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Luke Doughty*

INTRODUCTION

In United States federal courts, a criminal defendant can challenge a lower court’s decision through direct appeal.1 This approach to appellate litigation is perhaps the version that the lay public most recognizes: a lawsuit gets filed, a trial court oversees the case, and direct appeal begins when a party seeks review of one or numerous issues.2 Thereafter, another appeal to the Supreme Court may be available on a discretionary basis.3 Appellate courts may focus on any number of issues with the lower court’s procedure or application of substantive law, such as providing faulty jury instruction or ruling wrongly on the admissibility of evidence, but parties generally cannot litigate new arguments.4 However, direct appeal is not the only option for relief from a sentence.5 Petitioners have the option of challenging their sentences through collateral relief—which differs from direct appeal in various ways.6 As the California Supreme Court indicated, while direct attack is about challenging some aspect of the record itself, collateral attack is about challenging the judgment based on the record.7 It is not an appeal at all, but a separate action altogether, which occurs when the petitioner files a new case—with a different docket number and sometimes in a different court—asking for relief from the original sentence. This Note explains how collateral attack, because of its unique role in litigation, provides an opportunity for innovations in the law of resentencing incarcerated people. Specifically, I argue that because collateral attacks often happen years after the original sentencing, judges get a unique opportunity to consider the punishment a petitioner has already experienced.

In particular, this Note draws on two types of the most popular forms of collateral relief: habeas corpus and compassionate relief. Regarding the former,
habeas corpus\(^8\) enables a petitioner to allege that their detention is unlawful.\(^9\) Many types of habeas corpus claims exist,\(^10\) such as when an incarcerated person does not challenge their conviction, but challenges their sentence length.\(^11\) For example, if the trial record provided a textbook example of a fair trial, direct appeal would likely not become available. But if a retroactive law changed the way the judge should have determined the length of a sentence, an incarcerated person could still become eligible for a sentence reduction under habeas corpus.\(^12\) This might occur when an incarcerated person’s sentence increased due to a sentence enhancement,\(^13\) but then the Supreme Court later clarified the law, holding that the enhancement should not have applied.\(^14\) The latter example of collateral relief this Note draws upon is compassionate release.\(^15\) Under this law, an incarcerated person can petition for release if (1) the person has exhausted administrative remedies and (2) is both at least seventy years old and has served thirty years of their sentence, or has demonstrated “extraordinary and compelling” circumstances.\(^16\) Like other forms of collateral relief, such as a habeas corpus action challenging a sentence, compassionate release may shorten a sentence even though a conviction remains in place.\(^17\)

Notably, post-conviction collateral relief, such as habeas corpus or compassionate release, is an opportunity for judges to address an incarcerated person, who has already served many years of a sentence, and resentence them;\(^18\) to assess what incarcerated persons have already been through; and to question the

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\(^8\) Graham v. Borgen, 483 F.3d 475, 479 (7th Cir. 2007) (Habeas corpus is “the archetypical collateral review . . .”).


\(^10\) The Writ of Habeas Corpus enshrined in the Constitution is the “Great Writ.” Art. I, § 9, Cl. 2. Congress has codified a version of the Writ in 28 U.S.C. § 2241. Separate statutes, such as 28 U.S.C. § 2254 and § 2255, codify related forms of collateral relief for prisoners with state conviction or federal convictions, respectively. Prisoners could successfully litigate post-conviction relief under habeas corpus based on ineffective assistance of counsel claims (such as Strickland or Cronic claims), Brady claims, Napue claims, and many other claims based on federal law. See Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984); Brady v. Maryland, 373 U.S. 83 (1963); Napue v. Illinois, 360 U.S. 264 (1959).

\(^11\) See, e.g., Burrage v. United States, 571 U.S. 204, 218–19 (2014) (holding that sentence enhancement under § 21 U.S.C. § 841(b)(1)(C) for criminal defendants who caused death through dealing drugs was not applicable to the sentences unless “but-for” causation was proven beyond a reasonable doubt).

\(^12\) See, e.g., United States v. Booker, 543 U.S. 220, 226–227 (2005) (holding Sentencing Guidelines no longer mandatory); see also Hawkins v. United States, 706 F.3d 820, 823 (7th Cir. 2013) (holding that error in calculating sentence, causing sentence to fall outside of the Sentencing Guideline range, is not a miscarriage of justice and therefore does not entitle prisoner to § 2255 relief so long as sentence is under the statutory maximum).

\(^13\) See, e.g., Harrington v. Ormond, 900 F.3d 246, 248 (6th Cir. 2018).

\(^14\) See, e.g., Burrage, 571 U.S. at 218–19.


\(^16\) § 3582(c)(1)(A).

\(^17\) See id.

\(^18\) See, e.g., Transcript of Proceedings Before the Honorable Chief Judge John Jarvey at 12–13, United States v. Faulkner, No. 3:08-cr-74 (S.D. Iowa Aug. 23, 2018), ECF. No. 418.
quality of the incarcerated person’s experiences with incarceration: How close was the incarcerated person’s facility to their family? How sanitary was the prison? How civil were the people working in the prison? How civil were the inmates to each other? How much opportunity for rehabilitation and self-improvement did the incarcerated person have? Many judges do not consider these questions when resentencing an incarcerated person in the context of collateral relief, and this Note asks why.

This Note explores why judges do not consider the quality of sentences when those judges seemingly have the perfect legal mechanism to do so: 18 U.S.C. § 3553. This federal statute lists a number of factors that a judge must consider when sentencing—including “just punishment for the offense,” “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” and “the need for the sentence imposed . . . to provide the defendant with . . . medical care . . . in the most effective manner . . .” On its face, these legal mandates do not foreclose a qualitative assessment of prison sentences; courts have broad discretion in how they consider the § 3553 factors. Indeed, at least one interpretation of the factors—the plain, textualist interpretation of them—indicates that judges must assess the quality of a prison sentence.

Accordingly, this Note proceeds in three parts. Section I identifies and illustrates the problem. Initially, this Section offers a short synthesis of punishment literature to contextualize the issue; then, the Section looks to § 3553(a)(6) (“The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”), which provides a lens through which one can understand the acute disparities that incarcerated people face in two contrasting prisons—the United States Medical Center for Federal Prisoners (“MCFP Springfield”) in Missouri and the United States Penitentiary, McCreary (“USP McCreary”) in Kentucky. Section II has two parts to explain how COVID-19 has exacerbated the problem. The first part of Section II focuses on § 3553(a)(2)(D) (“[The need] to provide the defendant with needed educational or

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19 See generally Jonathan Simon, Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America (2014) (arguing that prisons amidst mass incarceration suffer fundamental qualitative defects); Benjamin Levin, Criminal Law in Crisis, Col. L. Rev. Forum 1, 5–6 (2020) (writing about the ways in which the criminal justice system in the United States fails to account for qualitative differences in punishment); see also John B. Riordan, Why Do Bad Things Happen to Good People? An Examination of Collateral Consequences and Their Role in Sentencing, 12 Liberty U. L. Rev. 466, 467–68, 475–76 (2018) (listing federal circuit courts that have rejected using § 3553 to adjust sentences based on the severity of collateral consequences).


21 § 3553(a)(6).

22 § 3553(a)(2)(D).

23 Riordan, supra note 19, at 474 (citing United States v. Thavaraja, 740 F.3d 253, 259 (2d Cir. 2014)).

24 § 3553.

25 See 18 U.S.C. § 3553. The three § 3553 factors pertinent to this Note’s analysis are as follows: “Unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” “medical care or correctional treatment in the most effective manner,” and “just punishment for the offense.”
vocational training, medical care, or other correctional treatment in the most effective manner . . . .”\textsuperscript{26} to argue that abysmal medical treatment in prison should invoke § 3553 as a means of adjusting the length of a sentence. The second part of Section II points out that litigation arising from MCFP Springfield and USP McCreary exemplifies how COVID-19 has changed compassionate release and the resulting § 3553 analyses, moving the factors further from qualitatively assessing sentences. Section III has two parts as well. The first part of Section III explores what a possible solution to this problem could look like, using a new, textualist reading of § 3553, to show how judges could use the factors to consider prison quality when sentencing. The second part of Section III outlines potential issues with this suggested reading of § 3553 and troubleshoots those issues.

I. **THE PROBLEM: THE FAILURE TO ASSESS PRISON CONDITIONS QUALITATIVELY**

This Note joins a number of articles which have already delineated the problem of abysmal prison conditions and the law’s unwillingness to take responsibility for them. One study relies on *Brown v. Plata* to argue that the horrific prison conditions in the United States are inherently unconstitutional.\textsuperscript{27} A separate study compares punishment practices to another prominent form of state-sanctioned violence at the hands of the United States government: war.\textsuperscript{28} That study notes that war focuses on concrete goals whereas punishment largely has no detailed concept of what makes for “good” punishment and what makes for “bad” punishment.\textsuperscript{29} Furthermore, the study points out that while much discourse in the context of war focuses on who is declaring war and what their justification for that declaration is, scant research explores who punishes and how they justify their decisions.\textsuperscript{30} In other words, while much energy in the context of incarceration focuses on *ius ad poena*, or justifying punishing at all, little attention is paid to *ius in poena*, or justifying the type of punishment itself.\textsuperscript{31} Consequently, the criminal justice system fails to ask itself important questions: How does a particular defendant uniquely interact with his or her surroundings in a particular prison? Does that incarcerated person deserve such treatment?\textsuperscript{32} Who or what takes responsibility for administering that treatment?\textsuperscript{33} How can the person or institution taking responsibility justify the type of punishment?\textsuperscript{34}

\textsuperscript{26} 18 U.S.C. § 3553(a)(2)(D).
\textsuperscript{27} SIMON, supra note 19, at 2–3.
\textsuperscript{28} Alice Ristroph, *Just Violence*, 56 Ariz. L. Rev. 1017, 1017 (2014).
\textsuperscript{29} See id. at 1043.
\textsuperscript{30} Id. at 1040–41.
\textsuperscript{31} See id. at 1021–22.
\textsuperscript{32} See id. at 1041, 1043.
\textsuperscript{33} See id. at 1040.
\textsuperscript{34} See id.
Instead of concrete analyses grounded in details, punishment justification usually relies on abstract ideas such as rehabilitation and retribution. Some combination of these concepts, mixed with the inherent vagueness associated with a factors test, enable judges at sentencing and resentencing hearings to handpick reasons for denying a claim that could leave many individuals skeptical of the process. Take, for example, Petitioner Stephen Villarreal in Villarreal v. Holland. Villarreal argued that medical staff at USP McCreary failed to treat his Hepatitis C, which caused “nausea, fatigue, joint pain, liver pain, depression, anxiety, and loss of appetite.” Despite these claims, the district court denied petitioner relief because he could not show “who injured his constitutional rights” nor “describe that person’s (or those peoples’) illegal conduct in detail.” It smacks as normatively unfair that the criminal justice system can punish in the abstract, but only grant relief in the concrete. The criminal justice system also does not consider the specific aspects of a prison when sentencing, or when resentencing after a successful collateral attack on a sentence. Take, for example, the case of James Faulkner and Kurt Harrington. On the night of October 31, 2008, police officers pulled over Faulkner and Harrington for a traffic violation. The officers subsequently found controlled substances in the glove compartment of the apprehended vehicle and arrested the two men. Subsequent prosecution resulted in each defendant facing life sentences in prison. While Harrington served his sentence at USP McCreary, Faulkner served his sentence at the MCFP Springfield. Years later, both defendants filed habeas corpus petitions to attack their sentences. When collateral attacks on a sentence succeed, as Faulkner’s and Harrington’s eventually would, the last step in the relief procedure requires a judge to evaluate the punishment the petitioner has endured for.

35 See generally Carol S. Steiker, Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration, in The Boundaries of the Criminal Law (R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo & Victor Tadros eds., 2010); see also Alice Ristroph, Desert, Democracy and Sentencing Reform, 96 J. Crim. L. & Criminology 1293, 1350–51 (2006) (arguing general punishment justifications are vague and therefore weak). Rehabilitation seeks to “reform” the prisoner so that “he will not desire or need to commit further crimes.” Wayne R. Lafave, 1 Subst. Crim. L. § 1.5(a)(3) (3d. ed., 2022). Retribution is about revenge, seeking to get back at the prisoner for harming society. Id. § 1.5(a)(6).

36 See, e.g., Transcript of Proceedings Before the Honorable Chief Judge John Jarvis supra note 18, at 12–13.


38 Id. at *1.


41 Id.


thus far to determine the appropriate new sentence.\textsuperscript{46} To do that, the judge must consider the factors listed in 18 U.S.C. § 3553.\textsuperscript{47} Faulkner succeeded on his collateral relief petition to reduce his sentence.\textsuperscript{48} During his re-sentencing hearing, the judge focused on the factor included in § 3553(a)(6): ‘I weigh heavily the need to avoid ‘unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct.’ It is very hard to square this [sentence reduction] with the life sentence that Kurt Harrington is currently serving for the same conduct.’\textsuperscript{49} Nevertheless, to avoid such disparities in punishment, the judge did not inquire into the relevant qualitative differences between the two prisons, and therefore, how punishment may have differed for the two incarcerated people. Rather, the judge focused merely on the quantitative aspect of the sentence—the length—before deciding not to reduce Faulkner’s time below the new guideline range.\textsuperscript{50} In doing so, the judge tried to make his sentence coextensive with any other similarly situated defendant.\textsuperscript{51} He avoided the statutory maximum of life in prison since he had never handed down a life sentence for a drug offense.\textsuperscript{52} And he did not dip below the guideline range minimum since that could depart too far from Harrington’s life sentence.\textsuperscript{53}

Nonetheless, prison sentences of similar length may still have disparities in quality. Faulkner’s prison, MCFP Springfield is known as “Fed Med,” in part because that nickname is much shorter than “United States Medical Center for Federal Prisoners, Springfield.”\textsuperscript{54} But the nickname also seems to function as a term of endearment; the criminally convicted have often sought MCFP Springfield because of the quality of incarceration.\textsuperscript{55} Visually, the prison has a sweeping, immaculate lawn and a stunning façade—almost like an English manor.\textsuperscript{56} The prison girds a baseball field as if the outfield were the prison’s courtyard, and the incarcerated people have formed a baseball team that competes with locals.\textsuperscript{57} MCFP Springfield generally benefits from the history of lucrative farming and affluent townspeople that surround it.\textsuperscript{58}

\begin{itemize}
  \item\textsuperscript{46} See 18 U.S.C. § 3553.
  \item\textsuperscript{47} See id.
  \item\textsuperscript{48} Stipulation at 5, Faulkner v. Daniels, No. 15-cv-00042 (S.D. Ind. May 23, 2017), ECF No. 36; see Amended Judgment in a Criminal Case, United States v. Faulkner, No. 08-cr-00074, (S.D. Iowa Aug. 23, 2018), ECF No. 410.
  \item\textsuperscript{49} Transcript of Proceedings Before the Honorable Chief Judge John Jarvey supra note 18, at 12–13.
  \item\textsuperscript{50} Id.
  \item\textsuperscript{51} Id. at *13.
  \item\textsuperscript{52} See id.
  \item\textsuperscript{53} See id.
  \item\textsuperscript{54} See id.
  \item\textsuperscript{56} Id. at 521.
  \item\textsuperscript{57} See id at 520 (showing picture of MCFP Springfield).
  \item\textsuperscript{58} Id at 520–21.
  \item\textsuperscript{59} Id at 521.
\end{itemize}
Comparatively, information available about USP McCreary—Harrington’s prison—tells a different story. While the prison has touted a strong record of rehabilitative educational and recreational programs, the high-security, all-male prison struggles with its record of violence. An A report about USP McCreary revealed that many incarcerated people voiced concern about staff mistreatment, based in part on racism and unnecessary punitive measures. Furthermore, reports of “significant” incidents at the prison from October 2012 to September 2013 are staggering: sixty-three assaults on incarcerated people took place, as did 186 uses of force or restraint by an officer on an incarcerated person.

The relevant records and illustrative distinctions between the two prisons fail to adequately demonstrate the very different, individual punishment experiences endured by Faulkner at MCFP Springfield and Harrington at USP McCreary. However, that might not matter as much as it formerly did. Trends in collateral relief litigation have shown that class actions will grant relief when prison conditions become so ubiquitous that they affect a large number of its incarcerated people. In other words, habeas corpus claims of cruel and unusual punishment have succeeded even when an individual has not shown that they have uniquely suffered, so long as the issue that gives rise to the claim implicates the entire prison experience. Under this theory of punishment, one might consider the damage of living in fear of violence or discrimination that Harrington may have experienced while imprisoned at USP McCreary.

The legal field seems to acknowledge that quality of punishment matters. For example, the U.S. News & World Report ranks states by their prisons. Two highly ranking states are Hawaii and Vermont, both of which transfer relatively high numbers of their in-state incarcerated people to out-of-state facilities, suggesting prison quality connects to mass incarceration. In other words, states that transfer incarcerated people out of state may have less space issues in their facilities. But prison transfers cause hardship and can lead to Eighth Amendment habeas corpus claims of cruel and unusual punishment: “[Those in charge of prison transfers] can bridge the distance between incarcerated people and their families or do precisely

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61 Id.

62 Id.


64 See e.g., Holt, 309 F. Supp. 362; Jones, 323 F. Supp. 93.


66 Id. at 1859 n. 254.

67 See generally Brown v. Plata, 563 U.S. 493 (2011) (holding that overpopulation of California prisons violates the Eighth Amendment of the U.S. Constitution, which prohibits cruel and unusual punishment, when prisoners could not receive adequate medical care).

68 See Kaufman, supra note 65, at 1854–55.
the opposite: operate as a punitive sanction, very much like formal banishment, to make imprisonment harder and harsher on incarcerated people who violate prison rules.”\textsuperscript{69} One can glean desert theory\textsuperscript{70} from decisions to transfer, since people in the criminal justice system make “consequential decisions about which incarcerated people deserve imprisonment close to home.”\textsuperscript{71}

To provide another example of disparate prison experiences, administrative law cases determining whether severe punishment in prison violates the Due Process clause of the Constitution have focused on comparing those punishments in question to a “typical” prison experience.\textsuperscript{72} For example, in \textit{Sandin v. Conner}, the Supreme Court held that solitary confinement did not violate an incarcerated person’s liberty interest when such punishment was not atypical and significant compared to other forms of punishment in that prison.\textsuperscript{73} Furthermore, in \textit{Wilkinson v. Austin}, the Supreme Court used \textit{Sandin} to hold that a class of incarcerated people had a liberty interest not to be transferred to a supermax prison without due process of law because the nature of the supermax prison was an atypical and significant hardship compared to other forms of incarceration.\textsuperscript{74} It seems strange that rhetoric of comparative prison experiences pervades various levels of the criminal justice system, but does not influence sentencing length.

\textbf{II. THE PROBLEM IS GETTING WORSE: PUNISHMENT DURING COVID-19}

COVID-19 has illuminated and aggravated poor prison conditions\textsuperscript{75}—a long-term problem within the criminal justice system in the United States.\textsuperscript{76} Prison conditions in the United States are abysmal\textsuperscript{77} and the system should account for them. This Note argues that § 3553 factors can do that because of their ubiquity in sentencing litigation.\textsuperscript{78} Particularly, this Part uses Benjamin Levin’s idea—that recent issues in incarceration have brought longstanding problems to the surface—and applies it to the context of § 3553.\textsuperscript{79} First, this Section explains how COVID-19

\textsuperscript{69} Id. at 1849–50.

\textsuperscript{70} Desert theory is the study of just deserts, that is, a phrase referring to the concept of punishing someone in proportion to the severity of the offender’s crime in order to give the offender what he or she deserves. See David A. Starkweather, The Retributive Theory of “Just Deserts” and Victim Participation in Plea Bargaining, 67 IND. L.J. 852, 854–55 (1992).

\textsuperscript{71} Kaufman, supra note 65, at 1850 (emphasis added).

\textsuperscript{72} See, e.g., Sandin v. Conner, 515 U.S. 472 (1995) (solitary confinement did not violate prisoner’s liberty when not atypical and significant compared to other forms of punishment in prison); see also Wilkinson v. Austin, 545 U.S. 209 (2005) (class of prisoners had liberty interest not to be transferred to Supermax prison because nature of Supermax prisons was atypical and significant hardship compared to typical incarceration).

\textsuperscript{73} Sandin, 515 U.S. at 486.

\textsuperscript{74} Wilkinson, 545 U.S. at 223–24.

\textsuperscript{75} See Levin, supra note 19, at 3 (addressing “pathologies of the U.S. criminal policy that the pandemic has exacerbated.”).

\textsuperscript{76} See id.

\textsuperscript{77} See id.; Prison Conditions, EQUAL JUSTICE INITIATIVE, https://eqi.org/issues/prison-conditions/.

\textsuperscript{78} The section aptly begins, “Factors To Be Considered in Imposing a Sentence.” 18 U.S.C. § 3553(a).

\textsuperscript{79} See Levin, supra note 19, at 3.
has worsened prison conditions and made qualitatively assessing prison sentences more crucial. Second, this Section explains that legal changes—in the context of compassionate release—have moved § 3553 away from its role qualitatively assessing sentences.

A. COVID-19 is Worsening Prison Conditions

The problem of shirking qualitative aspects of imprisonment is not only geographically widespread, it may also perpetuate the poor physical health of incarcerated people. In the case of Faulkner, the re-sentencing judge failed to consider the factor included in § 3553(a)(2)(D): “medical care or correctional treatment in the most effective manner.” While once touted for its reputation as a humane prison, COVID-19 has eroded MCFP Springfield’s quality. This downward spiral suggests that perhaps Faulkner’s sentencing judge should have lowered the sentence even further to account for the “additional punishments” Faulkner received because of the quality of his incarceration compared to Harrington’s.

In terms of Medical Care Levels, MCFP Springfield—where Faulkner served—is a Level 4 prison for incarcerated people with intense medical needs (hence, its name). Over one-third of the incarcerated people (385 of the 1,013 total incarcerated people) have contracted COVID-19. At twenty deaths, more incarcerated people have died from COVID-19 at this location than any other Bureau of Prisons (BOP) facility in the country, even more than other Level 4 facilities. A small number of incarcerated people at MCFP Springfield have filed petitions for habeas corpus, arguing that the prison’s conditions arise to cruel and unusual punishment violating the Eighth Amendment. But it seems that many more incarcerated people at MCFP Springfield have filed compassionate release

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85 Compare id. (showing MCFP Springfield deaths from COVID-19 exceeding the deaths from any other BOP prison), with EDWARDS, supra note 83, at 15 (listing all Level 4 BOP facilities).
86 On May 25, 2023, with the filter on for all federal sources, I ran a Westlaw search of “habeas corpus cruel and unusual punishment” without Boolean quotation marks. Then I searched within those results for “MCFP Springfield” using Boolean quotation marks. This search returned one hit.
claims based on “extraordinary and compelling circumstances” for release, sometimes successfully. Given these dire circumstances, the American University Washington College of Law Criminal Justice Clinic took part in a letter urging MCFP Springfield to better its conditions.

Devastatingly, a number of people who died from COVID-19 in MCFP Springfield likely faced harrowing, drawn-out pain and suffering before they died, even if they did not face that much time behind bars. Jaime Benavides, serving a five-year sentence for a marijuana conviction, tested positive for COVID-19 on December 18, 2020, and died on April 4, 2021 because COVID-19 created complications with his pre-existing condition. He battled the onslaught of such complications for four months between diagnosis and death. “As though his death were not tragic enough, the last months of Mr. Benavides’s life in the BOP must have been horrible,” wrote Assistant Federal Public Defender Anita Aboagye-Agyeman and Iowa College of Law Professor Alison K. Guernsey in a written testimony to the United States Senate.

Comparatively, other incarcerated people died much sooner after their COVID-19 test, leaving one to wonder whether the prison paid them much attention at all; otherwise, their symptoms might have been flagged sooner. On Monday, January 25, 2021, Pedro Lopez-Vargas, incarcerated at MCFP Springfield, tested positive for COVID-19 the day before he died. Two other incarcerated people at MCFP Springfield, Samuel Prieto and Waylon Young Bird, tested positive on October 26 and 28, 2020, respectively, and both were pronounced dead on November 4, 2020, a little over a week later. These stories raise questions: Why

87 Compassionate release is the popular name for 18 U.S.C. § 3582(c), which permits early release from incarceration under certain circumstances, often relating to a prisoner’s health.
88 On May 25, 2023, with the filter on for all federal sources, I ran a Westlaw search of “compassionate release extraordinary and compelling” without Boolean quotation marks. Then I searched within those results for “MCFP Springfield” using Boolean quotation marks. This search returned sixty-eight hits.
92 See id.
95 Id.
does a facility that specializes in caring for high-medical-risk incarcerated people seemingly shirk responsibility for the effects of COVID-19—an infectious disease that has claimed lives of over 750,000 Americans\textsuperscript{97}—on those incarcerated? Who takes responsibility for incarcerated people who face de facto death penalties at MCFP Springfield?

Unlike MCFP Springfield, USP McCreary is a Level 2 facility,\textsuperscript{98} generally meant for incarcerated people with less serious medical needs, and particularly meant for incarcerated people who only “need at least one quarterly clinician evaluation.”\textsuperscript{99} While a subset of incarcerated people expressed concerns at USP McCreary about their poor medical treatment—including long waits, poor treatment, false diagnoses, and more\textsuperscript{100}—other issues about the prison quality more greatly concerned people incarcerated there.\textsuperscript{101} About twenty-one percent of people incarcerated at USP McCreary (336 incarcerated people of 1,583 total) contracted COVID-19.\textsuperscript{102} Two incarcerated people died from the virus.\textsuperscript{103} Reflective of these statistics, relatively more habeas corpus claims, but fewer compassionate release claims, have plagued USP McCreary than MCFP Springfield.\textsuperscript{104} Because MCFP Springfield incarcerates so many medically high-risk people, COVID-19 seems to have spread more easily and to have killed a larger number of incarcerated people.

**B. Changes in Compassionate Release are Moving § 3553 in the Wrong Direction**

In addition to habeas corpus, opportunities to challenge conditions of confinement exist through collateral relief avenues such as compassionate release.\textsuperscript{105} Congress codified compassionate release in 18 U.S.C. § 3582, which enabled: (1) the Sentencing Commission to determine factors and policies for release, (2) the BOP to subsequently determine who is eligible for release based on those factors and policies, and (3) federal district court judges finally to weigh the §

\begin{itemize}
  \item \textsuperscript{99} Edwards, supra note 83.
  \item \textsuperscript{100} CIC INSPECTION REPORT USP McCreary, supra note 98.
  \item \textsuperscript{101} Id.
  \item \textsuperscript{103} COVID-19, supra note 84.
  \item \textsuperscript{104} On May 25, 2023, with the filter on for all federal sources, I ran a Westlaw search of “habeas corpus cruel and unusual punishment” without Boolean quotation marks. Then I searched within those results for “USP McCreary” using Boolean quotation marks. This search returned five hits. On the same date, with the filter on for all federal sources, I ran a Westlaw search of “compassionate release extraordinary and compelling” without Boolean quotation marks. Then I searched within those results for “USP McCreary” using Boolean quotation marks. This search returned forty-six hits.
  \item \textsuperscript{105} See 18 U.S.C. § 3582.
\end{itemize}
3553 factors to ensure appropriate release. While the statute delineates criteria for compassionate release, “extraordinary and compelling circumstances” is the catch-all criterion. The statute granted the Sentencing Commission power to “describe what should be considered extraordinary and compelling circumstances for sentence reduction.” The Sentencing Commission, in turn, delegated its congressionally provided authority to the BOP. However, the BOP often sat on this right.

To fix that problem, Congress passed the First Step Act, allowing judges, in addition to their role analyzing § 3553 factors, to hear § 3582 motions after thirty days of silence from the BOP. While judges can now hear these motions, the First Step Act does not delineate whether judges can also determine what constitutes “extraordinary and compelling circumstances,” which the Sentencing Commission only granted to the BOP based on the previous version of § 3582, before the First Step Act. The Sentencing Commission cannot update its interpretation of § 3582 after the First Step Act amendment because the Sentencing Commission does not have a quorum. As a result, judges must decide whether United States Sentencing Guidelines (USSG) section 1B1.13 applies to the amended § 3582, which would prevent judges from determining “extraordinary and compelling circumstances.”

COVID-19 seems to have provided a strong incentive for judges to reject this idea, and instead, broaden their discretion in this area of the law. Indeed, many “extraordinary and compelling circumstances” arguments have arisen as a result of COVID-19 running rampant in prisons that already suffer from lack of space amidst

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106 Id.
107 The prisoner either needs to show extraordinary and compelling reasons or needs to show the following combination: the prisoner is at least seventy and has served at least thirty years of a sentence imposed by 18 U.S.C. § 3559(c). U.S. Sent’g Guidelines Manual § 1B1.13 (U.S. Sent’g Comm’n 2021).
108 See id.
110 See U.S. Sent’g Guidelines Manual § 1B1.13 (U.S. Sent’g Comm’n 2021).
115 Petition for a Writ of Certiorari, supra note 113, at 3.
116 See, e.g., id. at 18 (“In the last year, however, several district courts granted relief to such individuals [affected by COVID-19] after finding that Section 1B1.13 was not an applicable policy statement for defendant-filed motions.”) (citations omitted).
mass incarceration. A circuit split now exists, in which some judges take the prerogative to define “extraordinary and compelling circumstances,” and some do not. The issue is pressing, yet Congress has not yet stepped in. The Supreme Court of the United States has not yet stepped in either, since it denied certiorari on the issue in Bryant v. United States. The enduring circuit split provides yet another example of the arbitrary ways in which the geographic location of one’s incarceration could influence the severity of their punishment. In the meantime, since judges in some circuits not only oversee the § 3553 analysis, but also now oversee the § 3582 analysis that precedes it, the two tests have begun to redefine one another.

The following analysis reveals how these recent events in compassionate release litigation have aggravated sentencing disparities. Not only has COVID-19 worsened prison conditions, but also, judges must now balance § 3553 factors squarely against the medical urgency for release as codified in § 3582. In other words, § 3582 generally houses prison condition analyses to the oversimplification of § 3553. Particularly, while § 3582 tends to represent prison conditions and the health of incarcerated people, § 3553 represents the seriousness of the offense and whether just punishment has occurred.

For example, in United States v. Miranda, the district court wrote that while a judge will analyze a petitioner’s health in determining if “extraordinary and compelling circumstances” exist, that judge will “cite additional factors, such as other comorbidities or prison conditions . . . .” The district court balanced those “comorbidities” against the § 3553 factors, which the court noted “are not particularly distinct, especially in the context of reducing rather than imposing a sentence” in which “most courts considering compassionate release analyze the

119 Alder, supra note 114.
120 See Bryant v. United States, 142 S. Ct. 583 (2021); see also United States v. Bryant, 996 F.3d 1243 (11th Cir. 2021).
121 See Kaufman, supra note 65, at 1850 (explaining that the punishment system makes choices about which prisoners “deserve” incarceration near their home).
122 See Levin, supra note 19, at 2 (Because of COVID-19, “[c]riminal justice reform, decarceration, or abolition—all causes that had gained ground in recent years—suddenly seemed more urgent.”).
123 See United States v. Johnson, 1:99-cr-00059, 2021 WL 930221, at *6 (citing United States v. Ebbers), (S4) 02-cr-1144-3 (VEC), 2020 WL 91399, at *7 (S.D.N.Y. Jan. 8, 2020) (“[T]he court should consider whether the § 3553(a) factors outweigh the ‘extraordinary and compelling reasons’ warranting compassionate release . . . .”); see, e.g., United States v. Mapuatuli, 12-cr-01301, 2021 WL 473719, at *5 (D. Haw. Feb. 9, 2021) (“In light of the deleterious changes to Mapuatuli’s health, the Court has re-considered all of the Section § 3553(a) factors and determined that, on balance, granting his prompt release does not undermine the goals of sentencing”).
125 Id. at *9.
factors in tandem rather than individually.” That statement suggests a trend in litigation to simplify § 3553, especially in compassionate release litigation, and to treat the factors as a singular representation of reasons not to mitigate one’s sentence. Perhaps in response to that issue, the district court gave an impressively well-delineated analysis of the factors.

United States v. Cooper offers another example, in which the movant sought compassionate release for medical conditions such as hypertension, renal failure, embolism of his veins, myocardial infarction, suffering a heart attack, and more, after serving approximately one year of his 240-month sentence for distributing controlled substances. The judge wrote that the “[movant] has not shown that the BOP’s response to the pandemic at MCFP Springfield [is] inadequate in any way” before engaging with a more in-depth analysis using statistics, comparing the prison to the local community, and describing preventative measures the prison takes. The opinion proceeded to indicate that “such ailments, coupled with the present conditions at MCFP Springfield, do not establish extraordinary and compelling reasons . . . .” The district court balanced this § 3582 analysis against a § 3553 analysis that focused heavily on the seriousness of the offense, redescribing it in detail. The heavy emphasis on the factor about the seriousness of the offense in § 3553 exemplifies the point that the Rojas court made about dwindling § 3553 factors into a singular meaning.

The judges in Rojas and Cooper have juxtaposed § 3553 against “extraordinary and compelling circumstances,” sometimes, but not always, simplifying the § 3553 factors in the process. Other judges seemingly took a different approach, conflating § 3553 with other legal tests, which is also problematic. In United States v. Mapuatuli, a judge explicitly analyzed the prison conditions at MCFP Springfield: “While [the facility] is capable of providing adequate care . . . the stroke [movant] recently suffered has certainly ‘substantially diminish[ed] [his] ability . . . to provide self-care within the environment of a correctional facility.’” The district court then conducted a § 3553 test that seemed to conflate the analysis with the analyses of § 3582 and USSG section 1B1.13 by discussing all three of them within a section labeled as a § 3553 analysis. Similarly, in United States v. Horse, before COVID-19 overtook MCFP Springfield, the sentencing judge wrote:

I have considered all of the § 3553(a) factors, as I did 2 ½ years ago when I originally sentenced defendant. I find that the COVID-19

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126 Id.
127 See id. at *9–10.
129 Id. at *5.
130 Id. at *5.
131 Id. at *6.
133 Id. at 4–5 (discussing § 3582(c)(1)(A) and USSG section 1B1.13 to focus, in the § 3553 section of the opinion, on how dangerous the prisoner was to society).
public health emergency is a compelling reason under Guidelines § 1B1.13 which, together with defendant’s serious medical conditions, could justify compassionate release under 18 U.S.C. § 3582(c)(1)(A).\textsuperscript{134}

It is unclear in this analysis where § 3553 stops and § 3582 begins.

Notably, however, the \textit{Horse} court also shows signs of using the factors tests the way judges should use them. In \textit{Horse}, the judge seemed to use § 3553 factors as a way of bolstering the rationale that “extraordinary and compelling circumstances exist.”\textsuperscript{135} Later, the judge seemed to use § 3553 factors for the opposite reason—to suggest that the defendant had too serious a crime to be released: “I also take into account that the defendant’s crimes are serious. He has served less than four years (taking into account time served pretrial) of his 12 years, ten months sentence.”\textsuperscript{136} While the \textit{Horse} court ultimately denied the motion for compassionate release, for a brief moment, that court seemed to recognize the nature of a factors test—allowing it to point in various, sometimes contradictory, directions, and assessing each factor individually.

The \textit{Horse} court—in assessing COVID-19’s impact on the incarcerated person—also shows that an incarcerated person’s punishment is inextricable from that incarcerated person’s environment.\textsuperscript{137} While some judges seem to conduct § 3553 analyses of an incarcerated person as if those incarcerated people exist in a vacuum, in reality, district courts must make § 3553 determinations about an incarcerated person’s circumstances \textit{as that incarcerated person interacts with the prison environment around them}. In other words, simplifying § 3553 so that it can only increase punishment, rather than truncate it, uses § 3553 to consider the incarcerated person’s aggravating circumstances, but not the mitigating ones. Those who make sentencing decisions who do not realize this miss an opportunity to punish with specificity and humility.

\section*{III. The Solution: § 3553 Factors as a Gateway to Qualitatively Assessing Prison Conditions}

Scholars seek a solution to the problem of judges who do not fully consider the qualitative aspects of an incarcerated person’s prison experience, but few legal avenues enable the quality of a sentence to truncate that sentence’s length. Outside of the context of collateral relief, Second Look Sentencing permits courts to re-evaluate a sentence after many years have passed, releasing incarcerated people earlier based on the belief that people change, and exorbitant sentences do not...
Further protect the public from crime.\textsuperscript{138} As another option, “The Model Penal Code: Sentencing,” proposed in 2017, seeks to reform sentencing and the “rules and procedures used to determine them.”\textsuperscript{139} Separately, in 2012, Ken Strutin argued for another option. He pointed out that Eighth Amendment cruel and unusual punishment habeas corpus claims could pave the way towards a solution.\textsuperscript{140} However, this remedy is limited in scope, in part because it only applies to habeas corpus claims, and because judges procedurally sidestep analyzing prison conditions in such proceedings.\textsuperscript{141} For example, in the case of Moore v. Holland, an incarcerated person collaterally attacked his sentence.\textsuperscript{142} In the order responding to his petition, the district court wrote: “Moore . . . alleges that various USP-McCreary staff members have denied him ‘safe conditions’ and proper medical and psychiatric care . . . in violation of his rights guaranteed under the Eighth Amendment of the U.S. Constitution, which prohibits cruel and unusual punishment.”\textsuperscript{143} Despite this claim, the district court did not address the prison conditions.\textsuperscript{144} Instead, the judge wrote that challenging conditions of confinement do not “fall[] under the ambit of [habeas corpus].”\textsuperscript{145} The court explained that “[t]he only claims which a federal prisoner can properly submit under [habeas corpus] are those challenging the execution of his sentence.”\textsuperscript{146}

Other avenues ostensibly do not look more promising. For example, some circuits, such as the First, Sixth, Seventh, Tenth, and Eleventh Circuits, have ruled out § 3553 as an option to qualitatively scrutinize sentences, holding that using § 3553 factors to focus on collateral consequences of punishment, rather than the offense itself, is “impermissible.”\textsuperscript{147} This Note rebuts the logic of those federal appellate opinions, arguing that a textualist use of § 3553\textsuperscript{148} requires assessing not only the defendant, but also the prison’s conditions, and how the defendant interacts with those conditions, making the factors a powerful tool to mitigate normatively bad disparities in sentencing.


\textsuperscript{142} Id.

\textsuperscript{143} Id.

\textsuperscript{144} See id.

\textsuperscript{145} Id. at 2.

\textsuperscript{146} Id. (emphasis added).

\textsuperscript{147} Riordan, supra note 19, at 475–76.

\textsuperscript{148} Such factors include the following: “the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence to be imposed . . . the kind of sentences available; the kinds of sentence and the sentencing range established . . . any pertinent policy statement . . . the need to avoid unwarranted sentence disparities . . . the need to provide restitution to any victims.” 18 U.S.C. § 3553.
In addition to the factors already discussed, factors that enable judges to use § 3553 for qualitative assessments of punishment include “just punishment for the offense,” a platitude usually functioning against the defendant’s interest in release, and “protect[ing] the public from further crimes of the defendant.” Therefore, judges may not see that parts of § 3553—factors about sentencing disparities and medical and rehabilitative resources—actually corroborate the considerations in § 3582, such as the harsh prison conditions or medical failings. To fix this problem, district courts could apply a textualist reading to these factors, and they must engage with each factor individually.

A. Recommended Readings of § 3553

The factor “unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” seems on its face to require assessing what entails a sentence. Judges must ask whether a sentence encompasses more than the length of time, such as happenings between the beginning and end of the sentence. Any discovered qualitative disparities must affect the overall sentence. The historical foundation of the factor in § 3553(a)(6) lends itself to this reading. Section 3553(a)(6) developed from a bill proposal at Yale Law School that focused on “the needs for deterrence, incapacitation, rehabilitation, denunciation, and provision of just punishment.” Neither rehabilitation, nor just punishment, can occur in inhumane prison conditions that prevent an incarcerated person from focusing on their own improvement.

Furthermore, regarding factor § 3553(a)(2)(D), “medical care or correctional treatment in the most effective manner,” seems to invoke how an incarcerated person interacts with his or her surroundings in prison. Judges must ask if incarcerated people can get what they need in prison to effectively rehabilitate themselves and stay healthy, and if the prison provides the most effective manner of doing so. If not, judges must consider lowering the sentence. This factor is especially important because of the overwhelming evidence suggesting that prisons cannot provide what § 3553(a)(2)(D) requires. Indeed, legal scholars and practitioners have recognized that prisons are not the most apt place for rehabilitation.

The Sentencing Reform Act has attempted to correct for the failings of incarceration as a means of rehabilitation. The Act provided options other than

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150 Id. § 3553(a)(2)(C).
151 Id. § 3553(a)(6).
153 § 3553(a)(2)(D).
154 See, e.g., Zunkel, supra note 80, at 49.
155 See id. at 56.
incarceration, such as probation. The Act also requires judges to state, on the
record, more specific reasons for the given punishment than judges may offer
otherwise. In part, courts have had to reckon with the reality that the BOP does
not have the resources to rehabilitate incarcerated people “in the most effective
manner.” While § 3553 cannot prevent normatively bad punishment from
happening prospectively, § 3553 factors in the context of collateral relief provide an
opportunity for judges to assess what punishment has happened retrospectively,
what unwarranted collateral consequences have affected the defendant, and how
such prison conditions must affect the new sentence going forward.

B. Potential Issues with a Textualist Reading of § 3553

Overall, one might argue that this reading of § 3553 creates a problem by
complicating prison sentencing litigation, rather than improving upon an already
broken system. In other words, the analysis this Note suggests seems to create a
zero-sum game—aspects of one prison compared to another may seem relatively
better, while other aspects are relatively worse. When all characteristics of a prison
point in different directions, achieving “just punishment” through qualitatively
assessing prison conditions may seem arbitrary. For example, while my analysis
indicates that MCFP Springfield might best USP McCreary in terms of quality, COVID-19 seems to have complicated that understanding. Furthermore, Kentucky, the home of USP McCreary, ranks as the thirteenth best state for incarceration, while Missouri, the home of MCFP Springfield, ranks forty-fifth. Thus, what happens when certain prisons in those respective states do not, or a certain incarcerated person’s experience does not, reflect those statistics?

A judge can find respite to this quandary in that sentencing determinations
do not occur on a broad, theoretical level, but in individualized cases—that is, for
specific people in particular situations. Indeed, this Note does not advocate for
focusing on either the defendant or the prison to the exclusion of the other, but
rather, on how the two collapse together—how the incarcerated person interacts
with their place of incarceration—which could make contradictory data about a
prison’s relative quality easier to navigate. For example, MCFP Springfield might
remain a bearable environment during the throes of COVID-19 for someone who is
relatively low risk. On the other hand, USP McCreary might be an especially
challenging prison for Black incarcerated people who suffer at the hands of
explicitly or implicitly racist probation officers. Taking a detailed approach to this
line of inquiry would exemplify the type of specificity Ristroph imagined when she

157 See id.
158 See Zunkel, supra, note 80, at 49.
159 See discussion of MCFP Springfield supra Section I, pages 320–321.
wrote her article comparing the vague justifications for types of punishment to the justifications for types of actions during war.\textsuperscript{161}

A textualist reading of § 3553 could create another issue: opening the floodgates to perverse incentives, such as incarcerated people seeking harrowing incarceration experiences in hopes of shortening their sentence.\textsuperscript{162} Judges would have some discretion to prevent such outcomes, such as refusing compassionate release motions when an incarcerated person has rejected receiving the COVID-19 vaccine because they wanted to make their circumstances especially “extraordinary and compelling.” Clearly, the solution this Note offers is not a silver bullet to fair sentencing. However, the courts should still engage in the process of making punishment as fair as possible.

**CONCLUSION**

This Note questions the assumptions that judges take to their reading of § 3553. Some courts have simplified the multi-factor § 3553 test. With COVID-19 having aggravated already inhumane prison conditions, now is the time to take stock of legal tools available to mitigate this issue. Courts should conduct the § 3553 differently to enable more “accurate” sentencing. This textualist reading of § 3553 would supplement where sentencing and collateral relief is heading, based on the burgeoning roles of Second Look Sentencing, the Model Penal Code’s approach to sentencing, and class action lawsuits in the context of habeas corpus claims of cruel and unusual punishment.

Other advantages would come with this novel reading. For one, interpreting the factors in the way this Note recommends would more wholly satisfy the “just punishment” factor and the “promote respect for the law” factor.\textsuperscript{163} Research and Supreme Court decisions indicate that the more imprisonment reflects justified punishment—nothing more, nothing less—the more successfully the goals of punishment will be accomplished.\textsuperscript{164} Tailoring sentences based on how livable the prison conditions are could help incarcerated people feel that they receive fair treatment, and therefore, help incarcerated people buy into their own rehabilitation. Respecting that each prison experience is different would make punishment less about latent functions, more about primary functions of punishment,\textsuperscript{165} and again, more bona fide in the eyes of incarcerated people and society at large.

\textsuperscript{161} Ristroph, *supra* note 28.


\textsuperscript{164} See Ristroph, *supra* note 28, at 1054 (“The [Supreme Court] has frequently stated that a punishment is cruel and unusual if it fails to serve any legitimate purpose of punishment, and the recognized purposes of punishment are retribution, deterrence, incapacitation, and rehabilitation—the four horsemen of justification so frequently embraced by criminal law theorists.”).