 2019 and the reasons for their deaths.<sup>323</sup> Prior to the group’s 2021 report, data on deaths in custody in Louisiana disaggregated by cause of death, facility, race, age, or length of stay did not exist.<sup>324</sup> Members of Incarceration Transparency also partnered with medical professionals to produce a report on prison medical care for the Louisiana State Legislature calling for “standardized healthcare policies and practices across all state prisons.”<sup>325</sup>

The § 3582(c)(1)(A)(i) rulings discussing the impact of the pandemic on medical and mental health care suggest that the idea that substandard medical care can increase a sentence’s punitive effect should be counted among the reasons for transparency. The decisions also point to specific metrics that might persuade judges or other decision-makers, such as delays in obtaining diagnostic care and referrals to specialty care, and suspensions of access to exercise areas and health-related programming.<sup>326</sup>

## 3. Social isolation

The third interrelated dimension of prison that stands out from the judges’ decisions is social isolation. For example, the court addressing the motions of three people held at FCI Fort Dix took issue not only with the physical dimension of lockdowns but also with the “isolation from the outside world” that the people had endured, including “almost non-

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<sup>321</sup> *United States v. Hatcher*, No. 18-CR-454-10 (KPF), 2021 WL 1535310, at \*1 (S.D.N.Y. Apr. 19, 2021).

<sup>322</sup> *United States v. Chavis*, No. 1:18-CR-481-3, 2021 WL 2784653, at \*1, \*4 (M.D.N.C. July 2, 2021).

<sup>323</sup> INCARCERATION TRANSPARENCY, *LOUISIANA DEATHS BEHIND BARS: 2015–2019*, at 5 (June 2021), <https://www.incarcerationtransparency.org/wp-content/uploads/2021/06/LA-Death-Behind-Bars-Report-Final-June-2021.pdf>.

<sup>324</sup> *See id.* at 5.

<sup>325</sup> ANDREA ARMSTRONG, BRUCE REILLY, & ASHLEY WENNERSTROM, INCARCERATION TRANSPARENCY, *ADEQUACY OF HEALTHCARE PROVIDED IN LOUISIANA STATE PRISONS, STUDY BRIEF* (May 2021), [https://www.loyno.edu/sites/default/files/2021-05/DPSC\\_Healthcare\\_Brief.pdf](https://www.loyno.edu/sites/default/files/2021-05/DPSC_Healthcare_Brief.pdf).

<sup>326</sup> *See, e.g.*, *United States v. Qadar*, No. 00-CR-603 (ARR), 2021 WL 3087956, at \*5 (E.D.N.Y. July 22, 2021) (failure to order recommended second test to confirm septal infarct); *Chavis*, 2021 WL 2784653, at \*1, \*4 (delays in obtaining diagnosis and care for ulcerative colitis); *Hatcher*, 2021 WL 1535310, at \*1 (suspension of “mental health care, drug abuse treatment, and other important services”).

existent” access to telephone calls.<sup>327</sup> Similarly, the Chief Judge of the Fourth Circuit reasoned that “[a] day in prison under the current conditions is a qualitatively different type of punishment than one day in prison used to be,” due to changes that included “restrictive visitation” and the “end[ ] [of] prison programs.”<sup>328</sup>

Statements issued by corrections departments relating to their pandemic responses frequently referenced these types of restrictions. For example, the version of the BOP’s COVID-19 Modified Operations Plan updated in November 2020 acknowledged that, “[d]uring modified operations in response to COVID-19, the BOP suspended social visitation.”<sup>329</sup>

Empirical studies have documented the importance of positive social contact to the well-being of incarcerated people. A study analyzing data on people released from prison in Minnesota between 2003 and 2007 “found that visitation significantly decreased the risk of recidivism.”<sup>330</sup> Similarly, a study analyzing 2017 data from Dutch prisons found evidence that “sustained, frequent visits are associated with the lowest risk of reconviction.”<sup>331</sup>

The § 3582(c)(1)(A)(i) decisions point to a need for data tracking the frequency and nature of suspensions of visits, group programming, and forms of communication with the outside world. One of the few investigations to focus on lockdowns highlighted this aspect of their impact on prison life. In 2018, the District of Columbia Corrections Information Council (CIC) surveyed people imprisoned at U.S. Penitentiary Atwater after reports of frequent lockdowns.<sup>332</sup> The two most frequent complaints about the impacts of lockdowns were that “[i]t is difficult to communicate with home because of the lockdowns” and “[l]ockdowns prevent programming.”<sup>333</sup> Future research should develop metrics that track the impact of restrictions within prisons on specific aspects of social contact, such as access to family visits, phone calls, and group programming.

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As of August 2022, the U.S. Sentencing Commission has a quorum for the first time in over three years.<sup>334</sup> In October 2022, the Commission published its priorities for amendments to the Guidelines Manual and listed updates to Policy Statement § 1B1.13

<sup>327</sup> United States v. Newell, Nos. 1:13-CR-165-1, 1:15-CR-362-1, 1:13-CR-214-2, 2021 WL 3269650, at \*1, \*4 (M.D.N.C. July 30, 2021) *appeal dismissed sub nom.* United States v. Burr, No. 21-7193, 2021 WL 9299047 (4th Cir. Sept. 22, 2021).

<sup>328</sup> United States v. Kibble, 992 F.3d 326, 335 (4th Cir. 2021) (Gregory, C.J., concurring).

<sup>329</sup> *BOP Modified Operations*, *supra* note 112. The Modified Operations Plan also noted that “inmates were afforded 500 (vs. 300) minutes per month at no charge to help compensate for the suspension of social visits.” *Id.*

<sup>330</sup> Grant Duwe & Valerie Clark, *Blessed Be the Social Tie That Binds: The Effects of Prison Visitation on Offender Recidivism*, 24 CRIM. J. POL’Y REV. 271, 271 (2011).

<sup>331</sup> Maria Berghuis, Paul Nieuwbeerta, Hanneke Palmen, Miranda Sentse, Babette van Hazebroek, & Estehar van Ginneken, *Visitation Patterns and Post-Release Offending: Exploring Variations in the Timing, Rate, and Consistency of Prison Visits*, 81 J. CRIM. JUST., No. 101904, 2022, at 1, 7.

<sup>332</sup> D.C. CORRS. INFO. COUNCIL, USP ATWATER INSPECTION REPORT 7 (Feb. 19, 2019), <https://cic.dc.gov/sites/default/files/dc/sites/cic/publication/attachments/CIC%20USP%20Atwater%20Report%202.19.19.pdf>.

<sup>333</sup> *Id.* at 11.

<sup>334</sup> *Applaud Senate Confirmation*, *supra* note 33.

first.<sup>335</sup> As part of this effort, the Commission should develop a plan for an informed, deliberate approach to assessing whether—and, if so, how—judges adjudicating sentence reductions should take prison conditions into account.

To begin this process, the Commission should gather data on lockdowns, the delivery of medical and mental healthcare, and social contact in BOP facilities. Although the involvement of Congress and the BOP may become necessary for this project,<sup>336</sup> the Sentencing Commission, whose membership includes judges, is an appropriate entity for laying out an initial account of the types of changes that occur within federal prisons and how these changes might bear on sentencing purposes.

In the meantime, the Commission should update the Guidelines Manual so that the scope of “Other Reasons” is the same for motions filed by the BOP and imprisoned people. There is no reason why judges adjudicating § 3582(c)(1)(A)(i) motions should apply a more restrictive standard in cases where the BOP has acted affirmatively to accelerate a person’s release. The Commission should therefore amend Policy Statement § 1B1.13 in a manner that provides judges with broad discretion to interpret the “Other Reasons” subcategory—in other words, the Commission should expand the standard applicable to BOP motions to meet the scope for motions filed by imprisoned people. To do otherwise would be inconsistent with the broad language of § 3582(c)(1)(A)(i)’s text and would unnecessarily stunt the development of case law expounding the “extraordinary and compelling reasons” standard before the Commission has time to make informed recommendations.

Given that lockdowns are conducive to measurement by duration and indisputably alter the experience of imprisonment, Congress, the BOP, and the Sentencing Commission should also give serious consideration to using sentencing credits to award reductions for time spent in facility- or unit-wide lockdowns. For aspects of prison that are less readily measurable, the Sentencing Commission should explore providing judges with ranges of recommended reductions.

Finally, whether or not the Commission ultimately decides to endorse the use of reductions to respond to changed prison conditions, the Commission should work with the BOP and/or Congress to develop recommendations for reducing significant fluctuations in restrictions inside prisons. Any system of reductions will be underinclusive to a degree, and the most impactful efforts therefore may be those that focus on understanding and improving the administration of prisons.

## CONCLUSION

The confluence of the FSA’s amendments to § 3582(c) and the impact of the COVID-19 pandemic on prison life caused federal judges to examine the relationship between changed prison conditions and punishment in a broader manner than they had before. Comparing judges’ approaches in these cases reveals important system design choices for sentencing frameworks and the challenges of each route. By reframing efforts

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<sup>335</sup> FINAL PRIORITIES FOR AMENDMENT CYCLE, *SUPRA* NOTE 35, at 2–3.

<sup>336</sup> For example, Congress could require the BOP to collect and publish data on specific metrics, as it did in the First Step Act, for “the number of prisoners who have been placed in solitary confinement at any time during the previous year.” First Step Act of 2018, Pub. L. No. 115-391, § 610(a)(2), 132 Stat. 5194, 5246 (2018).

to increase transparency as implicating the fairness of sentences, the rulings also point to an urgent need for broad, ongoing flows of information regarding life inside prison.

For systems that choose to define imprisonment in a manner that treats prison conditions as influencing punitive effect, the rulings make clear that granting reductions comes with significant challenges. Quantifying how much particular changes alter punitive effect is highly subjective, and there is a risk of inconsistent applications across cases. Increased data collection surrounding restrictions such as lockdowns can help guide these decisions.

The rulings also bear on the creation and implementation of second looks. Over the past decade, a variety of proposals to authorize reconsideration of prison sentences have emerged. These proposals are products of critical efforts to introduce new opportunities for reconsideration into one of the world's most punitive criminal legal systems. The rulings discussed in this Article suggest that, because second looks occur when previously unknowable information about a person's term of imprisonment is available,<sup>337</sup> those crafting second looks should anticipate the introduction of such information and provide thoughtful guidance in advance.

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<sup>337</sup> See Dolovich, *supra* note 270, at 885 (“A judicial decision upholding, say, a sentence of life in prison for murder is made before the sentence is served and is typically made with little or no attention to the conditions under which the offender will serve the time. But that offender will be in state custody for years and even decades after the habeas court has affirmed the sentence, and over that time he or she may endure all manner of unspeakable conditions.”); *c.f.* *Davis v. Ayala*, 576 U.S. 257, 288 (2015) (Kennedy, J., concurring) (“There is no accepted mechanism, however, for [judges] to take into account, when sentencing a defendant, whether the time in prison will or should be served in solitary.”).