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Incarcerated Persons During a Public Health Emergency

Meredith Harrell

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*Parens Patriae*¹, *Punishment, and Pandemics*: The State's Responsibility for
Incarcerated Persons During a Public Health Emergency

Meredith Harrell²

¹ Raymond Chao, *Parens Patriae and the Juvenile Death Penalty*, 21 CHILD.'S LEGAL RTS. J. 21 (2001).

² Thanks to Jeff Thaler for his patient help. "*Our chief want in life is somebody who will make us do what we can.*" — Ralph Waldo Emerson. Thanks also to Allison Briggs, for her invaluable editing. My greatest appreciation, as always, goes to my son, Cameron.

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I. Introduction

“Remember the Prisoners as if Chained with Them”³

There are few certainties in life, but one is that there will always be vulnerable, incarcerated persons under the care and protection of the State. Another certainty is infectious disease and the occurrence of pandemics. Cyclical spread of untreatable and incurable illnesses is part of the human condition. The world is now battling SARS-CoV-2, a new coronavirus that causes COVID-19, an illness that as of February 2022 has sickened nearly 412,000,000 people and killed 5,832,227.⁴ The United States, with four percent of the world’s population, had twenty-seven percent of the world’s cases at the beginning of the pandemic.⁵ Over two years into the pandemic, the US still has the largest share of COVID-19 cases by far.⁶ As of February 2022, there have been over 79,300, 000 cases of COVID-19 in the U.S. Almost a million people in this country have died with COVID-19. The U.S. saw an average of 565,156 cases per day and 1,610 deaths per day in the seven- day period that ended January 17, 2022.⁷ And since the

³ *Hebrews* 13:3-5 (King James).

⁴ *COVID-19 Coronavirus Pandemic*, WORLDOMETER (June 15, 2021), <https://www.worldometers.info/coronavirus/>.

⁵ Scottie Andrew, *The US has 4% of the World's Population but 25% of its Coronavirus Cases*, CNN (June 30, 2020, 7:10 AM), <https://www.cnn.com/2020/06/30/health/us-coronavirus-toll-in-numbers-june-trnd/index.html>.

⁶ John Elflein, *Distribution of Coronavirus (COVID-19) Cases Worldwide as of May 17, 2022*, STATISTA (May 17, 2022), <https://www.statista.com/statistics/1111696/covid19-cases-percentage-by-country/>.

⁷ *US COVID-19 Cases and Deaths by State*, USAFACTS, https://usafacts.org/visualizations/coronavirus-covid-19-spread-map/?utm_source=usnews&utm_source=partnership&utm_campaign=fellowship&utm_content=link, (last visited Jun. 1, 2022).

advent of at-home rapid test kits, the reported numbers cannot be relied upon to reflect the full disease burden in the U.S.⁸

COVID-19 is an insidious disease. Most people who contract it will never get severely ill.⁹ However, a significant number of patients will be debilitated and die.¹⁰ For those who survive, the effects on the body can be long-lasting.¹¹

Another feature of the illness, and one which informs public health response, is that at least thirty percent of people who carry SARS-co-V-2 do not develop symptoms.¹² The federal government had a critical window to stop the cascade of illness, death, and economic disaster that has occurred as a result of COVID-19.¹³ However, it did not act fast enough to implement disease prevention strategies, such as distributing protective gear and ventilators to hospitals and guaranteeing supply lines for tests.¹⁴ The United States trusted in a president who reassured the American public on January 22, 2020, “We have it totally under control. It’s going to be just fine.”¹⁵ On March 10, one day before the World Health

⁸ *Id.*

⁹ *COVID-19, Frequently Asked Questions*, CDC (May 25, 2021), https://www.cdc.gov/coronavirus/2019-ncov/faq.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fdaily-life-coping%2Fshare-facts.html.

¹⁰ DeeDee Stiepan, *Long Term Symptoms, Complications, of COVID-19*, MAYO CLINIC (Aug. 3, 2020), <https://newsnetwork.mayoclinic.org/discussion/long-term-symptoms-complications-of-covid-19/>.

¹¹ *Id.*

¹² Apoorva Mandavilli, *Even Asymptomatic People Carry the Coronavirus in Large Amounts*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/health/coronavirus-asymptomatic-transmission.html>.

¹³ Nicholas Kristof, *Life and Death in the ‘Hot Zone’*, N.Y. TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/opinion/sunday/coronavirus-hospitals-bronx.html>.

¹⁴ *Id.*

¹⁵ Rem Rieder, *Trump’s Statements About the Coronavirus*, FACTCHECK (Mar. 19, 2020), <https://www.factcheck.org/2020/03/trumps-statements-about-the-coronavirus/>.

Organization declared COVID-19 a global pandemic, President Trump declared, “[W]e’re doing a great job with it. Just stay calm and it will go away.”¹⁶ By the time states and tribal nations began to take the situation into their own hands, closing non-essential businesses and issuing stay at home orders, COVID-19 had spread like a fire.¹⁷

Key to preventing the spread of this fire would have been early, widely available testing.¹⁸ Instead, tests were only given to extremely ill patients, those who had been exposed to a diagnosed case, and those returning from countries with high infection rates.¹⁹ Testing alone does not contain the disease. However, positive test results are a reliable metric for how cases are spreading.²⁰ Countries that tested early and often—before cases got “out of the barn”²¹—fared better than the U.S. in controlling the disease.²²

¹⁶ *Id.*

¹⁷ Sarah Mervosh, et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

¹⁸ Tim Mercer & Marc Salit, *Testing at Scale During the COVID-19 Pandemic*, 22 NATURE REVIEWS GENETICS 415 (2021), <https://doi.org/10.1038/s41576-021-00360-w>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Clayton Dalton, *Opinion: Early Coronavirus Testing Failures Will Cost Lives*, NPR (Mar. 14, 2020), <https://www.npr.org/sections/health-shots/2020/03/14/815727231/opinion-early-coronavirus-testing-failures-will-cost-lives>.

²² *See generally New Zealand Takes Early and Hard Action to Tackle COVID-19*, WHO (July 15, 2020), <https://www.who.int/westernpacific/news-room/feature-stories/item/new-zealand-takes-early-and-hard-action-to-tackle-covid-19>; Anthony Kuhn, *South Korea's Drive-Through Testing For Coronavirus Is Fast—And Free*, NPR (Mar. 13, 2020, 1:52 PM), <https://www.npr.org/sections/goatsandsoda/2020/03/13/815441078/south-koreas-drive-through-testing-for-coronavirus-is-fast-and-free>; *Monaco to Use Mass Testing Against COVID-19 Resurgence*, MONACO TRIB. (May 20, 2020), <https://www.monaco-tribune.com/en/2020/05/monaco-to-use-mass-testing-against-covid-19-resurgence/>; *Monaco*, WORLDOMETER (June 15, 2021), <https://www.worldometers.info/coronavirus/country/monaco/>.

The National Center for Disease Control acknowledged in a May 20, 2020 document that both symptomatic and asymptomatic spread is a threat, one deserving “early, strong, and comprehensive.”²³ A place where residents can be helpless to prevent the spread of highly infectious disease is congregate living settings. To illustrate the vulnerability of congregate care settings, we look to Maine, where one of the largest outbreaks at the beginning of the pandemic was in a memory care facility with sixty-six residents; fifty-seven staff and residents were infected.²⁴ The Maine Center for Disease Control (MCDC) stated that the outbreak “illustrate[d] the vital importance of rapid testing...to contain the virus.”²⁵ However, the MCDC also said, in regard to why they had not conducted universal testing, “[W]e previously had no reason to believe there were any COVID-positive cases in this community.”²⁶ There would have been no need to “believe” if all the residents and staff had been preemptively tested.

Sentinel testing is crucial in other congregate living settings, jails and including prisons.²⁷ Some facilities have been hit harder than others.²⁸ In

²³ *COVID-19 Pandemic Planning Scenarios*, CDC (Mar. 19, 2021) [hereinafter *Pandemic Planning*], <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>.

²⁴ Sean Murphy, *Cape Memory Care Reels from Virus Case Outbreak*, PORTLAND PRESS HERALD (May 27, 2020), <https://www.pressherald.com/2020/05/27/cape-memory-care-reels-from-virus-case-outbreak/>.

²⁵ *Cape Elizabeth Long-term Care Facility Becomes 10th in Maine with a Coronavirus Outbreak*, WGME NEWS (May 22, 2020), <https://wgme.com/news/coronavirus/cape-elizabeth-long-term-care-facility-becomes-10th-in-maine-with-a-coronavirus-outbreak>.

²⁶ *Id.*

²⁷ *Surveillance Strategies for COVID-19 Human Infection*, WHO (May 10, 2020), https://apps.who.int/iris/bitstream/handle/10665/332051/WHO-2019-nCoV-National_Surveillance-2020.1-eng.pdf?sequence=1&isAllowed=y.

²⁸ Nancy Rosenbloom & Kyle Virgien, *As Omicron Surges, People in Jail and Detention are More Vulnerable than Ever*, ACLU (Dec. 22, 2021), <https://www.aclu.org/news/criminal-law-reform/as-omicron-surges-people-in-jail-and-detention-are-more-vulnerable-than-ever/>.

Donovan Correctional Facility in San Diego, for example, thirty percent of inmates have contracted COVID-19.²⁹ During an outbreak in December of 2020, eighteen inmates died from COVID-19, three of whom were discovered dead or dying in their beds.³⁰ Despite CDC guidance to frequently test prisoners, none of the inmates had received a test from the prison before transport to the hospital.³¹ By December 2021, half a million people in prison had been infected with the virus that causes COVID-19.³² This figure does not include the cases in jails, Immigrations and Customs Enforcement (ICE) facilities, and juvenile detention centers.³³ Early widespread testing would have allowed federal and local governments to mobilize a coordinated and effective response—including a plan tailored for incarcerated persons—instead of letting the pandemic turn into “an American catastrophe.”³⁴ A year into the pandemic, a number of state prisons continued to refuse to test all their inmates, including some who exhibited symptoms.³⁵ In June 2021, the CDC issued unequivocal guidance on testing incarcerated and detained persons.³⁶ In part, this guidance stated that diagnostic

²⁹ Jill Castellano, *Donovan Deaths: Inmates Died Of COVID-19 While Their Families Were Kept in The Dark*, KPBS (Apr. 9, 2021), <https://www.kpbs.org/news/2021/apr/09/donovan-deaths-inmates-died-covid-19-while-their-f/>.

³⁰ Jill Castellano & Mary Plummer, *Donovan Deaths: Three Prisoners Found Dead or Dying in Cells*, INEWSOURCE (Apr. 8, 2021), <https://inewssource.org/2021/04/08/donovan-deaths-3-prisoners-found-dead-or-dying-in-cells-from-covid-19/>.

³¹ *Id.*

³² Alexis Madrigal & Robinson Meyer, *How the Coronavirus Became an American Catastrophe*, B.U. NAT’L EMERGING INFECTIOUS DISEASE LABS (Mar. 21, 2020), <https://www.bu.edu/neidl/2020/03/how-the-coronavirus-became-an-american-catastrophe/>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Covid Prison Outbreak*, N.Y. TIMES, [hereinafter *Covid Prison Outbreak*], <https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html>.

³⁶ Guidance for Correctional & Detention Facilities, CDC (May 3, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html>.

and screening testing is part of a comprehensive strategy to prevent the spread of disease.³⁷ Given that, individuals in jails and prisons should have been offered regular testing.

Among the most vulnerable to the virus are wards of the state, who have no autonomy to protect themselves. The largest population of state wards is persons incarcerated in jails and prisons. Almost 2.2 million people are being held in jails and prisons in the United States, its territories, and Indian Country, 10,000 of whom are under the age of 18.³⁸ Jails and prisons have been categorized as “infectious disease incubators”³⁹ whose powerless occupants fall ill and die in large numbers because of close living conditions and absent or inadequate COVID-19 protections and disease management. 500,000 people who are jailed have not been convicted of a crime.⁴⁰ Yet, they too must confront this deadly illness in crowded communal settings. The case of Cook County Jail in Chicago is illustrative. As of July 1, 2020, 778 inmates had tested positive.⁴¹ Additionally, 362 staff in the jail had contracted COVID-19.⁴² A year into the pandemic, prison

³⁷ *Id.*

³⁸ Wendy Sawyer & Pete Wagner, *Mass Incarceration: The Whole Pie 2020* (March 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>; Drew Kann, 5 Facts Behind America's High Incarceration Rate, CNN (Apr. 21, 2019, 3:50 PM), <https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html>.

³⁹ Bill Chappell, *Crowded U.S. Jails Drove Millions of COVID-19 Cases, A New Study Says*, NPR (Sept. 2, 2021, 11:00 AM), <https://www.npr.org/2021/09/02/1033326204/crowded-jails-drove-millions-of-covid-19-cases-a-new-study-says>.

⁴⁰ Roni Caryn Rabin, *Prisons are COVID-19 Hotbeds. When Should Inmates Get the Vaccine?*, N.Y. Times (Nov. 30, 2020), <https://www.nytimes.com/2020/11/30/health/coronavirus-vaccine-prisons.html>.

⁴¹ Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, PEW CHARITABLE TRS. (July 1, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities>.

⁴² *Id.*

outbreaks were still occurring, some with a tremendous toll: a prison in Utah fought an outbreak of 1,545 cases (94% of these cases in inmates) that, as of March 2, 2021, has left thirty-one inmates hospitalized and twelve dead.⁴³ Although vaccinations have increased the chances of surviving a COVID-19 infection, in some jail and prisons populations are still succumbing to COVID-19 in shockingly high numbers. For example, in early January of 2022, sixty-five percent of the inmates at the federal corrections complex in Yazoo City, Missouri contracted COVID-19.⁴⁴

As of April 2021, thirty-four out of a hundred jailed and imprisoned persons have contracted COVID-19⁴⁵ (more than 661,000 cases in jails and prisons),⁴⁶ as compared to nine cases out of every one hundred in the U.S. generally.⁴⁷ As of January 2022, more than 2,750 incarcerated persons in prisons have died of COVID-19.⁴⁸ Figures for jails are harder to come by, as there are only three jurisdictions where a state agency collects and resorts information about COVID-19 in jails.⁴⁹ Death tolls in this population are considered to be a “vast undercount” according to the former chief medical officer at Riker’s

⁴³ Mary Van Beusekom, *Studies Detail Large COVID Outbreaks at US Prisons, Jails*, CTR. INFECTIOUS DISEASE RSCH. & POL’Y (Apr. 5, 2021), <https://www.cidrap.umn.edu/news-perspective/2021/04/studies-detail-large-covid-outbreaks-us-prisons-jails>.

⁴⁴ *Covid Behind Bars Data Project*, UCLA L., <https://uclacovidbehindbars.org/>, (last visited Jun. 1, 2022).

⁴⁵ *Covid-19: Infections Among U.S. Prisoners Have Been Triple Those of Other Americans*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/live/2021/04/10/world/covid-vaccine-coronavirus-cases>.

⁴⁶ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Apr. 16, 2021, 7:51 AM), https://eji.org/wp-content/uploads/2021/04/04-16-21-Coronavirus-in-the-U.S._-Latest-Map-and-Case-Count-The-New-York-Times.pdf.

⁴⁷ *Covid Prison Outbreak*, *supra* note 35.

⁴⁸ COVID PRISON PROJECT, <https://covidprisonproject.com/>, (last visited Jun. 1, 2022).

⁴⁹ UCLA L., *supra* note 44.

Island.⁵⁰ Some prisons, such as California’s notorious San Quentin – where three quarters of the 3,300 inmates and 227 staff members had tested positive as of August 2020⁵¹ became deadly warehouses of infection in the first year of the pandemic. This was an echo of the outbreak of influenza at the facility in 1918.⁵² One hundred years later, its prisoners are still not protected from deadly disease. Officials at San Quentin have been fined for not providing soap, running water, masks, COVID-19 testing, contact tracing, protective gear for staff, or referrals of sick staff to doctors.⁵³ In November 2021, Marin County Superior Court found that the prison’s mismanagement, including the practice of keeping two persons housed in one cell, amounted to cruel and unusual punishment. Despite this, Judge Geoffrey Howard denied the petition of inmates asking that the prison be ordered to provide more distance among persons incarcerated there. Judge Howard reasoned that vaccinations “...substantially reduce the danger posed by COVID-19 within the prison.” While vaccines reduce risk, unfortunately for the residents of San Quentin and other facilities, “...vaccination alone will not be enough to stop carceral outbreaks.”⁵⁴ Judge Howard went on to acknowledge the

⁵⁰ Beth Schwartzapfel et al., *1 in 5 Prisoners in the U.S. Has Had COVID-19*, MARSHALL PROJECT (Dec. 18, 2020), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19>.

⁵¹ Richard Winton, *San Quentin Prison is Fined \$421,880 Over Deadly COVID-19 Conditions; 28 Inmates and an Officer Died*, L.A. TIMES (Feb. 5, 2021 10:40 AM), <https://www.latimes.com/california/story/2021-02-05/san-quentin-prison-receives-mega-fine-over-deadly-conditions-from-cal-osh>.

⁵² L.L. Stanley, *Influenza at San Quentin Prison, California*, 34 PUB. HEALTH REP. 996, 996 (1919).

⁵³ Winton, *supra* note 51.

⁵⁴ Benjamin A. Barsky et al., *Vaccination plus Declaration – Stopping COVID-19 in Jails and Prisons*, NEW ENGLAND J. MED. (Mar. 3, 2021), <https://www.nejm.org/doi/full/10.1056/NEJMp2100609>.

risk, while still ... ” substantial and serious, may well not exceed contemporary standards of decency.”⁵⁵ Three hundred and thirty-five inmates at San Quentin contracted COVID-19 in the two weeks ending on January 25, 2022.⁵⁶ Still the prison not only continues to force two men to share a four by nine-foot living space, it has also increased the prison population from 2,418 in May 2021 to about 3,092 in January 2022.⁵⁷ These actions certainly exceed contemporary standards of decency. “It has long been said that a society’s worth can be judged by taking stock of its prisons,” observed Justice Sotomayor when the Supreme Court refused to prevent at-risk inmates in Ohio from being transferred to protect them from the virus.⁵⁸ “This is all the truer in a pandemic, where inmates have been rendered . . . powerless to protect themselves”⁵⁹

Further, complicating the care and protection of these defenseless individuals is the fact that the health of jailees and inmates is closely tied to the public health of the free community.⁶⁰ This is because detained and incarcerated persons, corrections officers, medical staff, contractors, clergy, social workers,

⁵⁵ *Marin County Judge Tentatively Rejects Cutting Inmate Crowding at San Quentin, Criticizes Officials Over COVID Outbreak*, CBS BAY AREA (Oct. 15, 2021 10:21 PM), <https://sanfrancisco.cbslocal.com/2021/10/15/marin-county-judge-tentatively-rejects-cutting-inmate-crowding-san-quentin/>.

⁵⁶ Juan Moreno Haines, *Op-Ed: We Pleaded for Social Distancing Here in San Quentin. The State Refused, and Now COVID is Raging*, L.A. TIMES (Jan. 28, 2022 6:00 AM), <https://www.latimes.com/opinion/story/2022-01-28/covid-prison-san-quentin-ruling>.

⁵⁷ *Id.*

⁵⁸ *Valentine v. Collier*, 140 S.Ct. 1598 (2020).

⁵⁹ *Id.*

⁶⁰ Eric Reinhart & Daniel L. Chen, *Association of Jail Decarceration and Anticontagion Policies with COVID-19 Case Growth Rates in U.S. Counties*, JAMA NETWORK (Sept. 2, 2021), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2783680?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=090221.

and family visitors move back and forth.⁶¹ Fifty-five percent of the jail population in the U.S. turns over each week.⁶² This is one of the reasons why compiling up-to-date information regarding jails is like chasing a drop of mercury. Jail “churn” has created problems since the beginning of the pandemic. In Cook County, in June 2020, one out of every six COVID-19 cases in Illinois was traced back to a contact at Cook County Jail.⁶³ The wave of COVID-19 infections that tore through San Quentin in August 2020 was started by a transfer of 122 untested inmates, fifteen of whom were ill with the disease, from the California Institution for Men in Chino.⁶⁴ This is the same way that flu was brought to San Quentin in April 1918.⁶⁵

Ultimately, since 2020, not much has changed to protect incarcerated persons. As the pandemic progressed, access to COVID-19 testing greatly increased and some prisoners were released.⁶⁶ But these measures were not nearly sufficient. By April 2021, there were 1,400 new cases of COVID-19 among incarcerated persons each day⁶⁷ and as of February 2022, there have been

⁶¹ *Id.*

⁶² *Id.*

⁶³ Matt Masterson, *Report: 1 in 6 Chicago COVID-19 Cases Can Be Tied to Cook County Jail*, WTTW (June 4, 2020, 6:33 PM), <https://news.wttw.com/2020/06/04/report-1-6-chicago-covid-19-cases-can-be-tied-cook-county-jail>.

⁶⁴ Don Thompson, *California Prison Officials Blasted for Coronavirus Outbreak; Transfer of Inmates from Chino Criticized*, DAILY BULL. (July 2, 2020, 3:55 PM), <https://www.dailybulletin.com/2020/07/01/california-officials-blasted-for-prison-coronavirus-outbreak>.

⁶⁵ Stanley, *supra* note 52.

⁶⁶ Meghan Peterson et. al, *Uneven Rollout of Vaccines in United States Prisons*, HEALTH AFFS. BLOG (Apr. 15, 2021), <https://www.healthaffairs.org/doi/10.1377/forefront.20210413.559579/full/>.

⁶⁷ *COVID's Impact on People in Prison*, EQUAL JUST. INITIATIVE (Apr. 16, 2021), <https://ej.org/news/covid-19s-impact-on-people-in-prison/>.

562,000 cases of COVID-19 just in the twenty-eight prisons that report this data.⁶⁸ Because many facilities have declined to update their COVID-19 morbidity and mortality statistics on public dashboards, the number of cases for prisons is higher.⁶⁹ Despite the fact that many more incarcerated persons are being given COVID-19 vaccines, jails and prisons are still not voluntarily prioritized by federal or state governments in vaccine distribution schemes anywhere but California.⁷⁰ As of April 2021, fewer than twenty percent of state and federal prisoners had been vaccinated.⁷¹ And it is estimated that, seven months after vaccines became available, only half of all prisoners have received a vaccine.⁷²

In a pandemic such as COVID-19, what measures must a state take to promote the safety of detained and incarcerated persons? Is it enough to rely on jail and prison officials to decide what precautions to implement? Is the state relieved of liability if inmates with underlying illnesses are furloughed or transferred? Does a state have to act more broadly in the wider community to protect people who have no choice but to wait to fall sick and possibly die within their institutions?

⁶⁸ COVID PRISON PROJECT, *supra* note 48.

⁶⁹ Michael Ollove, *Some States are Cloaking Prison COVID Data*, PEW CHARITABLE TRS. (Oct. 27, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/10/27/some-states-are-cloaking-prison-covid-data>.

⁷⁰ Marisa Fernandez, *Most States Aren't Prioritizing Prisons for COVID Vaccines*, AXIOS (Mar. 1, 2021), <https://www.axios.com/most-states-arent-prioritizing-prisons-for-covid-vaccines-5c16cddb-7557-43d4-9750-994c896a6d2d.html>.

⁷¹ Katie Park et al., *As States Expand COVID-19 Vaccines, Prisoners Still Lack Access*, NEWS CTR. ME. (Apr. 6, 2021, 7:15 AM), <https://www.newscentermaine.com/article/news/health/coronavirus/vaccine/states-expand-vaccines-prisoners-lack-access/507-eae62fca-38aa-4576-9c4d-bedd56ca195b>.

⁷² Tiana Herring & Emily Widra, *Just Over Half of Incarcerated People Are Vaccinated, Despite Being Locked in COVID-19 Epicenters*, PRISON POL'Y INITIATIVE (May 18, 2021), <https://www.prisonpolicy.org/blog/2021/05/18/vaccinationrates/>.

A typical analysis of the issues does not apply in a pandemic: During a public health emergency, the analysis shifts to take into consideration the unique circumstances of the crisis. Actions that will mitigate risk are of paramount importance, practically and legally. These include providing masks and soap; vaccinating staff, detainees, and inmates; slowing the movement of persons in and out of facilities; keeping individuals apart from one another; and testing incarcerated persons regularly. Courts have made it clear that jail and prison officials are obligated to implement COVID-19 precautions to protect persons in their care.

The Eighth Amendment of the U.S. Constitution forbids “cruel and unusual punishments[.]”⁷³ This amendment is a backdrop against which prisoners’ treatment is measured, using the standard of “deliberate indifference” to an inmate’s needs to determine if they are being treated cruelly.⁷⁴ In the context of the coronavirus pandemic, cruelty may mean failure to protect an incarcerated person from a deadly disease. Eighth Amendment claims, which seek to give equitable relief to prisoners, and Fourteenth Amendment Due Process claims, which apply to jail detainees, require difficult legal campaigns. However, they are powerful tools to forge a pathway to justice. Reforming the law to allow plaintiffs to more easily obtain certain types of damages will help detainees and prisoners make their voices heard. The beginning of this reform is explored in this article.

⁷³ U.S. CONST. amend. VIII.

⁷⁴ Michael J. Bentley et al., *The Coronavirus (COVID-19), Prisons, and the Eighth Amendment*, BRADLEY (Mar. 24, 2020), <https://www.bradley.com/insights/publications/2020/03/the-coronavirus-covid19-prisons-and-the-eighth-amendment>.

Part II of this Article provides an overview of the pandemic and weak government and law enforcement responses. These responses added to the broader impact of COVID-19 in communities, which contributed to illness and death of inmates. Part III discusses the traditional power and responsibility of the state over wards and guardians. Part IV discusses the Eighth Amendment generally and in relationship to COVID-19. Part V looks at 42 U.S. Code § 1983, civil action for a deprivation of right and addresses the lack of some states' actions to develop and enforce governors' orders and laws to stop the spread of COVID-19. Additionally, Part V discusses the requirement of physical and emotional injury in compensatory damages and the place of nominal and punitive damages in Eighth Amendment and § 1983 claims. These three kinds of damages have the power to send a message about the rights of incarcerated persons during a public health emergency; those under the protection of the state need tangible justice and rigorous accountability of governments during a public health emergency. Part VI examines how these shortfalls harm prisoners and contribute to states' liability for harm.

II. Condemned to Repeat It: What Went Wrong in 2020

Governmental policy and action during a public health emergency can mean the difference between life and death. Protecting incarcerated persons starts with measures taken by the state outside the prison to reduce the disease burden of COVID-19. Examples of these measures are quarantine, travel restrictions, stay at home orders, and mask orders. These are actions that are narrowly tailored to protect citizens. The extent to which these measures are implemented and

enforced determines how fast and far the virus spreads and ultimately if it reaches the blind alleys of jails and prisons. Much has shifted since the beginning of the COVID-19 pandemic, including the response of governments. However, unnecessary illness, debilitation, and death from COVID-19 continue in jails and prisons around the country.

The Constitution confers broad powers to the states to protect citizens' welfare.⁷⁵ Public health police power allows the states to pass and enforce isolation and quarantine, health, and inspection laws to interrupt or prevent the spread of disease.⁷⁶ Human rights law and the International Covenant on Civil and Political Rights says this about quarantines, "lockdowns," and similar measures:

[R]estrictions on rights for reasons of public health or national emergency [must] be lawful, necessary, and proportionate. They must be strictly necessary to achieve a legitimate objective, based on scientific evidence, proportionate to achieve that objective, neither arbitrary nor discriminatory in application, of limited duration, respectful of human dignity, and subject to review.⁷⁷

In 1905, the Supreme Court in *Jacobson v. Massachusetts* confirmed the position that state-issued quarantines are constitutional.⁷⁸ Generally, courts have reviewed police power measures "only when the degree of restriction of personal liberty was found to be unconscionable"⁷⁹ or when emergency powers during public illness are racially motivated and ill-suited to prevent disease.⁸⁰ Since

⁷⁵ See U.S. CONST. amend. X.

⁷⁶ Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REP. Supp. 1, 2005, at 20.

⁷⁷ Carlos Valerio, Human Rights and COVID-19 Pandemic, 24 JBRA ASSISTED REPROD. Jul. 14, 2021 at 379, 381, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7365536/>.

⁷⁸ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

⁷⁹ Galva et al., *supra* note 76, at 3.

⁸⁰ *Jew Ho v. Williamson* 103 F. 10 (1900).

March 2020, millions in the United States have lived under quarantine and “stay-at-home” orders given by governors. Unlike quarantine, “stay-at-home” (or “safer-at-home”) orders are meant to keep people apart and curtail foot traffic into public spaces, thus slowing the spread of illness sufficiently to allow doctors and hospitals time and resources to treat those who *do* become ill. “Lockdown” orders have been different from state to state and even at the city and town government level. This reflects not only varying disease burden, but also a lack of consistent policy and information.

Some worldwide governmental response to the COVID-19 pandemic has been draconian. Chinese officials sealed some people with suspected cases of COVID-19 into their homes,⁸¹ patrolled the streets with rifles,⁸² and forced sick residents to go to off-site medical isolation treatment centers.⁸³ This was reminiscent of the smallpox raids that U.S. public health officials conducted during the smallpox epidemic of 1898-1904.⁸⁴ The extreme tactics in China, although credited as “setting a new standard for outbreak response” by the

⁸¹ Faye Brown, *Wuhan Woman Screams as Chinese Authorities Barricade Her Inside Own Home*, METROUK (Feb. 2, 2020, 12:29 AM), <https://metro.co.uk/2020/02/02/wuhan-woman-screams-chinese-authorities-barricade-inside-home-12162599/>.

⁸² Mia Swart, *How the Coronavirus Has Deepened Human Rights Abuses in China*, AL JAZEERA (Mar. 12, 2020), <https://www.aljazeera.com/news/2020/03/12/how-the-coronavirus-has-deepened-human-rights-abuses-in-china/>.

⁸³ Emily Feng, *China Has Built Over 20 Mass Quarantine Centers for Coronavirus Patients in Wuhan*, NPR (Feb. 24, 2020), <https://www.npr.org/2020/02/24/808995258/china-has-built-over-20-mass-quarantine-centers-for-coronavirus-patients-in-wuha>.

⁸⁴ Alexandra Marvar, *How New York Separated Immigrant Families in the Small Pox Outbreak of 1901*, SMITHSONIAN MAG. (Jan. 10, 2019), <https://www.smithsonianmag.com/history/how-new-york-separated-immigrant-families-smallpox-outbreak-1901-180971211/>.

director of the World Health Organization⁸⁵ and for saving about a million lives,⁸⁶ also resulted in at least one death⁸⁷ and repressed human rights.⁸⁸ China has the world's second-largest prison population.⁸⁹ However, its strict measures have controlled COVID-19 not only in the country at large, but among jails and prisons. Key among those measures are holding prison officials accountable when infections enter a facility and requiring staff to live at the prisons for fourteen days at a time and then quarantine at home for fourteen days.⁹⁰ Although China's "sledgehammer"⁹¹ approach was effective in dampening COVID-19, it would not be constitutional in the United States.⁹²

In 2020, Hawai'i imposed its own extreme restrictions. Visitors were required to enter health and travel information into a database at the airport⁹³ and

⁸⁵ @DrTedros, Twitter (Jan. 30, 2020, 3:40 PM), <https://twitter.com/DrTedros/status/1222982869871669251>.

⁸⁶ *Compared With China, U.S. Stay-At-Home Has Been 'Giant Garden Party,' Journalist Says*, NPR (Apr. 29, 2020, 3:06 PM), <https://www.npr.org/transcripts/847755751>.

⁸⁷ *Coronavirus: Disabled Boy Dies in China After Father Quarantined*, BBC NEWS (Feb. 3, 2020), <https://www.bbc.com/news/world-asia-china-51362772>.

⁸⁸ Yaqiu Wang, *The Human Toll of China's Coronavirus Control Efforts*, HUM. RTS. WATCH (Mar. 12, 2020, 9:52 AM), <https://www.hrw.org/news/2020/03/12/human-toll-chinas-coronavirus-control-efforts#>.

⁸⁹ *Countries with the Largest Number of Prisoners as of June 2020*, STATISTA, <https://www.statista.com/statistics/262961/countries-with-the-most-prisoners/#:~:text=Countries%20with%20the%20most%20prisoners%20as%20of%20June%2020&text=As%20of%20June%202020%2C%20the,the%20Russian%20Federation%2C%20and%20India> (last visited June 2020).

⁹⁰ Spencer D. Li & Tzu-Hsuan Liu, *Correctional System's Response to the Coronavirus Pandemic and Its Implications for Prison Reform in China*, 15 INT'L J. EVIDENCE-BASED RSCH., POL'Y, & PRAC. 959 (2020).

⁹¹ Javier C. Hernández, *China Hits a Coronavirus Milestone: No New Local Infections*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/03/18/world/asia/china-coronavirus-zero-infections.html>.

⁹² James Hamblin, *A Historic Quarantine*, ATLANTIC (Jan. 24, 2020), <https://www.theatlantic.com/health/archive/2020/01/china-quarantine-coronavirus/605455/>.

⁹³ *New Online Safe Travels Form Mandatory on Sept. 1*, STATE OF HAW. OFF. ENTER. TECH. SERVS. (Aug. 28, 2020), <https://ets.hawaii.gov/new-online-safe-travels-application-mandatory-on-sept-1/>.

then call from quarantine to report their health status and confirm that they had not left their lodgings. If they did not respond to phone calls, the police checked to see if they were in quarantine. By July of 2020, Hawai'i arrested 200 people for violating the 14-day traveler's quarantine requirement.⁹⁴ Although "...public health metrics all point[ed] toward extended social isolation [,]"⁹⁵ Hawai'i, like other states that year, reopened economic opportunities in September 2020.⁹⁶ By January 1, 2021, 657 prisoners had contracted COVID-19.⁹⁷ As of November 2021, 2,900 inmates in prisons had fallen ill with COVID-19.⁹⁸ Despite emergency release of inmates in 2020 and 2021,⁹⁹ Hawaii's jails and prisons— like many in the United States— remain crowded. The spread of an infectious illness in these conditions is inevitable. Hawaii's governor acknowledged in September of 2021 that his state's correctional facilities still house too many people, therefore the disease continues to spread in these facilities.¹⁰⁰ In addition to the health risk

⁹⁴ Tovin Lapan, *Hawaii has Arrested Nearly 200 Visitors for Quarantine Violations*, TRAVEL WEEKLY (July 23, 2020), <https://www.travelweekly.com/Hawaii-Travel/Nearly-200-arrested-since-March-for-breaking-Hawaii-quarantine>.

⁹⁵ Alice Park, *Here's How Scientists and Public Health Officials Recommend Getting Back to Normal*, TIME (April 30, 2020), <https://time.com/5829387/coronavirus-reopening-science/>.

⁹⁶ *Hawaii Reopening to Tourism on October 15*, HAWAII.COM (Sep. 8, 2020), <https://www.hawaii.com/blog/hawaii-reopening-to-tourism-on-october-15-with-a-catch/>.

⁹⁷ Rick Daysog, *Attorney: Lawsuit Over Alarming Spread of COVID in Hawaii Prisons Prompted Change*, HAWAII NEWS NOW (Nov. 14, 2021 10:37 PM), <https://www.hawaiiinternow.com/2021/11/15/attorney-lawsuit-over-alarming-spread-covid-hawaii-prisons-prompted-change/>.

⁹⁸ *Id.*

⁹⁹ Mark Ladao, *Hundreds of Hawaii Inmates Freed from Overcrowded Facilities to Limit Exposure to COVID-19*, STAR ADVERTISER (May 1, 2020), <https://www.staradvertiser.com/2020/05/01/hawaii-news/hundreds-of-inmates-freed-from-overcrowded-facilities/>.

¹⁰⁰ Catherine Cruz, *Governor Says Hawai'i Prisons Don't Have the Capacity to Fully Implement COVID Protocols*, HAWAII PUB. RADIO (Sept. 30, 2021 5:15 PM), <https://www.hawaiiipublicradio.org/the-conversation/2021-09-30/governor-hawaii-prisons-covid-public-safety-tourism>.

of people living so closely with one another, the crowded conditions prevent facilities from fully implementing COVID-19 precautions such as ten-day isolation periods for new inmates.¹⁰¹

The regulation of movement of both people and goods has always been vital to managing a pandemic. This broader net of protection has measurable impacts on the safety of incarcerated persons. The Supreme Court in *Zemel v. Rusk* held that the United States may restrict the travel of U.S. passport holders to protect other citizens.¹⁰² Although citizens have the liberty to travel, this liberty is “subject to reasonable regulation of the law”¹⁰³ and does not mean that [travel] can under no circumstances be inhibited.”¹⁰⁴ States have responded differently during the COVID-19 pandemic. Some funneled cars through checkpoints, requiring drivers from “hotspots” to fill out a questionnaire and promise to quarantine for 14 days.¹⁰⁵ Others took a more aggressive stance: by March 28, 2020, National Guardsmen in Rhode Island were knocking on doors looking for travelers from New York.¹⁰⁶ In Maine, Governor Janet Mills was struggling to balance the economic welfare of the State and the protection of Maine

¹⁰¹ *Id.*

¹⁰² *Zemel v. Rusk*, 381 U.S. 22 (1965).

¹⁰³ *Shachtman v. Dulles*, 225 F.2d 938, 941 (1955).

¹⁰⁴ *Zemel v. Rusk*, 381 U.S. 22, 26 (1965).

¹⁰⁵ Melanie Payne, *Fact Check: Are Florida's Borders Closed to Out-of-state Visitors? No, But Expect Delays*, USA TODAY (Apr. 10, 2020, 9:27 AM), <https://www.usatoday.com/story/news/factcheck/2020/04/10/fact-check-coronavirus-florida-closed-border-georgia-alabama/5129404002/>.

¹⁰⁶ Nicholas Bogel-Burroughs, *Rhode Island Pulls Over New Yorkers to Keep Virus at Bay*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/03/28/us/coronavirus-rhode-island-checkpoint.html>.

residents.¹⁰⁷ The United States Department of Justice unintentionally highlighted the entire purpose for quarantine of visitors to Maine—restricting visitors by requiring quarantines and COVID-19 testing in order to slow the spread of illness—when it declared that that the quarantine discriminates against visitors.¹⁰⁸ In the first week of April, Mills expressed frustration in a press briefing: “While I cannot simply close the State’s border, or pull up the Maine-New Hampshire Bridge . . . , I have issued a new travel order . . . requiring that anyone entering Maine self-quarantine.”¹⁰⁹

While it is true that she could not pull up the bridge over the Piscataqua River, since it is a fixed-span bridge, it is not as certain if Maine could have closed its borders to non-essential travelers and survived a constitutional challenge. The Governor is given the power to control the movement of persons in an afflicted area during an emergency.¹¹⁰ What is absolutely true is that Maine’s travelers’ quarantine was not a complete deterrent. A CBS Maine affiliate reporter interviewed travelers at a rest stop and were told that it was not “practical” to quarantine for short stays, so the travelers had no intention of doing

¹⁰⁷ *Governor Janet Mills: Response to the Pandemic, from Public Health to Economic Fallout*, NPR (Aug. 12, 2020) [hereinafter *Economic Fallout*], <https://www.npr.org/podcasts/381443550/maine-calling>.

¹⁰⁸ Susan Sharon, *Justice Department Says Maine's 2-Week Quarantine Rule Discriminates Against Tourists*, NPR (May 29, 2020, 7:38 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/29/865932962/justice-department-says-maines-2-week-quarantine-rule-discriminates-against-tour#:~:text=Live%20Sessions-,Justice%20Department%20Says%20Maine's%202%2DWeek%20Quarantine%20Rule%20Discriminates%20Against,states%20have%20the%20same%20rule.>

¹⁰⁹ *Governor Mills: Stay Healthy. Stay Home.*, MAINE.GOV (Apr. 3, 2020), https://www.maine.gov/governor/mills/news/radio_address/governor-mills-stay-healthy-stay-home-2020-04-03.

¹¹⁰ ME. REV. STAT. ANN. 37 § 742(I)(C)(8) (West 2022).

so.¹¹¹ This was surely surprising news for Governor Mills who stated, “We are going to presume they [visitors] are following . . . quarantine.”¹¹² By contrast, during the same five months, New Brunswick, Canada, an area close to Maine with similar demographics, had only had 178 cases and two deaths at that time¹¹³ and no cases among its prisoners.¹¹⁴ This has been attributed in large part to the Canadian government’s willingness to severely restrict inter-provincial travel and close its international border.¹¹⁵ Since the SARS-CoV-2 spreads easily, restricting travel is a necessary and proportionate way to protect lives, especially the lives of vulnerable populations in the custody of the government.

Weak enforcement of governmental mandates was a significant problem in 2020. Police and park rangers in Maine, for example, reported last year that they do not have the resources to patrol for violators or a reliable means for identifying out-of-staters.¹¹⁶ In Maine, the Portland Police Department had an unofficial opinion on the scope of quarantine, masks, and COVID-19 test

¹¹¹ *Some Tourists Ignore Self-quarantine and 'Walking Only' Rule at Maine Beach*, WGME (May 26, 2020), <https://wgme.com/news/coronavirus/some-tourists-ignore-self-quarantine-and-walking-only-rule-at-maine-beach>.

¹¹² *Economic Fallout*, *supra* note 107.

¹¹³ Charles Eichacker, *Neighbors Maine and New Brunswick Have Very Different COVID-19 Stories*, BANGOR DAILY NEWS (Aug. 11, 2020), <https://bangordailynews.com/2020/08/13/news/neighbors-maine-and-new-brunswick-have-had-very-different-covid-19-stories/>.

¹¹⁴ Colin Woodard, *Neighboring New Brunswick Has Kept the Coronavirus in Check. Here’s How*, PORTLAND PRESS HERALD (May 9, 2020), <https://www.pressherald.com/2020/05/09/how-new-brunswick-stopped-covid-19/>.

¹¹⁵ *Id.*; Paula Newton, *Canada Further Locks Down International Borders, Announces New Testing Regime*, CNN (Feb. 9, 2021), <https://www.cnn.com/travel/article/canada-travel-restrictions-fines/index.html>.

¹¹⁶ Shannon Moss, *‘It’s Not Easy to Enforce’ Police Talk About 14-day Quarantine for Out of State Mainers During Coronavirus, COVID-19 Pandemic*, NEWS CTR. ME. (May 11, 2020, 6:35 PM), <https://www.newscentermaine.com/article/news/health/coronavirus/its-not-easy-to-enforce-police-talk-about-14-day-quarantine-for-out-of-state-mainers-during-coronavirus-covid-19-pandemic/97-5a09864f-6f42-407a-9c23-20f60bf04e0b>.

enforcement in late July 2020: “[The Order] is only a suggestion. It’s unconstitutional. We will not enforce it and I don’t know any police department in the State who will enforce it.”¹¹⁷ This response was similar to that of a North Carolina sheriff who allowed hundreds of spectators to attend a car race.¹¹⁸ “I will not enforce an unconstitutional law[.]” he said, explaining why he would not tell people to adhere to gathering limits.¹¹⁹ He, at least, unlike the Maine officer, acknowledged that a governor’s order has the effect of law.¹²⁰ Even though refusal to don a face covering at the direction of a police officer is a Class E crime,¹²¹ the Shifts Commander in Portland was clear in July 2020: “We are not involved in the criminal aspect of [enforcement].”¹²² This leaves a pressing question: If the police are not “involved in the criminal aspect” of a crime, then who is? Law enforcement has a duty to enforce the law to protect people. The community of a jailer and of a corrections officer consists of the detainees and residents in their charge. Officials have the legal obligation to protect individuals in jails and prisons. In the free community, lack of enforcement is discouraging and problematic. However, many people in the larger society were able to work from home, avoid crowded places, eat alone, and stand away from others. In the

¹¹⁷ Interview with Shifts Commander, Portland Police Department (July 29, 2020) [hereinafter Shifts Commander Interview].

¹¹⁸ Jerry Garrett, *N. Carolina Speedway Packs it Stands, Drawing Governor’s Rebuke*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/sports/autoracing/ace-speedway-crowd-coronavirus.html>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Guidance on Enforcing Face Covering Rules in Public Settings*, MAINE.GOV (Nov. 23, 2020), <https://www.maine.gov/decd/sites/maine.gov.decd/files/inline-files/Joint%20Face%20Covering%20Guidance%20%28w%20signatures%29%2011-23-20.pdf>.

¹²² Shifts Commander Interview, *supra* note 117.

captive and vulnerable society that is a jail or prison, individuals need protection from their custodian; officials are required to safeguard them in the same way that a parent or guardian must protect a child from harm.

When asked on July 4, 2020, if the Department would enforce any governmental mandate, including dispersing large gatherings at a campground or on a private beach, a representative of the Cumberland County Sheriff's Department said, "We don't get into politics here, we are not going to enforce any quarantine or masks."¹²³ Unfortunately, this laissez-faire attitude may have contributed to an August outbreak of COVID-19 at a wedding in Millinocket, Maine. A church and Inn ignored protective measures required by the Governor.¹²⁴ As a result, at least 177 people associated with the wedding became ill and eight died.¹²⁵ The outbreak caused by the wedding led to an outbreak at York County Jail, where 107 inmates and staff became ill, and one man died.¹²⁶ A corrections officer attended the wedding and worked double shifts at the jail for five days while suffering symptoms of COVID-19.¹²⁷ An investigator hired by York County determined that the jail "largely failed to follow best practices recommended by the MCDC, Gov. Janet Mills, and the state Department of

¹²³ Interview with Deputy, Cumberland County Sheriff's Department (July 4, 2020).

¹²⁴ Charles Eichacker, *Eight Deaths Now Tied to Millinocket-area Wedding Outbreak*, WGME (Sep. 19, 2020), <https://wgme.com/news/local/eight-deaths-now-tied-to-millinocket-area-wedding-outbreak>.

¹²⁵ *Id.*

¹²⁶ Rachel Ohm, *Failure to Follow Safety Protocols Led to COVID-19 Outbreak at York County Jail, Report Confirms*, PORTLAND PRESS HERALD (Feb. 6, 2021), <https://www.pressherald.com/2021/02/05/report-confirms-that-failure-to-follow-safety-protocols-led-to-covid-outbreak-at-york-county-jail/>.

¹²⁷ *Id.*

Corrections.”¹²⁸ Masks were not allowed for either inmates or staff, the rationale being that masks would “cause panic[.]”¹²⁹ This was also the case at Rikers Island last year, where inmates were told that masks might “scare” them.¹³⁰ Views on the efficacy of masks (or face coverings) have evolved over the past year. The Centers for Disease Control now recommends wearing two masks for efficient protection.¹³¹

Masks were not provided in U.S. prisons until May 2020, and even then “mask” may only have meant a bandana, perhaps with a coffee filter.¹³² The American Civil Liberties Union (ACLU) reported that jailees in Orange County, California were using blood-stained strips of sheets as face coverings, even as the Supreme Court lifted a lower court order to adopt safety measures in the jail.¹³³ An outbreak in December 2020 sickened 1,250 people in the Orange County Jail.¹³⁴ Yet, hand sanitizer is usually contraband, and soap was doled out stingily.¹³⁵ At Rikers Island Prison Complex, inmates had been mixing water,

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Michelle Evans, *I Got COVID at Rikers. I’m Still Suffering*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/opinion/rikers-jail-covid.html>.

¹³¹ *Improve How Your Mask Protects You*, CDC (Apr. 6, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/effective-masks.html>.

¹³² Samantha Michaels, *New York Prisoners Are Sewing Masks for Hospitals—But Most Don’t Have Their Own*, MOTHER JONES (May 6, 2020), <https://www.motherjones.com/crime-justice/2020/05/new-york-prisoners-are-sewing-masks-for-hospitals-but-most-dont-have-their-own/>.

¹³³ Ariane de Vogue, *Supreme Court Lifts Lower Court Order That Would Have Required More COVID-related Safety Measures in California Jail*, CNN (Aug. 5, 2020, 6:47 PM), <https://www.cnn.com/2020/08/05/politics/supreme-court-covid-measures-california-jail/index.html>.

¹³⁴ *Orange County Judge Says No Inmate Releases Needed to Contain COVID-19 at Jails*, ABC 7 (Feb. 16, 2021), <https://abc7.com/orange-county-jails-coronavirus-inmates/10345956/>.

¹³⁵ *Id.*

shampoo, and soap flakes to wash themselves.¹³⁶ In an ironic twist, some Rikers Island inmates had been “conveniently” bottling hand sanitizer for outsiders that they themselves are not allowed to possess, for an hourly wage of \$2.85.¹³⁷ This relatively high rate of pay allows them to buy soap from the commissary.¹³⁸ In a similar turn, other New York prisoners are sewing masks for the public that they are not allowed to use; instead, they must tie State-issued bandannas around their mouths and noses,¹³⁹ which the CDC calls “the last resort” for face coverings because they are ineffective.¹⁴⁰ Bathrooms and showers are shared in prisons, and homemade face coverings are sometimes forbidden. Further, testing in jails, while much increased in 2021, remains inconsistent and limited.¹⁴¹

Once within the walls of a facility, coronavirus makes the rounds with ease, infecting inmates who have no way to avoid becoming sick. In the Federal Correctional Institution in Seagoville, Texas, three out of four inmates have tested

¹³⁶ Christina Carrega, *Shampoo, Watery Soap to Disinfect: Conditions on Rikers Island During COVID-19 Unsafe, Some Inmates Say*, ABC (Mar. 29, 2020), <https://abcnews.go.com/Health/shampoo-watery-soap-disinfect-conditions-rikers-island-covid/story?id=69767859>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Michaels, *supra* note 132.

¹⁴⁰ Gabby Landsverk, *The CDC Says Healthcare Workers Who Can't Get a Mask Should Use a Bandanna or Scarf as a 'Last Resort' as Supplies Run Short*, BUS. INSIDER (Mar. 19, 2020), <https://www.businessinsider.com/cdc-recommends-health-workers-use-bandanas-face-masks-crisis-2020-3>.

¹⁴¹ EQUAL JUST. INITIATIVE, *supra* note 67. (“The number of infections and deaths is likely even higher than the reported number because jails and prisons are conducting limited testing on incarcerated people. Many facilities won’t test incarcerated people who die after showing symptoms of COVID-19.”).

positive.¹⁴² “It came through here so fast that it’s out of control. We’re packed like sardines,” an inmate at Seagoville reported.¹⁴³

Cumberland County Sheriff Kevin Joyce said in May 2020 that “trying to build a case or enforce the Order [requiring masks] is unrealistic.”¹⁴⁴ When pressed as to how the Falmouth police would enforce mask wearing, the Commander said the Governor’s Order was “only a suggestion.”¹⁴⁵ Refusal to enforce governor’s mandates has occurred all over the country. Despite both nationwide and worldwide flare ups of the virus due to premature reopening and lax masking, some U.S. police departments have made statements that they will not enforce any government mandate to wear masks.¹⁴⁶ Denton County, Texas Sheriff Tracy Murphree proclaimed, in part incorrectly, “The order is not a law, there is no requirement that any police officer enforce it, and it's unenforceable. We can't spend our time running from place to place for calls about mask[s] we can really do nothing about.”¹⁴⁷ Murphree and other law enforcement officers were wrong – they could have done something about citizens who refused to wear masks.

¹⁴² Casey Tolan et al., *Inside the Federal Prison Where Three Out of Every Four Prisoners Have Tested Positive for Coronavirus*, CNN INVESTIGATES (Aug. 8, 2020), <https://www.cnn.com/2020/08/08/us/federal-prison-coronavirus-outbreak-invs/index.html>.

¹⁴³ *Id.*

¹⁴⁴ Moss, *supra* note 116.

¹⁴⁵ *Id.*

¹⁴⁶ Sophie Lewis, *Growing Number of Texas Sheriffs Refuse to Enforce Governor's Mask Requirement*, CBS (July 8, 2020, 7:03 AM), <https://www.cbsnews.com/news/texas-coronavirus-face-masks-sheriffs-refuse-enforce-governor-abbott-order/>.

¹⁴⁷ *Id.*

Travel, of course, is how viruses get anywhere; “in today’s connected world, an outbreak anywhere is an outbreak everywhere.”¹⁴⁸ One destination of those viruses is jails and prisons. These carceral spaces are where the deadly impact of lax laws and enforcement can be most apparent. Some governors, perhaps following the president’s lead, did not advise caution when SARS-CoV-2 came to the U.S.¹⁴⁹ “I’m encouraging New Yorkers to go on with your lives and get out on the town[,]” Mayor Bill de Blasio said on March 2, 2020.¹⁵⁰ New York residents took his words to heart.¹⁵¹ Genetic sampling has shown that infected New York residents who visited other states are responsible for most of the United States’ initial outbreaks of coronavirus.¹⁵² “New York has acted as a Grand Central Station for this virus[,]” observed David Englethaler of the Translational Genomics Research Institute.¹⁵³ The genetic line of the New York cases can in turn be traced to Europe.¹⁵⁴ Federal and state governments were slow to intercept the virus superhighways throughout the United States and recognize that “the vast majority in this country is coming from domestic spread.”¹⁵⁵

¹⁴⁸ Alice Park, *Aurélia Nguyen: Distributing the World’s Vaccines*, TIME (Feb. 17, 2021, 6:55AM), <https://time.com/collection/time100-next-2021/5937629/aurelia-nguyen/>.

¹⁴⁹ Erin Schumaker, *Timeline: How Coronavirus Got Started*, ABC (Sept. 22, 2020, 11:55 AM), <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165>.

¹⁵⁰ Derek Watkins et al., *How the Virus Won*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-spread.html>.

¹⁵¹ *Id.*

¹⁵² Benedict Carey & James Glanz, *Travel From New York City Seeded Wave of U.S. Outbreaks*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2020/05/07/us/new-york-city-coronavirus-outbreak.html>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Lisette Voytko, *U.S. Coronavirus Outbreak Primarily Spread From New York City, Research Indicates*, FORBES (May 7, 2020, 6:07 PM), <https://www.forbes.com/sites/lisettevoytko/2020/05/07/us-coronavirus-outbreak-likely-spread-from-new-york-city-research-indicates/?sh=4b381a036152>.

“Decisions made by state and federal officials—including waiting to impose distancing measures and to limit international flights . . . allowed [COVID-19] to grow in the rest of the country.”¹⁵⁶ As a result of not implementing a swift pandemic response, such as restrictions on travel and universal testing² the nation was overwhelmed by May 2020.¹⁵⁷

Maine can trace its “patient zero,” the person responsible for the initial cluster of Maine cases, to a traveling salesperson.¹⁵⁸ Maine is one of the most popular travel destinations in the world.¹⁵⁹ In 2018, 37 million people visited the state, millions from what are now categorized as COVID-19 “hotspots:” New York and Massachusetts.¹⁶⁰ Another state that draws enormous tourist revenue is Florida.¹⁶¹ Billion of that comes from Disney World, which closed on March 15, 2020 because of the coronavirus pandemic.¹⁶² Disney World reopened on July 11,

¹⁵⁶ Carey & Glanz, *supra* note 152.

¹⁵⁷ Benedict Carey & James Glanz, *Hidden Outbreaks Spread Through U.S. Cities Far Earlier Than Americans Knew, Estimates Say*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/04/23/us/coronavirus-early-outbreaks-cities.html>.

¹⁵⁸ Caitlin Andrews, *A Traveling Salesperson was Responsible for a Cluster of Maine’s Early Coronavirus Cases*, BANGOR DAILY NEWS (June 16, 2020), <https://bangordailynews.com/2020/04/09/news/bangor/a-traveling-salesperson-was-responsible-for-a-cluster-of-maines-early-coronavirus-cases/>.

¹⁵⁹ Jeffrey Schools, *Maine Ranked One of the World’s Top Travel Destinations in 2020*, NEWS CTR. ME. (Oct. 26, 2019, 2:06 PM), <https://www.newscentermaine.com/article/travel/maine-ranked-one-of-the-worlds-top-travel-destinations-in-2020/97-ca13f9cf-fec3-4cb1-819f-a149fa0de92f#:~:text=PORTLAND%2C%20Maine%20%E2%80%94%20One%20of%20the,2020%3A%20Top%20Regions%22%20list>.

¹⁶⁰ *Id.*

¹⁶¹ *See generally* Daniel Dahm & Samantha Dunne, *Florida’s Latest Tourism Numbers Exceed Pre-pandemic Levels*, CLICK ORLANDO (Feb. 15, 2022 4:58 PM), <https://www.clickorlando.com/news/politics/2022/02/15/watch-live-at-3-pm-florida-gov-ron-desantis-talks-tourism/>.

¹⁶² Landon McReynolds, *2 Years Later: The Day Walt Disney World Closed for COVID-19*, CLICK ORLANDO (Mar. 17, 2022 7:55 AM), <https://www.clickorlando.com/theme-parks/2022/03/16/2-years-later-the-day-walt-disney-world-closed-for-covid-19/#/>.

2020.¹⁶³ On August 6, 2020, Florida passed half a million cases of COVID-19¹⁶⁴ to become one of the country's top three hotspot states.¹⁶⁵ As of April 2021, Florida had the second highest number of deaths of prisoners from COVID-19 in the U.S.¹⁶⁶

“You have to have society open,” Florida governor Ron DeSantis said at a press briefing in June 2020.¹⁶⁷ And open it did, beginning in May 2020, with alarming results.¹⁶⁸ On June 27, 2020, there was a record setting 9,585 cases in Florida¹⁶⁹ and a positivity rate hovering around 14.5 percent.¹⁷⁰ As of the week of Aug 2, 2021, Florida led the nation in reported COVID cases.¹⁷¹ At particular risk are bar patrons, who are responsible for outbreaks in various states, leading Texas governor Greg Abbott to say that he regretted opening bars early.¹⁷² In

¹⁶³ *Id.*

¹⁶⁴ Tiffini Theisen, *Florida Adds 7,650 Coronavirus Cases as Total Infected Passes 510,000*, ORLANDO SENTINEL (Aug. 6, 2020), <https://www.orlandosentinel.com/coronavirus/os-ne-florida-coronavirus-thursday-august-6-20200806-2vmpzws6fh3bobwivf7vshsm-story.html>.

¹⁶⁵ Stephanie Adeline et al., *Tracking the Pandemic: Are Coronavirus Cases Rising or Falling in Your State?*, GV WIRE (June 11, 2020), <https://gvwire.com/2020/06/11/tracking-the-pandemic-are-coronavirus-cases-rising-or-falling-in-your-state/>.

¹⁶⁶ *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT (July 1, 2021), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

¹⁶⁷ Will Feuer, *Florida Reports Another Record Spike in Coronavirus Cases, Up 5.3% in a Day*, CNBC (June 24, 2020, 3:52 PM), <https://www.cnbc.com/2020/06/24/florida-reports-another-record-spike-in-coronavirus-cases-up-5point3percent-in-a-day.html>.

¹⁶⁸ *Id.*

¹⁶⁹ Derek Hawkins et al., *U.S. Sets Single-day Record for New Coronavirus Cases for Fifth Consecutive Day*, WASH. POST (June 27, 2020, 10:17 PM), <https://www.washingtonpost.com/nation/2020/06/27/coronavirus-live-updates-us/>.

¹⁷⁰ *Daily State-by-State Testing Trends*, JOHNS HOPKINS (June 24, 2021, 6:00 AM), <https://coronavirus.jhu.edu/testing/individual-states/florida>.

¹⁷¹ Thomas Kika, *These States Have the Lowest Vaccination Rates and Highest COVID Cases*, NEWSWEEK (Aug. 3, 2021), <https://www.newsweek.com/these-5-states-have-lowest-vaccination-rates-highest-covid-cases-1615708>.

¹⁷² Patrick Svitek, *Gov. Greg Abbott Expresses Regret Over Reopening Texas Bars During Coronavirus*, TEX. TRIB. (June 26, 2020, 6:00 PM), <https://www.texastribune.org/2020/06/26/greg-abbott-texas-bars-regret/>.

Starr County, Texas, a hospital convened “death panels” (decision-making committees) to choose which patients would be sent home to die instead of being treated, a bleak illustration of what happens when the pace of COVID-19 cases overwhelms medical resources.¹⁷³

As access to vaccines expands, the public is eager to return to a semblance of normal life and fewer localities require masks. Following the SARS-CoV-2 variant Delta,¹⁷⁴ we are in the midst of another surge, powered by the Omicron variant.¹⁷⁵ While the general public goes in search of barbeques, tasting rooms, and trips to Disney, COVID-19 continues to take its toll on jailees and prisoners.

Although residents of the United States enjoy many rights given by our constitution, there is a balance between liberty and security. Our security in the current pandemic is as much protection from COVID-19 as the government can afford us. For inmates, it is a daily fight to be protected. Justice Robert Jackson opined in *Terminiello v. Chicago*, “If a court does not temper its doctrinaire logic with a little practical wisdom, it will convert its constitutional [rights] into a suicide pact.”¹⁷⁶ Among the victims of that pact are prisoners.

¹⁷³ Michael Sainato, *Texas Hospital Forced to Set Up “Death Panel” As COVID-19 Cases Surge*, GUARDIAN (July 26, 2020, 2:00 PM), <https://www.theguardian.com/world/2020/jul/26/covid-19-death-panels-starr-county-hospital-texas>.

¹⁷⁴ Zeynep Tufekci, *The Fourth Surge Is Upon Us. This Time, It’s Different.*, ATLANTIC (Mar. 30, 2021), <https://www.theatlantic.com/health/archive/2021/03/fourth-surge-variant-vaccine/618463/>.

¹⁷⁵ *SARS-CoV-2 Variant Classifications and Definitions*, CDC (Apr. 26, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-classifications.html>; Travis Caldwell & Holly Yan, *The Omicron Surge Hasn’t Peaked Nationwide, and ‘the Next Few Weeks will be Tough,’ U.S. Surgeon General Says*, CNN (Jan. 18, 2022 3:24 AM), <https://www.cnn.com/2022/01/17/health/us-coronavirus-monday/index.html>.

¹⁷⁶ *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949).

III. The Rationale for State Protection and Liability

A child or adult becomes a ward of the state in two ways: first, when the state acts under the doctrine of *parens patriae* to step in and serve as a guardian for children, the mentally ill, the incompetent, the elderly, or persons with disabilities who are unable to care for themselves; and second, after a person has been accused or convicted of a crime and is detained in a jail, juvenile detention facility, or prison.¹⁷⁷ The broader application of this doctrine to adults, including prisoners, was established in *Louisiana v. Texas*.¹⁷⁸ *Parens patriae* applies to adult inmates because a prisoner or detainee is helpless, as if they are a child and the state is their parent.¹⁷⁹ The Court asserted in *DeShaney v. Winnebago County Department of Social Services*, “[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”¹⁸⁰ Incarcerated persons and persons remanded to mental health facilities are the only two populations who have a protected right to health care.¹⁸¹ In addition to a responsibility for a ward’s safety and general well-being, courts have held that “correctional officers have an affirmative obligation to protect inmates from infectious disease.”¹⁸² Because the government has taken custody and

¹⁷⁷ *Parens Patriae*, NOLO, <https://nolo.com/dictionary/parens-patriae-term.html> (last visited Feb 14, 2022).

¹⁷⁸ *Louisiana v. Texas*, 176 U.S. 1, 2 (1900).

¹⁷⁹ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

¹⁸⁰ *Id.* at 199-200.

¹⁸¹ *Id.*

¹⁸² *Winter v. Runion*, Civ. No. 4:19-cv-04113, 2019 U.S. Dist. LEXIS 195769, at *6 (citing *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996)); see also *Lareau v. Manson*, 651 F.2d 96, 109-11

control of prisoners and detainees in jails—while not entitled to full constitutional protections— they have rights and safeguards. The Bureau of Prisons provides, for example:

The Bureau of Prisons, under the direction of the Attorney General, shall—

- (1) have charge of the management and regulation of all Federal penal and correctional institutions;
- (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
- (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.¹⁸³

On a state level, wardens enumerate rights such as, “[a]ccess to necessary health care services is a right, rather than a privilege. Each prisoner shall have unimpeded access to necessary health care services provided by qualified health care professionals licensed by the State of Maine.”¹⁸⁴ Failing to take care of prisoners opens prison officials, the state, and the federal government to liability. During a pandemic, those failures can come from the negligence of correctional officers, the poor policies of prison administration, and from a governor’s deficient mandates.

In addition to legal reasons for controlling COVID-19 in jails and prisons, there are urgent practical considerations. Congregate living facilities, such as jails and prisons, amplify and spread disease both inside the walls and beyond them.

(2d Cir. 1981); *DeGidio v. Pung*, 920 F.2d 525, 529-33 (8th Cir. 1990) (affirming District Court’s conclusion that deficient TB control and treatment program violated Eighth Amendment).

¹⁸³ 18 U.S.C. § 4042(a)(1)-(3).

¹⁸⁴ POLICIES & RULES § 18.3 (ME. DEP’T CORR. July 3, 2018).

Jail and prison populations are fluid. For example, about 700,000 inmates re-enter their communities each year¹⁸⁵— many without testing for COVID-19 or quarantine upon release¹⁸⁶—and visitors and staff come and go. Inadequate disease control in any detention center has a wide-ranging impact. Jail and prison workers are also at great risk where COVID-19 is not controlled, and safety measures are not in place. In North Dakota in 2020, for example, one out of every four prison staff contracted COVID-19.¹⁸⁷ In some prisons, correctional officers have been told to return to work while still sick with COVID,¹⁸⁸ and in others, staff have been required to remain at work after being exposed to inmates with COVID.¹⁸⁹

Vaccination may be the way out of danger for inmates and staff alike, but even here governments neglect their wards.¹⁹⁰ This was true in early 2021 when vaccines began to be available to high risk individuals.¹⁹¹ This was due in part to the fact that the CDC had not updated guidelines for vaccinating people who are

¹⁸⁵ *Prisoners and Prisoner Re-Entry*, U.S. DEP'T JUST., https://www.justice.gov/archive/fbci/progmenu_reentry.html (last visited Mar. 6, 2022).

¹⁸⁶ Nicole Lewis & Beth Schwartzapfel, *Prisons Are Releasing People Without COVID-19 Tests or Quarantines*, MARSHALL PROJECT (Jan. 1, 2019, 6:00 AM), <https://www.themarshallproject.org/2021/01/19/prisons-are-releasing-people-without-covid-19-tests-or-quarantines>.

¹⁸⁷ Schwartzapfel et al., *supra* note 50.

¹⁸⁸ Joseph Darius Jaafari, *Pa. Corrections Department Tells Officer with COVID-19 Symptoms to Return to Work Early*, PHILA. INQUIRER (Dec. 14, 2020), <https://www.inquirer.com/health/coronavirus/spl/pennsylvania-prisons-coronavirus-corrections-officer-20201214.html>.

¹⁸⁹ Eddie Burkhalter, *Prison Worker: Officer Exposed to COVID-19 was Forced to Work Before Inmate Tests Positive*, ALA. POL. REP. (May 8, 2020), <https://www.alreporter.com/2020/05/08/prison-worker-officer-exposed-to-covid-19-was-forced-to-work-before-inmate-tests-positive/>.

¹⁹⁰ Nina Pullano, *Bronx Court Orders NY State to Vaccinate Prisoners*, COURTHOUSE NEWS SERV. (Mar. 29, 2021) (emphasis added), <https://www.courthousenews.com/bronx-court-orders-ny-state-to-vaccinate-prisoners/>.

¹⁹¹ *Id.*

detained, which meant that incarcerated persons were not prioritized for vaccines.¹⁹² Instead, the CDC stated that “jurisdictions are *encouraged* to vaccinate staff and incarcerated/detained persons at the same time [as the general public].”¹⁹³ This left vaccination of incarcerated persons up to the discretion of the federal and state government. Predictably, incarcerated persons were not included in the states’ distribution plan of a limited supply of vaccine. Some prison officials even invoked the guidance as an excuse to withhold vaccines from persons in their charge, citing the “...ever-changing information offered by the CDC[.]”¹⁹⁴ In December 2020 and January 2021, over thirty-seven prison systems began to offer vaccines to their staff, but there has been an “alarming” rate of vaccine refusal among prison staff.¹⁹⁵ As of March 2021, only about half of prison staff had consented to receive vaccines.¹⁹⁶ Mandatory vaccines for jail and prison staff could have slowed the transmission of SARS-Co-V out of the gate. In response to low vaccine rates among jail and prison staff, some states and counties have mandated vaccination among corrections officers, which has led to suspensions for non-compliance and to some staff quitting in protest.¹⁹⁷ Low

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Claire Osborn, *Williamson County Jail Official Says Most Inmates Refuse to be Tested for COVID-19*, AUSTIN AMERICAN-STATESMAN (Sept. 8, 2021 5:21 PM), <https://www.statesman.com/story/news/2021/09/08/williamson-county-jail-inmates-refuse-covid-test-official-says/5759467001/>.

¹⁹⁵ Nicole Lewis & Michael R. Sislak, *US Prison Guards Refusing Vaccines Despite Covid-19 Outbreak*, ASSOCIATED PRESS (Mar. 16, 2021), <https://apnews.com/article/us-prison-guards-refuse-vaccine-despite-covid-19-outbreaks-522775575fc815ee2354e97c3428dce0>.

¹⁹⁶ *Id.*; Number of U.S. Prison Guards Refusing COVID-19 Vaccine has Health Experts Concerned, KTLA (Mar. 15, 2021, 10:28 AM), <https://ktla.com/news/nationworld/number-of-u-s-prison-guards-refusing-covid-19-vaccine-has-health-experts-concerned/>.

¹⁹⁷ Lewis & Sislak, *supra* note 195.

uptake of vaccines among prison staff remains a problem almost two years since the pandemic started.¹⁹⁸ Prison guards catch COVID-19 at twice the rate of the general population of California, but fewer than half of officers in California corrections facilities are vaccinated.¹⁹⁹ In all states for which there is data, only one state had a greater percentage of staff vaccinated than percentage of prisoners vaccinated.²⁰⁰ A low rate of unvaccinated staff leads to the spread of disease both within and outside of jails and prisons.²⁰¹ It also overburdens staff who do stay on when unvaccinated have become sick themselves or call out of work to avoid an outbreak.²⁰² In several states, prisons have had to call in the National Guard, who were given only one day of correctional facility training, because so many staff were absent.²⁰³ In some facilities, in a practice inaccurately termed “augmentation”,²⁰⁴ other prison staff like teachers, cooks, and nurses are called upon to guard inmates when officers are not available.²⁰⁵ Chronic understaffing and using untrained substitute staff adds to the already fragile situation in jails and

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Jamiles Lartey, *The National Guard Is Using Force on Prisoners After Little Training*, MARSHALL PROJECT (Dec. 21, 2020, 2:30 PM), <https://www.themarshallproject.org/2020/12/21/the-national-guard-is-using-force-on-prisoners-after-little-training>.

²⁰⁴ *Federal Prisons Forced to Use Cooks, Nurses, to Guard Inmates due to Staff Shortages*, NBC NEWS (May 21, 2021 1:36 PM), <https://www.nbcnews.com/news/us-news/federal-prisons-forced-use-cooks-nurses-guard-inmates-due-staff-n1268138>.

²⁰⁵ *Id.*

prisons. In some facilities it has led to lockdowns, de facto solitary confinement, cancelled programming, suicides, and more physical assaults.²⁰⁶

It is reasonable to require that persons who regularly come into contact with crowds of people get vaccinated against COVID-19. Hundreds of universities and colleges in the U.S., including the state university system in Maine, require students to be vaccinated against COVID-19 before they can come onto campus.²⁰⁷ Vaccination as a condition of employment is a widespread practice; twenty-one states have mandates concerning COVID-19 vaccines for healthcare workers²⁰⁸ including the State of Maine.²⁰⁹ However, in Maine, the State Police have no intention of requiring that their jail and prison staff get vaccinated “as long as [the vaccine] is authorized under an Emergency Use Authorization [EAU,]”²¹⁰ implying that EAU status means an employer cannot

²⁰⁶ *Id*; Erin Adler, *County Jails in Minnesota Struggle to Fill Corrections Officer Jobs*, STAR TRIB. (Oct. 1, 2021 10:32 AM), <https://www.startribune.com/county-jails-in-minnesota-struggle-to-fill-corrections-officer-jobs/600102690/>.

²⁰⁷ Chris Burt, *State-by-State Look at Colleges Requiring COVID-19 Vaccines*, U. BUS. (June 28, 2021), <https://universitybusiness.com/state-by-state-look-at-colleges-requiring-vaccines/>; Joe Lawlor & Rachel Ohm, *UMaine System Will Require COVID-19 Vaccine for Students on Campus This Fall*, PORTLAND PRESS HERALD (Aug. 4, 2021), https://www.pressherald.com/2021/08/04/maine-reports-126-new-cases-of-covid-19/?utm_source=Newsletter&utm_medium=email&utm_content=Daily+Headlines%3A+UMaine+System+will+require+COVID-19+vaccines+for+students+on+campus+this+fall&utm_campaign=PPH+DH+-+THURSDAY+%28HTML%29.

²⁰⁸ <https://leadingage.org/workforce/vaccine-mandates-state-who-who-isnt-and-how>

²⁰⁹ Joe Lawlor, *MaineHealth Will Require Staff, Including MaineHealth Employees, to be Vaccinated by October 1st*, PORTLAND PRESS HERALD (Aug. 3, 2021), https://www.pressherald.com/2021/08/03/maine-reports-255-new-cases-of-covid-19-over-3-days/?utm_source=Newsletter&utm_medium=email&utm_content=Daily+Headlines%3A+Maine+Health+will+require+staff%2C+including+Maine+Med+employees%2C+to+be+vaccinated+by+Oct++1&utm_campaign=PPH+DH+-+WEDNESDAY+Aug++4.

²¹⁰ Evan Popp, *Maine Won't Require COVID-19 Vaccine for Police, Corrections Officers*, ME. BEACON (Jan. 26, 2021), <https://mainebeacon.com/maine-wont-require-covid-19-vaccine-for-police-corrections-officers/>.

adjust duties or fire a person who chooses not to get the vaccine. This is not the case; the EAU only provides that no person can be forced to get the vaccine; it does not shield a person from the consequences of choosing not to get vaccinated.²¹¹ Pfizer BioNTech's vaccine-now known as Comirnaty- was given full approval by the Federal Drug Administration (FDA) in August 2021.²¹² In January 2022, the FDA approved Moderna's vaccine, which is now known as Spikevax.²¹³ Even though two COVID-19 vaccines have been approved, prison staff in Maine are still not required to get these vaccines.²¹⁴ The vaccination rate of prison staff in Maine falls behind other states',²¹⁵ and low rates of vaccine protection have contributed to more than twenty-eight outbreaks in the state's correctional facilities.²¹⁶ Among those outbreaks is one at Cumberland County Jail that began in September of 2021, which resulted in inmates initially being confined to their cells twenty- three hours a day.²¹⁷ Maine continues to struggle to care for its hospitalized COVID-19 patients, the majority of whom are

²¹¹ 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III).

²¹² *FDA Approves First COVID-19 Vaccine*, FDA (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>.

²¹³ *Coronavirus (COVID-19) Update: FDA Takes Key Action by Approving Second COVID-19 Vaccine*, FDA (Jan. 31, 2022), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-takes-key-action-approving-second-covid-19-vaccine>.

²¹⁴ Megan Gray, *Despite Outbreaks at Maine Prisons and Jails, Workers Aren't Required to get Vaccinated*, PORTLAND PRESS HERALD (Oct. 29, 2021), <https://www.centralmaine.com/2021/10/29/despite-outbreaks-at-maine-prisons-and-jails-workers-arent-required-get-vaccinated/>.

²¹⁵ *Id.*

²¹⁶ *Id.*; Lauren Abbate, *21 Residents Test Positive for COVID-19 at Maine State Prison*, BANGOR DAILY NEWS (Oct. 8, 2021), <https://bangordailynews.com/2021/12/08/news/21-residents-test-positive-for-covid-19-at-maine-state-prison/>; Matt Byrne, *COVID Outbreak Persists at Cumberland County Jail, with more than 50 Cases and 1 Hospitalized*, SUN J. (Feb. 4, 2022), <https://www.sunjournal.com/2022/02/03/more-than-50-covid-cases-1-inmate-hospitalized-as-cumberland-county-jail-outbreak-continues/>.

²¹⁷ Byrne, *supra* note 216.

unvaccinated.²¹⁸ With Omicron cases surging, the state’s largest hospital installed negative pressure systems in all its Special Care Unit rooms to accommodate the overflow of COVID-19 patients. The hospital was forced to contemplate converting part of its garage to patient rooms.²¹⁹ National Guardsmen have been called in to assist in hospitals statewide.²²⁰ Despite the desperate need to shield vulnerable populations from COVID-19, the jail continues to experience waves of infection, with the most recent spike in cases sickening fifty-six inmates and staff.²²¹ The jail reports that “...facility-wide cleaning is on-going daily...” and staff is “...question[ed] about recent possible exposure.”²²² What is not being implemented is a fundamental way to prevent the carriage of the virus inside the jailhouse walls: vaccination, including a booster dose, of all employees at the jail. The Maine Department of Health and Human Services (Maine DHHS) requires that providers in hospitals, multi-level health care facilities, home health agencies, nursing facilities, and residential care facilities get vaccinated against COVID-19.²²³ Confoundingly, the Maine DHHS rule that healthcare workers get vaccinated does not extend to doctors and nurses in jails and prisons.²²⁴

²¹⁸ Eric Russell, *COVID-19 Hospitalizations in Maine Reach Another Record, ‘Overwhelming Our System’*, PORTLAND PRESS HERALD (Dec. 15, 2021), <https://www.pressherald.com/2021/12/15/maine-cdc-reports-1504-new-cases-of-covid-19-2-additional-deaths/>.

²¹⁹ Interview with staff, Maine Medical Center (February 15, 2022).

²²⁰ *National Guard Members Deploy to Main Hospitals*, WMTM (Jan. 20, 2022 12:07 PM), <https://www.wmtw.com/article/more-national-guard-members-deploying-to-maine-hospitals/38825094>.

²²¹ Byrne, *supra* note 216.

²²² *Id.*

²²³ *Mills Administration Requires Health Care Workers to be Fully Vaccinated Against COVID-19 by October 1*, MAINE.GOV (Aug. 12, 2021) <https://www.maine.gov/governor/mills/news/mills-administration-requires-health-care-workers-be-fully-vaccinated-against-covid-19-october>.

²²⁴ *Id.*

Prisoners, even though they live in what has been characterized as “long term care facilities with bars[,]”²²⁵ are not part of the CDC’s distribution tier for residents of long-term care and congregate care settings.²²⁶ This may be because we, as a society and as a system of governments, value the lives of incarcerated persons less than we value the lives of nursing home residents or patients in a psychiatric hospital. Maria Morris of the ACLU put it this way: “People who are incarcerated are not a particularly popular group of people.”²²⁷ This bias is apparent in New York and other states where vaccines have been available for months to residents of nursing homes, homeless shelters, group homes, hospice care, and psychiatric hospitals, but not to inmates.²²⁸ “There’s no way it’s going to go to prisoners before it goes to people who haven’t committed any crime,” Gov. Jared Polis of Colorado opined in December of 2020.²²⁹ Gov. Polis seemed to have forgotten that most individuals held in jails have not been convicted of a crime.

The attitude that the incarcerated are less deserving of protection from COVID-19 ignores not only the ethical and legal responsibility that states have for

²²⁵ Isaac Stanley-Becker, *Early Vaccination in Prisons, a Public Health Priority, Proves Politically Charged*, WASH. POST (Jan. 2, 2021, 5:30 PM), <https://www.washingtonpost.com/health/2021/01/02/covid-vaccine-prisons/>.

²²⁶ Ike Swetlitz, *Chan, Zuckerberg Boost Open-access Biology with Grant to Cold Spring Harbor*, STAT NEWS (Apr. 26, 2017), <https://www.statnews.com/2017/04/26/238006/>.

²²⁷ Nina Pullano, *Prisoners Face Severe COVID Risks Without Federal Vaccine Priority*, COURTHOUSE NEWS SERV. (Mar. 1, 2021), <https://www.courthousenews.com/prisoners-face-severe-covid-risks-without-federal-vaccine-priority/>.

²²⁸ *Id.*

²²⁹ John Ingold, *Colorado Governor Says Prisoners Won't Get Priority Over Elderly for a Coronavirus Vaccine*, COLORADOAN (Dec. 2, 2020, 1:21 PM), <https://www.coloradoan.com/story/news/2020/12/02/colorado-vaccine-distribution-polis-says-prisoners-wont-get-priority/3796111001/>.

their wards, but also disregards the public health reasons for protecting jailees and inmates. Two states that have not extended vaccines to prisoners were ordered to do so by courts.²³⁰ As of May 2021, New York must now stop excluding prisoners in its vaccine distribution scheme.²³¹ The court noted that the New York Department of Corrections “irrationally distinguished between incarcerated people and people living in every other type of adult congregate facility.”²³² Earlier in 2021, a federal court in Oregon ruled that the state must put prisoners ahead of senior citizens when distributing vaccine doses.²³³ To fail to do so was a violation of inmates’ rights, specifically to be safe from the “irreparable harm” that being unvaccinated would cause.²³⁴

Even in Maine, a state with the third fewest cases of COVID-19 in the nation in early 2021 and a good vaccine supply, the distribution strategy remained age-based until April 2021.²³⁵ The administration of what few vaccines are available to jails and prisons were left to the discretion of jail and prison staff.²³⁶

²³⁰ See Sam McCann, et al., *NY Supreme Court Rules Incarcerated People Must be Offered COVID Vaccine Immediately*, BRONX DEFS. (May 29, 2021), <https://www.bronxdefenders.org/ny-supreme-court-rules-incarcerated-people-must-be-offered-covid-vaccine-immediately/>; Maney v. Brown, No. 6:20-cv-00570-SB, 2021 U.S. Dist. LEXIS 19665 (D. Or. 2021).

²³¹ McCann, *supra* note 230.

²³² *Id.*

²³³ Maney v. Brown, No. 6:20-cv-00570-SB, 2021 U.S. Dist. LEXIS 19665, at *121 (D. Or. 2021); *see also* Basank v. Decker, 449 F.Supp. 3d 205, 216 (S.D.N.Y. 2020) (finding that “[t]he risk of contracting COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious” and concluding that “[p]etitioners face irreparable injury—to their constitutional rights and to their health”).

²³⁴ *Id.*

²³⁵ Press Briefing, Me. CDC, on Maine’s process for vaccination within the DOC (Apr. 1, 2021).

²³⁶ *Id.* The Department of Health and Human Services gave the vaccine to the Department of Corrections and the DOC decided how and when to give the vaccine out to prisons and jails. “We have to be sure they are ready to receive those doses . . . and keep moving along that process. [Receiving more vaccine doses] just expands who is eligible, it doesn’t change our approach [to not prioritize jails and prisons].” *Id.*

The week of March 29, 2021, over three months after the American public began to be vaccinated, the State of Maine allowed prisoners to get vaccines.²³⁷ During that week, the State's largest jail received only eleven vaccine doses.²³⁸ Two weeks later, the facility reported an outbreak that sickened twenty-nine inmates and two staff members.²³⁹ Two and a half weeks after that, a fresh outbreak involving fifty-one inmates and two staff forced the jail to divert all incoming arrestees.²⁴⁰ By the end of April 2021, thirty-one percent of Maine's general population had been fully vaccinated, but only 125 residents of correctional facilities had received a dose of vaccine.²⁴¹ The belief that their lives matter less can be internalized by prisoners themselves: "I sometimes feel that [my crime] did diminish the value of my own life. I sometimes feel that I am less deserving of the vaccine than an innocent person."²⁴² Animus towards detained and imprisoned persons should have no bearing on a matter of public health or whether these individuals are protected from illness and death. Like a parent is responsible for a

²³⁷ Susan Sharon, *Cumberland County Sheriff: Vaccine Efforts for Jailed Mainers 'Not Good Enough' Maine Public*, ME. PUBLIC (Apr. 1, 2021, 4:39 PM), <https://www.mainepublic.org/health/2021-04-01/cumberland-county-sheriff-vaccine-efforts-for-jailed-mainers-not-good-enough>.

²³⁸ *Id.*

²³⁹ Matt Byrne, *COVID-19 Outbreak Infects 29 at Cumberland County Jail*, PORTLAND PRESS HERALD (Apr. 13, 2021), <https://www.pressherald.com/2021/04/13/covid-19-outbreak-infects-29-at-cumberland-county-jail/>.

²⁴⁰ Matt Byrne, *COVID-19 Outbreak Prompts Cumberland County Jail to Divert Prisoners*, PORTLAND PRESS HERALD (Apr. 18, 2021), <https://www.pressherald.com/2021/04/16/outbreak-prompts-cumberland-county-jail-to-divert-prisoners/>.

²⁴¹ *2 More Mainers with COVID-19 Have Died as State Reports 260 Additional Cases*, WMTW (Apr. 19, 2021, 2:00 PM), <https://www.wmtw.com/article/2-more-mainers-with-covid-19-have-died-as-state-reports-260-additional-cases/36162080>; Mary Cate Mannion, *Maine's Correctional Facilities Begin Vaccinating Prisoners, Inmates Against COVID-19*, WMTW (Apr. 1, 2021, 5:13 PM), <https://www.wmtw.com/article/maines-correctional-facilities-begin-vaccinating-prisoners-inmates-against-covid-19/35995832>.

²⁴² John J. Lennon, *I'm Incarcerated. This is My Covid Lockdown Story.*, N.Y. TIMES MAG. (May 6, 2021), <https://www.nytimes.com/2021/04/06/magazine/prison-covid.html>.

child, the state is responsible for wards. Whatever the public's view toward persons who have been convicted of a crime, those who are sentenced are serving time, they have not been condemned to die by COVID-19.

IV. The Plight of Prisoners and the Utility of Eighth Amendment Claims

Incarcerated persons are captive victims of COVID-19. The facilities where they live face what the Centers for Disease Control rather euphemistically describe as a “significant challenge” in preventing the spread of the virus.²⁴³ Like students in schools, passengers on cruise ships, and residents in nursing homes, incarcerated persons share the air they breathe with those around them. As discussed in this article, the virus takes a devastating toll in jails and prisons. In San Quentin, COVID-19 has killed more Death Row inmates than the State has put to death in 25 years.²⁴⁴

Health disparities among inmates are stark; conditions such as asthma, diabetes, high blood pressure, hepatitis, HIV, and poor physical condition due to drug dependence make inmates very vulnerable to the severe effects of COVID-19.²⁴⁵ The older a person is, the more at risk they are for severe effects of COVID-19.²⁴⁶ The United States has an aging prison population; twelve percent

²⁴³ Megan Wallace et al., *COVID-19 in Correctional and Detention Facilities—United States, February–April 2020*, CDC (May 6, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm>.

²⁴⁴ Anna Buchmann & Kellie Hwang, *Bay Briefing: Coronavirus Cases Explode Among the Young*, S.F. CHRON. (Aug. 10, 2020), <https://www.sfchronicle.com/bayarea/article/Bay-Briefing-Young-people-driving-latest-15470925.php>.

²⁴⁵ Alexandria Macmadu & Josiah D. Rich, *Correctional Health Is Community Health*, ISSUES.ORG, <https://issues.org/correctional-health-care-community-health-prisons-jails/>.

²⁴⁶ Hans Henri P. Kluge, *Statement—Older People Are at Highest Risk from COVID-19, But All Must Act to Prevent Community Spread*, WHO EUROPE (Apr. 2, 2020), <https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid->

of federal and state prisoners are fifty-five and older.²⁴⁷ Detainees and prisoners have more predictors of poor health than the general population.²⁴⁸ These include poverty, lack of health insurance, homelessness, chronic mental illness, and low levels of education.²⁴⁹ Another predictor of poor health outcomes and early death is being Black or Hispanic. Over half of U.S. prisoners are Black or Hispanic.²⁵⁰ If a person is both uninsured and Black or Hispanic, they may be hit doubly hard. For example, it has been posited that some states' decision to refuse federal funding to expand Medicaid programs has increased the morbidity and mortality from COVID-19 among non-white Americans.²⁵¹ The disparate impact of COVID-19 on non-white patients, both in prisons and other settings, is troubling. In Maine, for example, Black residents of the state contract the illness at twenty times the rate of their white counterparts.²⁵² Most states do not collect data on why Black and Latino people are more likely to contract and die from the disease.²⁵³ It has been suggested that prison policies reinforce the racial disparities

19/statements/statement-older-people-are-at-highest-risk-from-covid-19,-but-all-must-act-to-prevent-community-spread.

²⁴⁷ Hope Reese, *What Should We Do about Our Aging Prison Population?*, JSTOR DAILY (July 17, 2019), <https://daily.jstor.org/what-should-we-do-about-our-aging-prison-population/>.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT'G PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

²⁵¹ <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1497&context=>

²⁵² *Maine Has Widest Coronavirus Racial Disparity Gap in the Country*, BOS. GLOBE (June 21, 2020, 4:43 PM), <https://www.bostonglobe.com/2020/06/21/nation/maine-has-widest-coronavirus-racial-disparity-gap-country/>.

²⁵³ Graeme Wood, *What's Behind the COVID-19 Racial Disparity?*, ATLANTIC (May 27, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/we-dont-know-whats-behind-covid-19-racial-disparity/612106/>.

of inmates,²⁵⁴ and prison policies about COVID-19 are harming minorities disproportionately.²⁵⁵

Prisons and jails are facing lawsuits over a variety of issues relating to protection of prisoners during the COVID-19 pandemic.²⁵⁶ In Allegheny County, Pennsylvania, prisoners have alleged that the jail is not giving inmates enough space to control the spread of the illness.²⁵⁷ In Louisiana, the ACLU seeks the release of medically fragile inmates. In Arkansas, in 2020, thirty-eight percent of the State’s COVID cases were in prisons. Civil rights groups filed a lawsuit on behalf of twelve prisoners in the state seeking injunctive relief but were denied in May 2020, in part because “the federal courts must tread lightly when it comes to the questions of managing prisons, particularly state prisons.”²⁵⁸ This pronouncement came even as the Court acknowledged that the conditions in the named prisons put the inmates at risk for “imminent and irreparable” harm.²⁵⁹ Prisons were further insulated from responsibility after the court in *Turner v. Safly* held that the courts may defer to prison regulations even if they infringe on prisoner’s constitutional rights, so long as the restrictions were rationally related

²⁵⁴ Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 330 (2010).

²⁵⁵ E. Ann Carson, *Prisoners in 2014*, U.S. DEP’T OF JUST. (2015), <https://bjs.ojp.gov/content/pub/pdf/p14.pdf> (explaining that six percent of prisoners are composed of racial groups that fall under the category of “other”).

²⁵⁶ See e.g. *Graham v. Allegheny Cnty.*, No. 2:20-cv-00496, 2020 U.S. Dist. LEXIS 95515, at *2-3 (W.D. Pa. May 27, 2020); *Frazier v. Kelley*, 460 F.Supp. 3d 799 (E.D. Ark. 2020).

²⁵⁷ *Graham v. Allegheny Cnty.*, No. 2:20-cv-00496, 2020 U.S. Dist. LEXIS 95515, at *2-3 (W.D. Pa. May 27, 2020).

²⁵⁸ *Frazier v. Kelley*, 460 F.Supp. 3d 799, 845 (E.D. Ark. 2020) (quoting *Woodford v. Ngo*, 548 U.S. 81, 94 (2006)).

²⁵⁹ *Frazier*, 460 F.Supp. 3d at 845; *Petition for Writ of Habeas Corpus, Injunctive, and Declaratory Relief, Livas v. Meyers*, 455 F.Supp.3d 272 (W.D. La. Apr. 6, 2020) (No. 1:20-cv-00422).

to a legitimate penological interest.²⁶⁰ Asserting that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution[,]” Justice O’Connor nevertheless acknowledged that “[r]unning a prison is an inordinately difficult undertaking”²⁶¹ The Court created a four-factor test to determine if a prison regulation is acceptable:

(1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;" (2) "whether there [are] alternative means of exercising the right that remain open to prison inmates;" (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates;" and (4) "whether there are 'ready alternatives' to the regulation."²⁶²

Post-*Turner*, even with four-factor test, prisoners remain largely at the mercy of prison regulations. This is compounded by the administrative exhaustion requirements of the Prison Litigation Reform Act, which makes it very difficult to bring an action against prisons.²⁶³

A possible legal claim is one made under the Eighth Amendment. Prison officials are required to provide inmates with adequate medical, dental, and mental health care.²⁶⁴ Although the Eighth Amendment was drafted as a way to prevent prisoners from being subject to barbarous methods of punishment, its interpretation has expanded to include prevention of conditions of incarceration that are not compatible with “...the evolving standards of decency that mark the

²⁶⁰ *Turner v. Safly*, 482 U.S. 78, 95 (1987).

²⁶¹ *Id.* at 84-85.

²⁶² *Id.* at 84-91.

²⁶³ 42 U.S.C. § 1997e(a).

²⁶⁴ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

evolving a maturing society.”²⁶⁵ In the twenty-first century, decency requires that governments do better for detainees and prisoners. Conditions inside a prison can be “restrictive and harsh[,]”²⁶⁶ but that adversity must serve a legitimate penological objective.²⁶⁷ Living in a virus incubator with nowhere to go and no effective measures of protection from possible death serves no correctional objective.

An inmate hoping to prevail on an Eighth Amendment claim must show that they have been confined in conditions that have deprived them of a basic human need, such as sanitation, health, or safety.²⁶⁸ They must demonstrate that prison officials treated them with “deliberate indifference to [these] needs.”²⁶⁹ These medical needs can be prospective, not immediate.²⁷⁰ This is the case with coronavirus infections in prisons, where the threat of contracting COVID-19 hangs over every inmate. A prison official shows “deliberate indifference” if they recklessly disregard a substantial risk of harm to the prisoner.²⁷¹ To act with deliberate indifference, officials must have knowledge of the risks to a prisoner’s health or knowledge of the circumstances showing the risks.²⁷² The knowledge of a substantial risk to a prisoner’s health can be shown by “the very fact that the risk was obvious.”²⁷³

²⁶⁵ *Trop v. Dulles*, 356 U.S. 101 (1958).

²⁶⁶ *Rhodes v. Chapman*, 452 U.S. 337, 345-47 (1981).

²⁶⁷ *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

²⁶⁸ *Rhodes v. Chapman*, 452 U.S. 337, 345-47 (1981).

²⁶⁹ *Farmer*, 511 U.S. at 835.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 832-51.

²⁷³ *Id.* at 843.

Warden and correctional officers may protest that they were not aware of how serious the risk is to their inmates. They may puzzle over germ theory. “We’re not quite sure how the virus got in[,]” said Randy Liberty, Warden of the Maine State Prison, three months into the pandemic.²⁷⁴ But that assertion of ignorance grew disingenuous as the pandemic progressed and the more people contracted the illness in jails and prisons. SARS-Co-V-2 is, of course, not the only contagious disease to impact jails and prisons. There have been outbreaks of tuberculosis, typhus, measles, Spanish flu, and H1N1 (“swine flu”).²⁷⁵ Jail and prison officials have appeared not to have learned enough from centuries of hosting contagion in their facilities. The Eighth Amendment claim does not allow a petitioner to guess at a prison official’s state of mind, but no protest of ignorance is complete protection from liability, as the Court in *Farmer v. Brennan* made clear.²⁷⁶

A court can order prison officials to conform to CDC COVID-19 safety guidelines if a prisoner succeeds in their Eighth Amendment claim. These changes may be nominal, such as requiring guards to tell prisoners to keep six feet apart from one another or they will have to return to their rooms.²⁷⁷ However, even if a prisoner jumps the high evidentiary threshold of the Eighth Amendment,

²⁷⁴ Callie Ferguson, *Officials Still Aren’t Sure How the Coronavirus Got into Maine Prison*, BANGOR DAILY NEWS (June 5, 2020), <https://bangordailynews.com/2020/06/05/mainefocus/officials-still-arent-sure-how-the-coronavirus-got-into-maine-prison/>.

²⁷⁵ See generally Marvar, *supra* note 84; *infra* note 327.

²⁷⁶ *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

²⁷⁷ *Remick v. City of Philadelphia*, No. 2:20-cv-01959-BMS2021, 2021 U.S. Dist. LEXIS 10482, at *3 (E.D. Pa. Jan. 13, 2021) (“PDP staff shall specifically inform incarcerated persons that under this procedure they must maintain at least six feet of separation from anyone who is not their cellmate, and that the failure to abide by that policy may result in their return to their cell.”).

changes such as mandated physical distance may not mean much because there is not enough square footage in a prison to keep everyone apart. Further, an inmate will likely not be released if they prevail because release is not a remedy for Eighth Amendment violations.²⁷⁸ Prisoners who do seek release as a cure for an Eighth Amendment violation must follow the guidelines of the PRLA.²⁷⁹ The PRLA provides for an inmate to be released when a court finds that the person's Eighth Amendment rights have been violated. However, this release is a "remedy of last resort"²⁸⁰ and can only be granted once every "less intrusive" remedy has been tried and the facility has been given a "reasonable" amount of time to remediate the harm.²⁸¹ What this means for detainees and prisoners is that months or years may pass while officials test new protocols.²⁸² Some of these procedures may save lives. Examples of these are: suspending transfers between prisons, vaccinating, and isolating sick persons. Examples of arguably ineffective mitigation efforts that have been found sufficient to avoid releasing inmates are:

²⁷⁸ *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir. 2005) (emphasis added) ("If an inmate established that his medical treatment amounted to cruel and unusual punishment, the appropriate remedy would be to call for proper treatment, *or to award him damages*; release from custody is not an option."); *Seifert v. Spaulding*, No. 18-11600-MGM, 2018 U.S. Dist. LEXIS 221340, at *3 (D. Mass. Sep. 11, 2018) ("Even where a prisoner claims that his only hope of obtaining adequate medical treatment is through release, a court cannot order release as a remedy for conditions of confinement that violate the Eighth Amendment violation.").

²⁷⁹ *Brown v. Plata*, 563 U.S. 526 (2011); Prison Litigation Reform Act of 1995 (PLRA), 18 U.S.C. § 3626(a)(3)(E).

²⁸⁰ *Brown v. Plata*, 563 U.S. 526 (2011); Prison Litigation Reform Act of 1995 (PLRA), 18 U.S.C. § 3626(a)(3)(E).

²⁸¹ *Butler v. Kelso*, No. 11CV02684 CAB RBB, 2013 WL 1883233, at *10 (S.D. Cal. May 2, 2013) (denying plaintiff's motion to amend his complaint alleging that California state prison officials acted with deliberate indifference to his serious medical needs to include a request for prison release order).

²⁸² *Gillette v. Prosper*, Civil Action No. 2014-00110, 2016 U.S. Dist. LEXIS 27776 (D.V.I. Mar. 4, 2016) (granting Golden Grove Correctional Facility more time to comply with a two and a half year old order to change "deplorable" conditions after the facility had failed to do so).

painting markers on the floor to remind inmates to stand apart from one another; asking staff as they start a shift if they think they have been exposed to COVID-19; telling inmates how viruses are spread; and giving inmates disinfectant spray.²⁸³

There have been notable exceptions to the prohibition against release when it comes to ICE detainees,²⁸⁴ and in 2011, the Supreme Court in *Brown v. Plata* upheld the lower court's decision to order California to reduce prisoner populations, finding that "overcrowding [was] the primary cause of the [Eighth Amendment] violation".²⁸⁵ Overcrowding in the *Plata* case meant that many inmates were not receiving proper medical care and being exposed to risk by simply being in the prison.²⁸⁶ This is the same situation that prisoners currently face during the pandemic; there is not enough room to keep inmates safely separate and they get worse care once they are sick. However, these exceptions have not made their way to jails and federal and state prisons in relation to COVID-19.

The Prison Litigation Reform Act authorizes states to reduce prison population to improve medical care²⁸⁷ under the ruling of a court with three

²⁸³ See *Remick v. City of Philadelphia*, No. 2:20-cv-01959-BMS2021, 2021 U.S. Dist. LEXIS 10482, at *3 (E.D. Pa. Jan. 13, 2021) ("PDP staff shall specifically inform incarcerated persons that under this procedure they must maintain at least six feet of separation from anyone who is not their cellmate, and that the failure to abide by that policy may result in their return to their cell.").

²⁸⁴ See *Coronel v. Decker*, 449 F.Supp. 3d 274 (S.D.N.Y. 2020); *Hernandez v. Decker*, 450 F.Supp. 3d 443 (S.D.N.Y. 2020).

²⁸⁵ *Brown v. Plata*, 563 U.S. 493, 525 (2011); Prison Litigation Reform Act of 1995 (PLRA), 18 U.S.C. § 3626(a)(3)(E).

²⁸⁶ *Plata*, 563 U.S. at 525.

²⁸⁷ 18 U.S.C. § 3626(a)(3)(E)(i).

judges. A court must give “substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief[.]”²⁸⁸ which means that prisoners cannot be released if the impact on the community will be negative. This is a difficult analysis during a pandemic, when decisions about both individual and public safety must be made very fast. The court must consider a range of options, including the appointment of special masters or receivers, the possibility of consent decrees, and orders limiting a prison’s population. This remedy contemplates release as a solution. This is a necessary pathway to reducing prison outbreaks because smaller populations make physical distance, proper hygiene, and consistent medical care possible. A person who rejoins the free community, even with restrictions, can care for themselves. This reduces the burden on jails and prisons and increases an individual’s chances of both avoiding the SARS-CoV-2 virus and surviving if they get COVID-19.

There are other ways to reduce prison populations and lower the rate of disease in jails and prisons. One way is compassionate release. This is when an inmate’s sentence is commuted because of “particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing[.]”²⁸⁹ Other ways are premature parole, home confinement, furlough, legislation to allow prisoners to be released under a merit

²⁸⁸ 18 U.S.C. § 3626(a)(1)(A).

²⁸⁹ *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)*, FED. BUREAU PRISONS (Jan. 17, 2019), https://www.bop.gov/policy/progstat/5050_050_EN.pdf.

system,²⁹⁰ and probation rather than incarceration. Compassionate release was not created to let significant numbers of people out of prison, and it is rarely granted.²⁹¹ Other forms of de-incarceration present challenges with enforcement and recidivism. Releasing inmates, especially without COVID-19 testing, could hasten community spread. People waiting for legislation to be passed may die waiting. Even diffusing the prison populations by inter-facility transfers is simply playing a game of “sick hot potato[,]” as a Marion County Correctional Institution inmate put it.²⁹²

Jail and prison populations dropped significantly in 2020 as facilities tried desperately to save lives and slow the spread of COVID-19.²⁹³ It was an unevenly implemented response.²⁹⁴ Most of the persons released from prisons were under correctional control in the federal prison system in three states. Some jails limited intakes but did not let many jailed out of custody.²⁹⁵ These measures were helpful, but they were insufficient. This this strategy was an emergency response;

²⁹⁰ Tracey Tully, *About 20% of New Jersey Prisoners Could be Freed to Avoid Virus*, N.Y TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/nyregion/New-jersey-inmate-release-Covid.html>.

²⁹¹ Emily Widra & Wanda Betram, *Compassionate Release was Never Designed to Release Large Numbers of People*, PRISON POL’Y INITIATIVE (May 29, 2020), <https://www.prisonpolicy.org/blog/2020/05/29/compassionate-release/>.

²⁹² Dara Lind, *The Prison Was Built to Hold 1,500 Inmates. It Had Over 2,000 Coronavirus Cases.*, PROPUBLICA (June 18, 2020, 2:00 PM), <https://www.propublica.org/article/the-prison-was-built-to-hold-1500-inmates-it-had-over-2000-coronavirus-cases>.

²⁹³ Damini Sharma et al., *Prison Populations Drop by 100,000*, MARSHALL PROJECT (July 16, 2020), <https://www.themarshallproject.org/2020/07/16/prison-populations-drop-by-100-000-during-pandemic>.

²⁹⁴ *Id.*

²⁹⁵ Sharma et al., *supra* note 293; Off. of the Pub. Def. v. Connors, No. SCPW-20-0000200, 2020 Haw. LEXIS 83, at *2 (Haw. Apr. 9, 2020); *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL’Y INITIATIVE (Aug. 6, 2020), <https://www.prisonpolicy.org/virus/virusresponse.html>.

the urgency demanded by the SARS-Co-V-2 pandemic has waned and there are no permanent policy changes that require correction facilities to hold fewer individuals. Prison populations are climbing back to levels seen before the pandemic.²⁹⁶ Among jails with available data, these are now at eighty-seven percent of pre-pandemic capacity by the peak of the Delta variant surge in September of 2021.²⁹⁷ This is not encouraging given that more people have died from the Omicron variant than were killed by the Delta variant.²⁹⁸ The United States falls far behind other countries in releasing inmates to protect them from COVID. As of October 2020, only 170,000 jailees and prisoners had been released to protect them from COVID-19, a tiny dent in the 2.2 million population of inmates nationwide.²⁹⁹ By contrast, Turkey, with the second-highest prison population in Europe, released almost forty percent of its inmates.³⁰⁰ Other notable countries are France (17%), Portugal (17%), Norway (15%).³⁰¹ It has been estimated that reducing the U.S. jail population by eighty percent would have

²⁹⁶ John L. Micek, *After Dropping in the Early Pandemic, Jail Populations are Rising Again*, PA. CAPITAL STAR (Jan 1, 2022 7:14 AM), <https://www.penncapital-star.com/commentary/after-dropping-early-in-the-pandemic-jail-populations-are-rising-again-wednesday-morning-coffee/>.

²⁹⁷ Wendy Sawyer, *New Data: The Changes in Prisons, Jails, Probation and Parole in the First Year of the Pandemic*, PRISON POL'Y INITIATIVE (Jan. 11, 2022), https://www.prisonpolicy.org/blog/2022/01/11/bjs_update/.

²⁹⁸ Jon Kamp et al., *Omicron Deaths in U.S. Exceed Delta's Peak as COVID-a9 Optimism Rises in Europe*, WALL ST. J. (Jan. 26, 2022 12:32 PM), <https://www.wsj.com/articles/omicron-deaths-in-u-s-exceed-deltas-peak-as-covid-19-optimism-rises-in-europe-11643201653>.

²⁹⁹ Linda So et al., *America's Inmate Population Fell by 170,000 Amid COVID. Some See a Chance to Undo Mass Incarceration*, REUTERS (Oct. 28, 2020), <https://www.reuters.com/investigates/special-report/usa-jails-release/>.

³⁰⁰ *New Survey "Prisons and Prisoners in Europe in Pandemic Times"*, COUNCIL OF EUR. (Oct. 11, 2020), <https://www.coe.int/en/web/human-rights-rule-of-law/-/mid-term-impact-of-covid-19-on-european-prison-populations>.

³⁰¹ *Id.*

prevented millions of COVID-19 cases and tens of thousands of deaths in jails and the free community.³⁰²

The most recent data show most state prisons and jails in the U.S. still operating at seventy-five percent capacity or higher.³⁰³ Nineteen states are at ninety percent or higher. Alabama, with the fifth highest rate of COVID-19 prisons deaths in the nation,³⁰⁴ operates at one hundred and fifty-three percent of capacity.³⁰⁵ Even prisons that have reduced their population to the intended capacity still have many people living and working in proximity to one another. In this scenario, it is not possible for prison officials to meet their duty of care to the people whose lives depend on them. This struggle to protect prisoners is made even harder by state governments' inadequate response and widespread refusal of police departments to enforce safety measures such as masks, gathering limits, traveler's tests, and quarantines. Without strict protections from the outside, members of the larger community carry the illness into and out of prisons, and newly detained people have a greater chance of carrying it into jails and prisons.

In California, because the prisons were mandated in 2011 to reduce the inmate population to 137% of what the facility can safely hold, there remains no way to shield inmates from the ravages of COVID-19.³⁰⁶ Only twenty-two percent

³⁰² Chappell, *supra* note 39.

³⁰³ Emily Widra, *Since You Asked: Just How Overcrowded Were Prisons Before the Pandemic, And at This Time of Social Distancing, How Overcrowded Are They Now?*, PRISON POL'Y INITIATIVE (Dec. 21, 2020), <https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/>.

³⁰⁴ Eddie Burkhalter, *As Vaccines Trickle into Alabama Prisons, COVID-19 Deaths Continue*, ALA. POL. REP. (Apr. 13, 2021), <https://www.alreporter.com/2021/04/13/as-vaccines-trickle-into-alabama-prisons-covid-19-deaths-continue/>.

³⁰⁵ Widra, *supra* note 303.

³⁰⁶ COUNCIL OF EUR., *supra* note 300.

of the State’s thirty-three prisons are at or below 137% of design capacity.³⁰⁷ In most prisons, such as the one in Marion County, Ohio—where 80% of the over 2,000 inmates had contracted the virus as of May of 2020—³⁰⁸ freedom from a deadly illness by early release comes too late.

The Eighth Amendment has been heavily relied on by civil rights attorneys as they advocate for clients in prisons. However, the Eighth Amendment is a hard road. First, even though the harm can come in the form of anticipated substantial risk, most Eighth Amendment cases are brought because of ongoing mistreatment or medical neglect, not a harm that may (or even will likely) occur in the future. Secondly, although prisons are not allowed to “strip[] [incarcerated persons] of virtually every means of self-protection and foreclose[] their access to outside aid, and . . . let the state of nature take its course[,]”³⁰⁹ the claims are governed by the Eighth Amendment’s “deliberate indifference” standard. This standard is arguably too easy to overcome in the context of COVID-19. A prison official cannot be deemed deliberately indifferent if he or she “responds reasonably” to substantial risks to inmate health or safety, “even if the harm ultimately was not averted.”³¹⁰ The Supreme Court in *Barnes v. Alhman* decided that the Orange County, California Jail was not deliberately indifferent to the

³⁰⁷ Joseph Hayes et al., *California’s Prison Population*, PUB. POL’Y INST. CAL., <https://www.ppic.org/publication/californias-prison-population/>.

³⁰⁸ Lind, *supra* note 292.

³⁰⁹ Farmer v. Brennan, 511 U.S. 825, 833 (1994).

³¹⁰ *Id.* at 844-45.

welfare of its detainees because it released fifty-three percent of its population.³¹¹

But what of the 3,000 people left behind in conditions that were not improved?

What constitutes a “reasonable response” changes from month to month.

An ever-shifting collection of factors guide the public health response to the SARS-CoV-2 pandemic. These include case counts, hospitalizations, reliability of tests, access to vaccines, vaccine rate, availability of therapeutics, and to some extent, the public’s tolerance to risk. At the beginning of the pandemic, mask wearing was discouraged by the WHO³¹² and CDC.³¹³ However, now wearing two face coverings is considered the best way to curb the spread of the disease.³¹⁴ Yet as cases from the Omicron variant start to decline, some states have withdrawn mask mandates³¹⁵ and the CDC is expected to again change its guidance on masks.³¹⁶ SARS-CoV-2 is on the verge of being reclassified as endemic.³¹⁷ This may translate into fewer- or no- protection from SARS-Co-V-2 in jails and prisons if governments and officials are unwilling to tailor COVID-19

³¹¹ *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020).

³¹² *Advice on the Use of Masks in the Context of COVID-19*, WHO, (Apr. 6, 2020), https://apps.who.int/iris/bitstream/handle/10665/331693/WHO-2019-nCov-IPC_Masks-2020.3-eng.pdf?sequence=1&isAllowed=y.

³¹³ Abby Goodnough & Knvul Sheikh, *CDC Weighs Advising Everyone to Wear a Mask*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/03/31/health/cdc-masks-coronavirus.html>.

³¹⁴ *How to Protect Yourself & Others*, CDC (June 11, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

³¹⁵ *U.S. States that are Ending Mask Mandates*, N.Y. TIMES (Apr. 11, 2022), <https://www.nytimes.com/article/mask-mandates-us.html>.

³¹⁶ Berkeley Lovelace & Heidi Przybyla, *CDC Expected to Update Mask Guidance as Early as Next Week*, NBC NEWS (Feb. 16, 2022 8:50 AM). <https://www.nbcnews.com/health/health-news/cdc-masks-cdc-expected-update-mask-guidance-early-week-rcna16331>.

³¹⁷ James Paton, *Is COVID Becoming Endemic? What would that Mean?*, BLOOMBERG (Feb. 4, 2022 2:41 PM), <https://www.bloomberg.com/news/articles/2022-01-19/is-covid-becoming-endemic-what-would-that-mean-quicktake>.

prevention strategies to these spaces.³¹⁸ At the beginning, frequent handwashing was considered the best way to stop illness; now we know that the dominant means of spread is through the air.³¹⁹ Other means of spreading the disease have also been discovered, such as through human waste and in bodily fluids.³²⁰ In the first months of the pandemic, tests were rationed to people who had severe symptoms from a short list given by the CDC.³²¹ Now we know that there is a wide variety of symptoms, and the long-term effects on brain and lung health can be severe.³²² It is also understood that at least thirty percent of people who carry the illness are asymptomatic,³²³ and the chance of transmission by asymptomatic people is seventy-five percent.³²⁴ Additionally, it is now acknowledged that universal testing is the way to identify the majority of silent and mild cases so that persons who test positive can be medically isolated or quarantined³²⁵ In prisons, this universal testing is crucial, due to crowding, lack of protective equipment,

³¹⁸ *Id.*

³¹⁹ Renyi Zhang et al., *Identifying Airborne Transmission as the Dominant Route for the Spread of COVID-19*, PROCS. NAT'L ACAD. SCI. (June 20, 2020), <https://www.pnas.org/content/117/26/14857>.

³²⁰ Amir Hossein Mohseni et al., *Body Fluids May Contribute to Human-to-Human Transmission of Severe Acute Respiratory Syndrome Coronavirus 2: Evidence and Practical Experience*, 15 CHINESE MED. 58, (2020).

³²¹ Robinson Meyer, *America Isn't Testing for the Most Alarming Coronavirus Cases*, ATLANTIC (Mar. 13, 2020), <https://www.theatlantic.com/science/archive/2020/03/who-gets-tested-coronavirus/607999/>.

³²² *Looking Forward: Understanding the Long-term Effects of COVID-19*, NAT'L HEART, LUNG, & BLOOD INST. (June 3, 2020), <https://www.nhlbi.nih.gov/news/2020/looking-forward-understanding-long-term-effects-covid-19/>.

³²³ Mandavilli, *supra* note 12..

³²⁴ *Pandemic Planning*, *supra* note 23.

³²⁵ *Overview of Testing for SARS-COV-2, the Virus that Causes COVID-19*, CDC (Feb. 11, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html>.

and communal spaces. Demonstrating this, the Connecticut prison system uncovered 830 silent cases of COVID-19 in its prisons in 2020.³²⁶

The 2009-2010 Swine Flu cases, which were based on Eighth Amendment claims, provide insight into what may be considered “reasonable responses” to incurable infectious disease in a prison.³²⁷ If reasonable steps are taken to prevent exposure and if a prisoner is treated in a timely way, the mere fact that a prisoner is exposed to and contracts an illness is not a cause for a constitutional violation.³²⁸ Some courts have held that high-risk prisoners may prevail on an Eighth Amendment claim if the prison does not treat them quickly and they get very ill, suffer complications to their underlying illness, or die.³²⁹ However, other courts have said that if a prisoner is at high risk for severe illness due to an underlying condition, a prison is not liable if its health care providers monitor the symptoms of the illness.³³⁰

³²⁶ Zach Murdock, *Mass Testing at Connecticut Prisons Identifies Another 832 COVID-19 Cases, Almost All Asymptomatic, DOC Says*, HARTFORD COURANT (June 29, 2020, 6:13 PM), <https://www.courant.com/coronavirus/hc-news-coronavirus-doc-mass-testing-numbers-20200629-fdgou7ywpneknewyl32d4e3bxe-story.html>.

³²⁷ See *Jackson v. Rikers Island Facility*, 2011 U.S. Dist. LEXIS 84842 (S.D.N.Y. Aug. 2, 2011); *Fraher v. Heyne*, 2011 U.S. Dist. LEXIS 125581 (E.D. Cal. Oct. 31, 2011); *Washington v. Harrington*, 2012 U.S. Dist. LEXIS 123103 (E.D. Cal. Aug. 29, 2012).

³²⁸ *Jackson v. Rikers Island Facility*, 2011 U.S. Dist. LEXIS 84842 (S.D.N.Y. Aug. 2, 2011) (holding prison was not deliberately indifferent to a prisoner’s medical needs when it responded in a timely way to a request for medical treatment).

³²⁹ *Fraher v. Heyne*, 2011 U.S. Dist. LEXIS 125581 (E.D. Cal. Oct. 31, 2011) (denying a prisoner with a heart condition a flu test because her fever “was not high enough” was not deliberately indifferent).

³³⁰ *Washington v. Harrington*, 2012 U.S. Dist. LEXIS 123103 (E.D. Cal. Aug. 29, 2012) (giving basic treatment and monitoring a prisoner with asthma who contracted H1N1 until he could be sent to an outside hospital for treatment is not deliberate indifference).

Lastly, although scholars have proposed it,³³¹ removal from a prison is not a remedy for Eighth Amendment violations, so even prisoners who succeed in their claim will not be released. This leads to a mobius strip legal process: the prisoner is recognized to be at risk, but they cannot leave. The prison must try to make their situation safe. It can be, through some factors not within the control of the prison officials, impossible to make their situation safe. The harm will not “ultimately be averted,”³³² so they remain in danger with no further recourse. Although the hurdle of the Eighth Amendment is hard to clear, it provides prisoners a means to receive damages. The Fourteenth Amendment gives detained persons the same opportunity.

V. § 1983 Liability

Courts have recognized that a special relationship exists between incarcerated persons and the state. This relationship “gives rise to a duty of care to protect the prisoner from foreseeable harm and thus can support a state-law negligence claim.”³³³ Civil Action for Deprivation of Rights, § 1983, is not itself a substantive right, but allows prisoners, among others, to hold a government official accountable for a deprivation of a clearly established Constitutional right:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

³³¹ Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575 (2012).

³³² *Farmer v. Brennan*, 511 U.S. 825, 844-45 (1994).

³³³ Michael Brodheim, *California Recognizes “Special Relationship” Between Jailer and Prisoner*, PRISON LEGAL NEWS (July 15, 2011), <https://www.prisonlegalnews.org/news/2011/jul/15/california-recognizes-special-relationship-between-jailer-and-prisoner/>.

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress³³⁴

Claims under § 1983 let prisoner plaintiffs seek monetary damages and declaratory and injunctive relief from the officers who violated their rights or the prison system that failed to protect them from harm. Once it is established that a person has been injured by a deprivation of a right, the question becomes what damages are available to them. Inmates can receive money and/or the court can impose an equitable remedy. For inmates who have been harmed by a facility's unwillingness or inability to keep them safe, relief might come in the form of changes in prison policies, such as how many persons can be housed in a cell or whether the facility offers COVID-19 vaccines. Throughout the pandemic, courts have been faced with an unfolding set of unusual circumstances that have challenged their ability to protect detainees and inmates.

In an incident that has been compared to a modern-day Tuskegee experiment played out on society's least powerful, three inmates of a detention center in Arkansas filed a complaint in January 2022 against the facility alleging a violation of their substantive due process rights under the Fourteenth Amendment.³³⁵ The Plaintiffs claim that the prison doctor gave them Ivermectin- a medication used primarily in animals as a de-wormer and mite killer- as a

³³⁴ 42 U.S.C. § 1983.

³³⁵ Andrew Boryga, 'Like Tuskegee,' Southern Jail Treats COVID with Dangerous, Unproven Drug Ivermectin, DAILY BEAST (Aug. 25, 2021 9:20 PM), <https://www.thedailybeast.com/like-tuskegee-deep-south-jail-treats-covid-with-drug-fda-says-is-dangerous>; Complaint, Floreal-Wooten v. Washington Cnty. Det. Ctr., No. 5:22-cv-05011-TLB-CDC (W. D. Ark. Jan. 13, 2022), https://www.acluarkansas.org/sites/default/files/field_documents/complaint-_file_marked.pdf.

treatment for their COVID-19 infections.³³⁶ The CDC cautions that Ivermectin has not been shown to be safe or effective against SARS-CoV-2. In high doses, it can be fatal.³³⁷ The Plaintiffs were told that the drug mixture was “vitamins”, “antibiotics”, and “steroids” and were given Ivermectin in doses many times higher than what is approved for treatment of parasites in humans.³³⁸ The men were given an ineffective and potentially dangerous drug for their COVID-19 infections, they suffered ill effects from that drug, and were required to pay for the “treatment” they received.³³⁹ Despite the harm done to them, the most the Plaintiffs can hope for in their action is that the prison will not give Ivermectin to another prisoner without their consent, that the Plaintiffs will be allowed one medical exam by a different doctor, and that the Plaintiffs’ costs are paid.³⁴⁰

Two of the same barriers arise with § 1983 claims as with Eighth Amendment claims. Firstly, measures that officials take to protect inmates may be ineffective or inadequate but considered reasonable and sufficient by the

³³⁶ *Id.*

³³⁷ *Why You Should Not Use Ivermectin to Treat or Prevent COVID-19*, FDA <https://www.fda.gov/consumers/consumer-updates/why-you-should-not-use-ivermectin-treat-or-prevent-covid-19> (last visited Jun. 2, 2022); *FAQ: COVID-19 and Ivermectin Intended for Animals*, FDA, <https://www.fda.gov/animal-veterinary/product-safety-information/faq-covid-19-and-ivermectin-intended-animals> (last visited Jun. 2, 2022); *FDA Letter to Stakeholders: Do Not Use Ivermectin Intended for Animals as Treatment for COVID-19 in Humans*, FDA, <https://www.fda.gov/animal-veterinary/product-safety-information/fda-letter-stakeholders-do-not-use-ivermectin-intended-animals-treatment-covid-19-humans> (last visited Jun. 2, 2022); *Rapid Increase in Ivermectin Prescriptions and Reports of Severe Illness Associated with Use of Products Containing Ivermectin to Prevent or Treat COVID-19*, CDC, <https://emergency.cdc.gov/han/2021/han00449.asp> (last visited Jun. 2, 2022).

³³⁸ Complaint, *supra* note 335.

³³⁹ *Id.*

³⁴⁰ *Id.*

courts³⁴¹ and secondly, release is not a remedy in § 1983 actions; the only federal remedy for a prisoner challenging the fact or duration of their confinement is a petition for writ of habeas corpus.³⁴²

Qualified immunity protects prison and jail officials from liability in whole or part from either Eighth Amendment or claims under § 1983. Qualified immunity operates under the premise that when the law is unsettled, government officials should not be held liable for interpreting the law in a reasonable way, even if they are mistaken in their interpretation.³⁴³ Prison officials enjoy qualified immunity from Eighth Amendment and § 1983 lawsuits unless “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”³⁴⁴ “[G]overnment officials performing discretionary functions [are entitled to] a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.”³⁴⁵ § 1983 claims seem to provide no more protection to prisoners during the COVID-19 pandemic than Eighth Amendment claims. Therefore, if officials have been put on notice that their actions are unlawful, they are liable for violating an individual’s rights. Jail and prison officials are, at this point in the pandemic, on practical notice about the dangers of COVID-19 and the conditions in which it thrives. It could be argued that centuries

³⁴¹ Smith v. Washington, 2022 U.S. Dist. LEXIS 18416 (citing Wilson v. Williams, 961 F.3d 829 (6th Cir. 2020) (holding that even though the Bureau of Prisons’ actions were “inadequate” to protect prisoners, it took affirmative actions to prevent the spread of COVID-19)).

³⁴² Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

³⁴³ See Saucier v. Katz, 533 U.S. 194, 202 (2001).

³⁴⁴ *Id.*

³⁴⁵ Anderson v. Creighton, 483 U.S. 635, 638 (1987).

of disease inside a jail and prison has informed them of the fact that, by permitting the spread of SARS-CoV-2, they are violating the right of their wards to not be sick or dead. § 1983 claims seem to provide no more protection to prisoners during the COVID-19 pandemic than Eighth Amendment claims. In a § 1983 claim, the plaintiff must show deprivation of a civil right, that the deprivation of the civil right caused harm, and that the deprivation was a proximate or legal cause of the damages.³⁴⁶ § 1983 creates "...a species of tort liability."³⁴⁷

The States' reaction to the danger of COVID-19 in jails and prison has been described as one of "gross negligence."³⁴⁸ Gross negligence can be called "a twilight zone which exists somewhere between ordinary negligence and intentional injury."³⁴⁹ This seems to apply to many prisons during the pandemic; the State and its prisons officials do just enough to avoid being accused of intentionally injuring inmates, but not enough to keep them safe. However, both district courts and the Supreme Court have said that negligence is not part of the standard for an Eighth Amendment claim.³⁵⁰ This is, in part, because negligence does not "shock the conscience,"³⁵¹ which is a standard that is often considered

³⁴⁶ 42 U.S.C. § 1983.

³⁴⁷ *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

³⁴⁸ Jen Christensen, *States Engaged in 'Gross Negligence' in COVID-19 Response in Jails and Prisons, New Report Finds*, CNN (June 25, 2020 7:55AM), <https://www.cnn.com/2020/06/25/health/state-response-covid-jails-prisons-trnd/index.html>.

³⁴⁹ *Pleasant v. Johnson*, 325 S.E.2d 244, 247 (N.C. 1985).

³⁵⁰ *Farmer v. Brennan*, 511 U.S. 825 (1994); *Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996); *Lippay v. Christos*, 996 F.2d 1490, 1501 (3d Cir. 1993); *Miller v. City of Philadelphia*, 174 F.3d 368, 374-75 (3d Cir. 1999) ("[The court] suggested that the 'shocks the conscience' standard [applies] to all substantive due process cases."); *Schieber v. City of Philadelphia*, 320 F.3d 409, 419 (3d Cir. 2003); *Duckworth v. Franzen*, 780 F.2d 645, 652-53 (7th Cir. 1985) ("[T]he infliction of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either deliberate, or reckless in the criminal law sense. Gross negligence is not enough.").

³⁵¹ *Whitley v. Albers*, 475 U.S. 312 (1986).

with Eighth Amendment claims. However, failing to protect over two million incarcerated persons from being the captive victims of a deadly contagious disease *should* shock the conscience of decent people.

The Supreme Court has rejected the idea that prisons should receive compensatory damages as a vindication of their rights under § 1983 when this remedy is based on the factfinder's assessment of the value of the right.³⁵² A person must have an actual injury caused by the respondent's action or failure to act because compensatory damages are intended to give redress for a physical or emotional harm. If a person seeks compensatory damages for mental or emotional distress, they must have suffered a physical harm. Circuit courts are split as to what constitutes "physical injury". All circuit courts require an injury to be more than *de minimus* yet disagree on what might constitute a *de minimus* injury.³⁵³ COVID-19, especially when it runs its course in an unvaccinated person, is surely more than "...a matter of trifling consequence."³⁵⁴ A possible place for movement in the law is to expand the scope of what is considered an injury. If a prisoner gets COVID-19, their illness should be considered physical injury. A prisoner who contracts COVID-19 is not only harmed by suffering from an illness that may kill them or disable them, they are also emotionally harmed by the stress and fear of being unable to avoid the illness and the uncertainty of proper medical care once they get ill. If there was no underlying physical harm, plaintiffs cannot seek

³⁵² *Memphis Comty School v. Stachura*, 477 U.S. 299 (1986).

³⁵³ *Hudson v. McMillan*, 503 U.S. 1, 9–10 (1992).

³⁵⁴ *What is De Minimis*, LAW DICTIONARY, <https://thelawdictionary.org/de-minimis/#:~:text=a%20Latin%20phrase%20that%20means,wish%20to%20even%20consider%20it>, (last visited Jun. 2, 2022).

compensatory damages for the mental or emotional distress that followed from the unsafe conditions that they live in. This is a double bar to justice for incarcerated persons who have, as a result of prison officials' neglect, gotten COVID-19 and lived in terror of contracting it. The law should allow for the award of damages in these cases by recognizing COVID-19 as a physical injury, which would also open the door for recovery of damages for emotional and mental distress. The PLRA allows for the prospect of nominal or punitive damages.³⁵⁵ Nominal damages may be awarded; courts have looked favorably on nominal damages as a way to vindicate absolute rights.³⁵⁶ These have also been awarded even when there has been no physical injury.³⁵⁷ Even if COVID-19 is never considered an injury for the purposes of civil rights, nominal and punitive damages are a means to deliver justice.

Detainees and prisoners who receive compensatory, nominal, and punitive damages would be able to have some financial means to navigate long term COVID-19 effects and provide for dependents. A favorable outcome for these plaintiffs would also send a message about what is not acceptable treatment. Further, these cases might deter this kind of treatment.

³⁵⁵ *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002) (finding that § 1997e(e) does not limit the availability of nominal or punitive damages).

³⁵⁶ *Carey v. Phipus*, 435 U.S. 247 (1978).

³⁵⁷ *Thompson*, 284 F.3d at 416 (“[§1997e(e)] does not restrict a plaintiff’s ability to recover... nominal or punitive damages”).

VI: Concluding Lessons for the Parent State

Being an incarcerated person during the COVID-19 pandemic has been likened to being condemned to “death by virus.”³⁵⁸ This is not so. It is death by neglect of governments. It has been observed that “[c]orrections institutions have continuously failed to take even the most basic life-saving measures to protect incarcerated people from Covid-19.”³⁵⁹ Governments are responsible for dependent wards, including prisoners and jail detainees who have no autonomy or way to protect themselves during the COVID-19 pandemic. An incarcerated person is a captive victim for any contagious illness, especially in one of the many facilities filled past design capacity. These populations are particularly vulnerable because of high rates of underlying disease, recreational drug use, smoking, histories of inadequate health care, and large numbers of non-white inmates.

If the state and its prison system cannot protect incarcerated persons, there are few good remedies. Some prisoners may be furloughed, granted compassionate release because they are close to death, or freed with or without conditions. For individuals with a low risk of committing violent crimes or who are being held pre-trial because they cannot afford bail, release provides relief to a small portion of the incarcerated population. Releasing people into the free community is not a solution without risks: carriage of the virus to healthy

³⁵⁸ *Prison Outbreak: How Do We Stop Covid-19 from Spreading in Prisons and Jail?*, MAKING THE CALL (May 2020), <https://open.spotify.com/episode/6XztMVcWWdGUKcqEYQ7l8H>.

³⁵⁹ *ACLU Files Class Action Lawsuit to Protect Incarcerated People at the Deadliest Federal Prison*, ACLU (Oct. 27, 2020), <https://www.aclu.org/press-releases/aclu-files-class-action-lawsuit-protect-incarcerated-people-deadliest-federal-prison>.

individuals, burdening the resources of poor communities, inciting the anger and fear of neighbors, and possibility incurring the risk of flight or recidivism.

Other strategies include premature parole, home confinement, or probation. These have similar perils and burdens as release without surveillance does, with the added cost of monitoring. Compassionate release is rarely granted, which makes this an almost useless strategy for saving lives. Release of inmates and deferral of intakes in jails has been a slow and discretionary process. Since the start of the pandemic, the population of U.S. jails and prisons has been reduced by about eight percent with some of these people being released to their home or other arrangements with or without surveillance.³⁶⁰ In part, the numbers in prisons fell because prisons have accepted fewer jail transfers,³⁶¹ leaving concentrations of COVID-19 in local jails. Of the 151,735 people serving sentences in a federal prison, 7,850 have been released to home confinement.³⁶² Pregnant women, who comprise three percent of women at federal prisons, four percent at state prisons, and five percent at jails, are at a high risk of complications from COVID.³⁶³ Pregnant women of color, who are overrepresented in jails and prisons, are more affected by COVID infections.³⁶⁴

³⁶⁰ *Reducing Jail and Prison Populations During the Covid-19 Pandemic*, BRENNAN CTR. JUST. (June 25, 2021), <http://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic>.

³⁶¹ *How Criminal Justice Systems are Responding to the Coronavirus Outbreak*, CRIME & JUST. INST., <https://www.cjainstitute.org/corona/> (last visited Mar. 6, 2022).

³⁶² Roni Caryn Rabin, *Vulnerable Inmates Left in Prison as COVID Rages*, N.Y. TIMES (May 6, 2021), <https://www.nytimes.com/2021/02/27/health/coronavirus-prisons-danbury.html>.

³⁶³ *Pregnancy and COVID-19: What are the risks?*, MAYO CLINIC (May 18, 2021), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/pregnancy-and-covid-19/art-20482639>.

³⁶⁴ *Id.*

When they are incarcerated, these women face the same degree of exposure to the virus as other inmates. Despite this, states have been slow to find alternatives to incarceration for pregnant women or have stringent requirements that result in only a handful of releases.³⁶⁵ For any jail or prison, regardless of who is held there, release does not solve a glaring problem: what happens to those left behind?

Those left behind face dangerous conditions, even when the facility is not considered overcrowded. When facilities have been required to implement policies and protocols, there is no way, outside of court-ordered relief, to enforce compliance. Hazardous conditions in facilities have included not only no availability of proper masks, such as the recommended N95 respirators, but often no masks at all.³⁶⁶ Throughout the pandemic, there have been jails and prisons with not enough soap and cleaning supplies, who continue to utilize dormitory housing and shared cells, who withhold vaccines, and stingily ration medical care even to the sickest detainees and inmates. In most facilities, it is not possible to stay six feet apart in common areas. In some prisons, risks include having to be guarded by officers who have tested positive for the virus but who are required to work regardless.³⁶⁷ The dangerous conditions also may include being in close contact with correctional officers who refuse to get vaccinated or who have been overwhelmed by the responsibilities created by understaffing. As it becomes more unsafe to work in a prison or jail, staff are leaving in large numbers. As of May

³⁶⁵ Rabin, *supra* note 362.

³⁶⁶ *Types of Masks and Respirators*, CDC (Jan. 28, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/types-of-masks.html>.

³⁶⁷ Rachel Aviv, *Punishment by Pandemic*, NEW YORKER (June 15, 2020), <https://www.newyorker.com/magazine/2020/06/22/punishment-by-pandemic>.

2021, one third of federal correctional officer positions were vacant.³⁶⁸ Three prisons in Florida have closed because there is not enough staff.³⁶⁹

For those left in the line of fire,³⁷⁰ Eighth Amendment or Fourteenth Amendment protections have been invoked. These are difficult legal standards to overcome and limited in what they can provide, as are actions under § 1983. This is especially true in light of the deference that courts give to prisons to set their policies and regulations. Reform of the laws to allow for simple and full recovery of compensatory damages is a way for prisoners to provide for their dependents and access long-term care for themselves. A corrections officer in Georgia testified that on a “good day”, six to seven officers are responsible for 1,200 inmates a day.³⁷¹ As difficult as it is for staff inside a jail or prison ravaged by COVID-19, they have the choice to leave.

³⁶⁸ NBC NEWS, *supra* note 204.

³⁶⁹ Grace Toohey, *Facility Closures Continue as Florida Prisons Face 'Unprecedented' Staff Shortages*, ORLANDO SENTINEL (Sept. 3, 2021 3:55 PM) <https://www.orlandosentinel.com/news/crime/os-ne-florida-prisons-struggle-staffing-20210913-x34d5cfefnhetfu5zrdp74qum-story.html#:~:text=In%20late%20August%2C%20the%20Florida,to%20information%20provided%20by%20FDC>

³⁷⁰ See Brandon Garrett, *Constitutional Criminal Procedure Post-COVID*, HARV. L. REV. BLOG (May 19, 2020), <https://blog.harvardlawreview.org/constitutional-criminal-procedure-post-covid/>; John Curran et al., *COVID-19 and the Constitution: How the Bill of Rights is Being Tested by the Coronavirus*, N.Y. L. J. (May 29, 2020), <https://www.law.com/newyorklawjournal/2020/05/29/covid-19-and-theconstitution-how-the-bill-of-rights-is-being-tested-by-the-coronavirus/>; Michael Campion Miller et al., *The Pandemic in Prisons: Advocating for Clients in Federal Custody*, STEPTOE (April 9, 2020), <https://www.steptoel.com/en/news-publications/the-pandemic-in-prisons-advocating-for-clients-in-federal-custody.html>.

³⁷¹ Keri Blakinger et al., *As Corrections Officers Quit in Droves, Prisons Get Even More Dangerous*, MARSHALL PROJECT (Nov. 1, 2021 6:00 AM), <https://www.themarshallproject.org/2021/11/01/as-corrections-officers-quit-in-droves-prisons-get-even-more-dangerous>.

SARS-Co V-2 spread swiftly in the United States. The public health crisis unfolded with no concern for politics and the lack of a coordinated federal effort to combat it. The shockingly disorganized and callous response by governments to incarcerated persons during the COVID-19 pandemic led to widespread illness and death. Those who died are lost and many who were sick may suffer a lifetime of complications.³⁷² The wolf of disease will be at the door again, that is certain. “[L]aw cannot anticipate the specifics of each public health emergency,”³⁷³ but pandemic response developed now will inform future action. That action should primarily consist of mounting a swift and protective strategy to protect all citizens, especially dependent wards of the government such as prisoners, before the wolf gets one foot inside the door. And if governments cannot protect their citizens before disease takes hold, prisoners- who are among the most vulnerable citizens- must be allowed to fully claim what is owed to them.

³⁷² Jennifer Couzin-Frankel, *From ‘Brain Fog’ to Heart Damage, COVID-19’s Lingering Problems Alarm Scientists*, SCIENCEMAG (July 31, 2020, 1:30 PM), <https://www.sciencemag.org/news/2020/07/brain-fog-heart-damage-covid-19-s-lingering-problems-alarm-scientists>.

³⁷³ Stanley M. Lemon et al., *Ethical and Legal Considerations in Mitigating Pandemic Disease: Workshop Summary*, NAT’L ACAD. SCI., <https://www.ncbi.nlm.nih.gov/books/NBK54163/#:-:text=Laws%20give%20public%20health%20agencies,of%20each%20public%20health%20emergency>.