

# AMERICAN PUNISHMENT AND PANDEMIC

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*Many of the sites of the worst outbreaks of the disease caused by the novel coronavirus (COVID-19) are America's prisons and jails. As of March 2021,<sup>1</sup> the virus has infected hundreds of thousands of incarcerated people and well over two thousand have died as a result contracting the disease caused by the virus. Prisons and jails have been on perpetual lockdowns since the onset of the pandemic, with family visits suspended and some facilities resorting to solitary confinement to mitigate the virus's spread, thereby exacerbating the punitiveness and harmfulness of incarceration. With the majority of the 2.3 million people incarcerated in the United States being people who identify as people of color, the virus's tear through prisons and jails multiplies the burden of the pandemic on underrepresented communities, which the pandemic has already disproportionately impacted among the general population.*

*Since the pandemic began, incarcerated people and advocates have attempted to wield the law to protect prison and jail populations from the virus's spread. Many have raised the issue in criminal law proceedings. For others, civil lawsuits have sought prisoner releases and the implementation in facilities of mitigation measures known to slow the virus's spread. Most of these civil justice efforts have thus far been unsuccessful, as courts have concluded the plaintiffs sought relief under the improper legal mechanism, were procedurally barred from the relief they sought, or were unlikely to succeed on the merits of their claims as the law is interpreted.*

*The U.S. Constitution purports to protect incarcerated people from "cruel and unusual punishments" but has largely failed to offer protection during one of the most exceptional—indeed, unusual—moments in modern history. This Essay observes the impact of the first year of the pandemic on prisons and jails and the civil justice system's failure to account for the deeply unusual environment the virus has created. Indeed, as the virus spreads at elevated rates in carceral settings, courts have effectively told us that this is, simply, punishment as usual.*

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<sup>1</sup> Most of this piece was written in Summer 2020. The author acknowledges that the COVID-19 pandemic is a rapidly evolving situation and has endeavored to provide the most current information at the time of the primary drafting of the piece, which may not reflect the latest developments at the time of publication.

## INTRODUCTION

We have learned that individuals are the primary vectors of [COVID-19], and experts increasingly recognize that controlling individuals' actions by setting and enforcing policy will be the key to society's success or failure in mitigating the devastating effects of this modern plague. The lives of all those who interact within the [prison] system—hundreds of thousands—are literally at stake.<sup>2</sup>

The pandemic caused by the novel coronavirus has inflicted profound and unprecedented disruptions around the world.<sup>3</sup> By March 2021, the disease had infected more than 123 million people and taken more than 2.7 million lives globally.<sup>4</sup> The numbers in the United States are especially troubling, totaling nearly 30 million cases and more than 542 thousand deaths.<sup>5</sup> In its first year, the virus has impacted virtually every facet of society and changed our lives in significant ways, forcing us to rethink how we learn, work, and—simply put—live.<sup>6</sup> Many schools have closed, moving instruction online.<sup>7</sup> Most forms of travel have slowed dramatically or ceased.<sup>8</sup> The economy is in a historic recession, and unemployment has hit record levels.<sup>9</sup> Many American cities are pre-

<sup>2</sup> OFF. OF THE INSPECTOR GEN., COVID-19 REVIEW SERIES: PART ONE: INCONSISTENT SCREENING PRACTICES MAY HAVE INCREASED THE RISK OF COVID-19 WITHIN CALIFORNIA'S PRISON SYSTEM, at v (2020), <https://www.oig.ca.gov/wp-content/uploads/2020/08/OIG-COVID-19-Review-Series-Part-1-Screening.pdf> [<https://perma.cc/7HCV-FHB5>].

<sup>3</sup> Tedros Adhanom Ghebreyesus, Dir.-Gen., World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [<https://perma.cc/AM5S-E92V>] (declaring COVID-19 as a pandemic).

<sup>4</sup> CTR. FOR SYS. SCI. & ENG'G, JOHNS HOPKINS UNIV. OF MED., *COVID-19 Dashboard*, <https://coronavirus.jhu.edu/map.html> [<https://perma.cc/UVK8-SKTJ>].

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., *Most Americans Say Coronavirus Outbreak Has Impacted Their Lives*, PEW RSCH. CTR. (Mar. 30, 2020), <https://www.pewsocialtrends.org/2020/03/30/most-americans-say-coronavirus-outbreak-has-impacted-their-lives> [<https://perma.cc/XBF2-R4W4>] (“Nearly nine-in-ten U.S. adults say their life has changed at least a little as a result of the COVID-19 outbreak, including 44% who say their life has changed in a major way.”).

<sup>7</sup> See, e.g., Amelia Nierenberg & Adam Pasick, *Schools Briefing: The State of Play for K-12*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/08/17/us/k-12-schools-reopening.html> [<https://perma.cc/GYZ5-W8S7>].

<sup>8</sup> See, e.g., Natasha Frost, *Will Business Travel Ever Be the Same?*, BBC (Aug. 4, 2020), <https://www.bbc.com/worklife/article/20200731-how-coronavirus-will-change-business-travel> [<https://perma.cc/M9VB-PCAU>]; *Public Health Considerations While Resuming International Travel*, WORLD HEALTH ORG. (July 30, 2020), <https://www.who.int/news-room/article-s-detail/public-health-considerations-while-resuming-international-travel> [<https://perma.cc/F2GH-NU5W>].

<sup>9</sup> See, e.g., Philipp Carlsson-Szlezak et al., *Taking Stock of the Covid-19 Recession*, HARV. BUS. REV. (Aug. 14, 2020), <https://hbr.org/2020/08/taking-stock-of-the-covid-19-recession> [<https://perma.cc/9JYW-Z2UU>]; Jon Schwarz, *The Unemployment Crisis Is a True National Emergency*, INTERCEPT (July 30, 2020, 11:44 AM), <https://theintercept.com/2020/07/30/coronavirus-unemployment-crisis-national-emergency> [<https://perma.cc/YE8R-4LCG>].

dicted to face deep budget shortfalls as the pandemic rages on.<sup>10</sup> There is little left of life as it existed before the pandemic.

The pandemic's impact in the United States has been disproportionately greater along two intersecting axes:<sup>11</sup> one, for people and communities of color, and two, for people incarcerated in prisons and jails.<sup>12</sup> As for the first axis, by most measures, Black people are the pandemic's most-impacted: according to the Atlantic's COVID Tracking Project, Black people are dying from COVID-19 at almost one-and-a-half times the rate of white people.<sup>13</sup> Nearly one in three Black Americans knows someone who has died of COVID-19, compared with 17 percent of Latinx adults and 9 percent of white adults.<sup>14</sup> According to The Marshall Project, "People of color make up just under 40 percent of the U.S. population but accounted for approximately 52 percent of all the 'excess deaths' above normal through July."<sup>15</sup> While six months into the pandemic deaths among white Americans were 9 percent above normal, deaths among

<sup>10</sup> See, e.g., Emily Badger & Quoc Trung Bui, *The Recession Is About to Slam Cities. Not Just the Blue-State Ones.*, N.Y. TIMES (Nov. 26, 2020), <https://www.nytimes.com/2020/08/17/upshot/pandemic-recession-cities-fiscal-shortfall.html> [<https://perma.cc/8FWW-RPNG>].

<sup>11</sup> Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (coining the term "intersectionality" and challenging the notion that discrimination and marginalizing occur "along a single categorical axis"). These two axes are certainly not exhaustive, as the pandemic has disproportionately impacted people based on many other factors, including income level, immigration status, etc.

<sup>12</sup> When I refer to "prisons and jails," I include spaces used to confine people in the government's custody pending the resolution of civil/administrative immigration proceedings—people often referred to as in "immigration detention." For reasons I have discussed in other works, I find it more accurate in discussions like this one to not differentiate among the facilities incarcerating people pursuant to criminal law and those incarcerating people pursuant to civil law. Danielle C. Jefferis, *Yearning to Breathe Free: Migration-Related Confinement in America*, 106 CORNELL L. REV. ONLINE 27, 27–28 (2020) (reviewing CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019)); René Lima-Marín & Danielle C. Jefferis, *It's Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*, 96 DENV. L. REV. 955, 956 (2019).

<sup>13</sup> *The COVID Racial Data Tracker*, COVID TRACKING PROJECT, <https://covidtracking.com/race> [<https://perma.cc/KM4T-K99Y>] (data through March 7, 2021, demonstrating that COVID-19 affected Black, Indigenous, Latinx, and other people of color the most).

<sup>14</sup> Amy Goldstein & Emily Guskin, *Almost One-Third of Black Americans Know Someone Who Died of Covid-19, Survey Shows*, WASH. POST (June 26, 2020, 3:30 AM), [https://www.washingtonpost.com/health/almost-one-third-of-black-americans-know-someone-who-died-of-covid-19-survey-shows/2020/06/25/3ec1d4b2-b563-11ea-aca5-ebb63d27e1ff\\_story.html](https://www.washingtonpost.com/health/almost-one-third-of-black-americans-know-someone-who-died-of-covid-19-survey-shows/2020/06/25/3ec1d4b2-b563-11ea-aca5-ebb63d27e1ff_story.html) [<https://perma.cc/N5Z7-4GBV>].

<sup>15</sup> Anna Flagg et al., *COVID-19's Toll on People of Color Is Worse than We Knew*, MARSHALL PROJECT (Aug. 21, 2020), <https://www.themarshallproject.org/2020/08/21/covid-19-s-toll-on-people-of-color-is-worse-than-we-knew> [<https://perma.cc/98S9-773N>]. This report defines "excess deaths" as deaths above the average rate but that may not be attributed to COVID-19, noting "public health authorities have long known that some coronavirus deaths, especially early on, were mistakenly attributed to other causes, and that the crisis may have led indirectly to the loss of many other lives by preventing or discouraging people with other serious ailments from seeking treatment." *Id.*

Black, Latinx, Asian, and Native Americans were up 31, 44, 35, and 22 percent, respectively.<sup>16</sup> Researchers have linked a number of structural forces to the racial disparities among COVID-19 deaths, including lower incomes and poorer living conditions, access to health insurance and care, and access to food and a clean, stable environment.<sup>17</sup>

And for the second axis, the pandemic is disproportionately impacting incarcerated people as it wreaks havoc in prisons and jails across the country.<sup>18</sup> Indeed, the pandemic has laid bare the cruelties of American punishment. Prisons and jails are sites of many of the worst of the virus's outbreaks, and incarcerated people face a greater risk of infection than the non-incarcerated populations.<sup>19</sup> Closed environments' inherent susceptibility to infectious disease outbreaks, coupled with a failure to respond appropriately to the pandemic, has led to serious outbreaks, cases, and deaths among incarcerated people—the majority of whom identify as people of color—across the country.<sup>20</sup>

The COVID-19 pandemic has coincided with a historic civil rights movement and national reckoning for American policing.<sup>21</sup> The police killed George Floyd, Breonna Taylor, Elijah McClain, Tony McDade, Eric Garner, Michael Brown, Tamir Rice, Walter Scott, Alton Sterling, Philando Castile, Stephon Clark, Atatiana Jefferson, Botham Jean, Freddie Gray, and many more Black people in America. Their deaths have brought the issues of structural racism, oppression, and institutionalized violence against people and communities of color to the forefront of public debate around the world.<sup>22</sup>

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Elizabeth Warren et al., Opinion, *End the Silence About What Covid-19 Is Doing to America's Prisons*, CNN (Jan. 5, 2021, 4:01 PM), <https://www.cnn.com/2021/01/05/opinion/s/us-prison-covid-19-data-warren-brinkley-rubinstein-nowotny/index.html> [https://perma.cc/4ZES-UXLF]; see also Flagg et al., *supra* note 15.

<sup>19</sup> Madeleine Carlisle & Josiah Bates, *With over 275,000 Infections and 1,7000 Deaths, COVID-19 Has Devastated the U.S. Prison and Jail Population*, TIME (Dec. 28, 2020, 2:52 PM), <https://time.com/5924211/coronavirus-outbreaks-prisons-jails-vaccines> [https://perma.cc/FAA4-729F].

<sup>20</sup> *Racial and Ethnic Disparities in Prisons and Jails*, PRISON POL'Y INITIATIVE, [https://www.prisonpolicy.org/graphs/pie2016\\_race.html](https://www.prisonpolicy.org/graphs/pie2016_race.html) [https://perma.cc/2UNW-PP69] (“Whites are a majority of the total U.S. population, but a minority of the prison population.”); Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL'Y INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities> [https://perma.cc/8M54-JHN3]; Jessica Bresler & Leo Beletsky, *COVID-19, Incarceration, and the Criminal Legal System*, in *ASSESSING LEGAL RESPONSES TO COVID-19*, at 228–30 (Scott Burris et al. eds., 2020), <https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f4d6578225705285562d0f0> [https://perma.cc/VJZ3-3WT6].

<sup>21</sup> Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [https://perma.cc/7LSR-J5PE].

<sup>22</sup> See, e.g., Reuters Staff, *Thousands Rally Across Australia in Black Lives Matter Protests*, REUTERS (July 4, 2020, 1:32 AM), <https://www.reuters.com/article/us-global-race-protests-australia/thousands-rally-across-australia-in-black-lives-matter-protests-idUSKCN24509S>

Against that backdrop, this Essay observes that the pandemic has only exposed the American carceral system for what it is in “normal” times: an inherently punitive system of confinement that disproportionately impacts people and communities of color and from which the civil justice system is ill-constructed to provide protection. Professor Benjamin Levin observes,

This exceptional [pandemic] situation and crisis mentality offer an important opportunity to reexamine the hardships experienced by people affected by the criminal system and potentially to save lives in the process. But, they also offer an important opportunity to recognize the cruelty, inhumanity, and destructiveness that define U.S. criminal policy even in “normal” times. That is, so many of the most shocking aspects of criminal law’s administration during the pandemic are actually extensions of problems that plague the system in “normal” times.<sup>23</sup>

This Essay has two parts. Part I summarizes the state of the pandemic in American prisons and jails and describes prison and jail administrators’ predominately punitive response to the pandemic as putative efforts to mitigate infection and harm. Part II analyzes courts’ responses to administrators’ putatively preventative, yet punitive, measures and observes the law’s failures in protecting people from the pandemic’s risks in prisons and jails. As institutions grapple with growing demands to dismantle institutionalized and structural racism, subordination, and inequity, the COVID-19 crisis in America’s prisons and jails—and courts’ response to the crisis—underscores the call for a radical reimagining of policing and confinement in this country.<sup>24</sup>

## I. COVID-19 IN PRISONS AND JAILS

Prisons and jails are highly conducive to the spread of disease and other infections.<sup>25</sup> Incarcerated people are forced to live in close—sometimes over-

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[<https://perma.cc/U5C5-853B>]; Assoc. Press, *Black Lives Matter Protests Sweep Across Europe*, SYDNEY MORNING HERALD (June 8, 2020, 5:02 AM), <https://www.smh.com.au/world/europe/black-lives-matter-protests-sweep-across-europe-20200608-p550cn.html> [<https://perma.cc/XV33-TYPH>]; Frank Jordans, *Black Lives Matter Protests in Australia, Asia and Europe*, PBS (June 6, 2020, 9:16 AM), <https://www.pbs.org/newshour/world/black-lives-matter-protests-in-australia-asia-and-europe> [<https://perma.cc/3HE5-D45L>].

<sup>23</sup> Benjamin Levin, *Criminal Law in Crisis*, U. COLO. L. REV.: DIGITAL (Aug. 16, 2020), <https://lawreview.colorado.edu/digital/criminal-law-in-crisis> [<https://perma.cc/2DGM-U6ZD>] (citations omitted).

<sup>24</sup> Lauren Lyons, *Incarceration, COVID-19, and Emergency Release: Reimagining How and When to Punish*, KENNEDY INST. ETHICS J. (July 17, 2020), <https://kiej.georgetown.edu/incarceration-covid-19-special-issue> [<https://perma.cc/D2CS-77ML>].

<sup>25</sup> See, e.g., Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 HEALTHCARE EPIDEMIOLOGY 1047, 1054 (2007) (“A significant and increasing percentage of the US population works or resides in correctional facilities. The prevalence of infectious diseases among incoming inmates is substantial, and the conditions that exist within our nation’s jails and prisons contribute to the further amplification of contagious illnesses. Jails and prisons represent unique and challenging environments in which to implement effective infection-control strategies.”).

crowded—quarters with each other.<sup>26</sup> Conditions may be unsanitary and access to basic hygiene supplies restricted or prohibited.<sup>27</sup> Reliable and adequate medical care is a longstanding problem in prison systems across the country, and the serious mental health needs of many incarcerated people may amplify the difficulties of infection control in prisons and jails.<sup>28</sup> Facilities may disallow the implementation and use of infection harm-reduction controls, and the willingness of some prison and jail administrators to seek assistance and expertise in infection-control seems to vary from one jurisdiction to another.<sup>29</sup> Moreover, jails and prisons are not closed environments. Staff and visitors enter and exit the facilities each day, as do people subject to detention and release, potentially bringing and taking infectious pathogens with them.<sup>30</sup> American prisons and jails routinely have higher infection rates than that of the non-incarcerated population for influenza,<sup>31</sup> tuberculosis,<sup>32</sup> MRSA,<sup>33</sup> varicella or “chicken pox,”<sup>34</sup> hepatitis,<sup>35</sup> and HIV,<sup>36</sup> among other diseases.

COVID-19 is highly contagious among the non-incarcerated population,<sup>37</sup> and even more so in prisons and jails for the reasons explained above.<sup>38</sup> The

<sup>26</sup> *Id.* at 1048 tbl.1.

<sup>27</sup> *Id.*; see also Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 Nw. U. L. REV. ONLINE 59, 73 (2020), <https://northwesternlawreview.org/articles/pretrial-detention-in-the-time-of-covid-19> [<https://perma.cc/D5DP-PF8B>] (“Even before the current health crisis, the conditions of the nation’s jails and prisons rendered their occupants susceptible to contagions in ways that members of the free world were not. Jails and prisons are infamous for overcrowding and lack of medical care.”).

<sup>28</sup> Bick, *supra* note 25, at 1047 (“Most jails and prisons were constructed to maximize public safety, not to minimize the transmission of disease or to efficiently deliver healthcare. The probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, insufficient infection-control expertise, and prohibitions against the use of proven harm-reductions tools, such as condoms and sterile needle exchange.”).

<sup>29</sup> *Id.* (“Some correctional facilities have been slow to seek assistance from outside agencies, and published guidelines for the diagnosis and treatment of communicable diseases are often not readily applicable to correctional facilities.”).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1049.

<sup>32</sup> *Id.* at 1052 (“Up to 25% of US inmates have latent tuberculosis infection (LTBI), and the incidence of active MTB infection among inmates is 6–10 times that in the nonincarcerated population.”).

<sup>33</sup> *Id.* at 1049 (“MRSA is hyperendemic in most correctional facilities.”).

<sup>34</sup> *Id.* at 1051.

<sup>35</sup> *Id.* at 1053 (“Up to 40% of all Americans with chronic viral hepatitis have been incarcerated, and the prevalence of viral hepatitis among inmates is significantly higher than it is among the general population.”).

<sup>36</sup> *Id.* at 1053 (“The prevalence of AIDS is at least 5 times greater among prisoners than it is among the general population, and HIV infection and/or AIDS remains one of the most common causes of death among inmates in the United States.”).

<sup>37</sup> See, e.g., Morgan McFall-Johnsen & Aria Bendix, *An Average Coronavirus Patient Infects at Least 2 Others. To End the Pandemic, That Crucial Metric Needs to Drop Below 1—Here’s How We Get There.*, BUS. INSIDER (Apr. 18, 2020, 9:44 AM), <https://www.businessinsider.com/coronavirus-contagious-r-naught-average-patient-spread-2020-3> [<https://perma.cc/>

cornerstones to controlling the virus's spread—social distancing and frequent hand-washing—are difficult, if not impossible, in closed living environments like carceral facilities.<sup>39</sup> People who are incarcerated live in dormitories or shared cells in close quarters with each other. Prisons and jails have notoriously poor ventilation. Prison regulations often prohibit incarcerated people from having access to soap, cleaning supplies, and personal protective equipment like face masks and gloves.<sup>40</sup>

Professors Nicole B. Godfrey and Laura L. Rovner describe the typical American prison:

American prisons are crowded and unhygienic. Incarcerated people live and work in very close, communal quarters where they share toilets, showers, sinks, laundry facilities, and dining halls. They often sleep on bunk beds, either in individual cells or in dormitory (or warehouse) style housing. Because security, not health care, is the top priority in prisons, items like hand sanitizer are not allowed in prison, and windows remain closed and locked, leading to poor air circulation. In other words, the physical layout and punitive nature of American prisons create “a system designed to spread communicable disease.”<sup>41</sup>

Preliminary studies based on officially reported data suggest that people incarcerated in state and federal prisons face a risk of contracting COVID-19

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<sup>38</sup> See, e.g., Declaration of Expert Eldon Vail in Support of Petitioners/Plaintiffs' *Ex Parte* Application for Temporary Restraining Order and Motion for Preliminary Injunction at 3, *Cullors v. County of Los Angeles*, No. 20-CV-03760 (C.D. Cal. Apr. 24, 2020) (“COVID-19 presents a special threat to people incarcerated in prisons and jails. It is well known by corrections administrators that any infectious disease must be taken extremely seriously in prisons and jails. People are housed in prisons and jails in very close quarters, and all infectious diseases appear to spread quickly. Jails represent a ticking time bomb during this pandemic.”); Carroll, *supra* note 27, at 62.

<sup>39</sup> Carroll, *supra* note 27, at 62 (“Unlike free people, detainees cannot engage in ‘social distancing’ and ‘self-quarantine’ and ‘flattening the curve’ of the epidemic—all of these things are impossible in jails . . . or are made worse by the way jails . . . are operated.’ Inmates in jails are often housed in large dormitories or shared cells with poor ventilation. They are denied freedom of movement. They eat in large dining halls and share shower and toilet facilities. They lack access to adequate medical care, soap, cleaning supplies, and personal protective equipment like face masks or gloves. In addition, a greater percentage of detainees qualify as ‘high-risk’ for COVID-19 due to age and preexisting health conditions than the general population. Each of these factors compound the risk for infection, severe symptoms, and death.” (quoting Jennifer Gonnerman, *How Prisons and Jails Can Respond to the Coronavirus*, *NEW YORKER* (Mar. 14, 2020), <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus> [<https://perma.cc/5BGC-N55V>])).

<sup>40</sup> See *id.*

<sup>41</sup> Nicole B. Godfrey & Laura L. Rovner, *COVID-19 in American Prisons: Solitary Confinement Is Not the Solution*, 2 *ARIZ. STATE L.J. ONLINE* 127, 133 (2020), <https://arizonastatelawjournal.org/wp-content/uploads/2020/11/Godfrey-Rovner-Final.pdf> [<https://perma.cc/ZA4J-VG4W>] (quoting Jennifer Gonnerman, *How Prisons and Jails Can Respond to the Coronavirus*, *NEW YORKER* (Mar. 14, 2020), <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus> [<https://perma.cc/9SE4-494G>])).

that is at least 5.5 times higher than the non-incarcerated U.S. population.<sup>42</sup> Approximately three months after the United States began to see COVID-19 cases, there had already been more than 42 thousand cases and 510 deaths among approximately 1.3 million prisoners.<sup>43</sup> These data sets show a COVID-19 case rate of 3,251 per 100 thousand prisoners, compared to a case rate of 587 per 100 thousand in the general population, and a death rate of thirty-nine deaths per 100 thousand prisoners, compared to twenty-nine deaths per 100 thousand in the general population.<sup>44</sup> These early data also suggest that older people are three times more likely to die from COVID-19 than non-incarcerated people of the same age.<sup>45</sup> Importantly, these figures do not account for people incarcerated in jails and immigration detention centers.<sup>46</sup> Another study showed at least 6.9 percent of incarcerated people and staff in twenty-nine Massachusetts prisons and jails tested positive for the virus.<sup>47</sup>

By March 22, 2021, at least 390,076 people incarcerated in the nation's prisons alone—not including jails or civil immigration detention facilities—had tested positive for COVID-19.<sup>48</sup> By that same date, at least 2,489 people in prisons have died from coronavirus-related causes, with nineteen new deaths in the previous week alone.<sup>49</sup> In some prisons, well over half of the incarcerated people have been positive for the virus at some point during the past year.<sup>50</sup> Accurate case counts are difficult to obtain because the public may rely only on officially reported data<sup>51</sup> and in some systems, test rates not available or are significantly lower than others.<sup>52</sup> The actual total of cases of COVID-19 among people incarcerated in prisons is likely much higher.<sup>53</sup>

<sup>42</sup> Brendan Saloner et al., Research Letter, *Covid-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602, 602–03 (2020).

<sup>43</sup> *Id.* at 602.

<sup>44</sup> *Id.* at 602–03.

<sup>45</sup> *See id.* at 603.

<sup>46</sup> *Id.*

<sup>47</sup> Monik C. Jiménez et al., Research Letter, *Epidemiology of COVID-19 Among Incarcerated Individuals and Staff in Massachusetts Jails and Prisons*, 3 JAMA NETWORK OPEN, Aug. 2020, at 1, <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2769617> [https://perma.cc/5R3A-JYHQ].

<sup>48</sup> *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/0announ1/a-state-by-state-look-at-coronavirus-in-prisons> [https://perma.cc/TZ4T-UVE5] (Apr. 23, 2021).

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

<sup>50</sup> Mary Van Beusekom, *US Prison Inmates Among Those Hit Hard with COVID-19*, CIDRAP (July 9, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/07/us-prison-in-mates-among-those-hit-hard-covid-19> [https://perma.cc/MS2N-XC75].

<sup>51</sup> Saloner et al., *supra* note 42, at 603.

<sup>52</sup> *Id.*; *see also* Brad Maurer & Sandhya Kajeepeta, *There Must Be Mass Releases from NYC Jails Immediately—It's the Only Way to Protect Public Health*, APPEAL (July 9, 2020), <https://theappeal.org/there-must-be-mass-releases-from-nyc-jails-immediately-its-the-only-way-to-protect-public-health> [https://perma.cc/T4M3-3XLJ].

<sup>53</sup> *See* Saloner et al., *supra* note 42, at 603; *A State-by-State Look at Coronavirus in Prisons*, *supra* note 48 (“Given the huge differences in how many people are being tested in prisons



The situation in jails and immigration detention facilities is likely even more dire, as the populations are overall more transient than prison populations.<sup>54</sup> Pretrial detainees and people confined in jails on parole or probation violations are likely to enter and exit the facility with greater frequency—for court hearings, legal visits, and reentry—than people confined in prisons after the imposition of a criminal sentence.<sup>55</sup> One study suggests nearly 100 thousand *more* people may die as a result of contracting COVID-19 because of the nation’s jail population alone, raising the U.S. death toll to twice the figures of the federal government’s modeling.<sup>56</sup> Inconsistent testing and reporting have also been problems observed in jails.<sup>57</sup>

Specific figures for infections and deaths among people incarcerated in women’s prisons are, to date, difficult to obtain. At least thirteen incarcerated women had reportedly died from COVID-19 by mid-May 2020.<sup>58</sup> That figure has certainly risen. The first federal prisoner to die from the virus was Andrea Circle Bear, who was eight-and-a-half months pregnant when she passed.<sup>59</sup> Circle Bear, a Native woman, was thirty years old and sentenced to twenty-six months in the custody of the Federal Bureau of Prisons for a nonviolent drug offense.<sup>60</sup> She was on a ventilator when she went into labor and had no choice but to deliver her child via cesarean section.<sup>61</sup> She died a few weeks later from COVID-19-related complications.<sup>62</sup>

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for the virus, the effects of the pandemic have varied widely between different state prison systems.”); Van Beusekom, *supra* note 50 (“The authors noted that the true prevalence of coronavirus in prisons is likely higher than that measured in the study because some prisons aren’t reporting cases, and others are not testing prisoners at all.”).

<sup>54</sup> See, e.g., Carroll, *supra* note 27 (“In many ways, local jails fare worse when it comes to medical care and contagion control. First, jails are composed of pretrial detainees and individuals on parole or probation violation holds, which means that jail populations fluctuate more than prison populations as inmates move in and out of the facilities.”).

<sup>55</sup> See *id.*

<sup>56</sup> See Ed Pilkington, *Mass Incarceration Could Add 100,000 Deaths to US Coronavirus Toll, Study Finds*, GUARDIAN (Apr. 22, 2020, 10:00 AM), <https://www.theguardian.com/us-news/2020/apr/22/coronavirus-us-jails-incarceration-death-toll-study> [<https://perma.cc/PJ34-FJZJ>].

<sup>57</sup> See Maurer & Kajeepeta, *supra* note 52 (describing documents obtained through open-records laws that revealed NYC jail officials were testing one-third of approximately 1,200 new jail admissions despite declaring the system had implemented universal testing).

<sup>58</sup> Cary Aspinwall et al., *What Women Dying in Prison from COVID-19 Tell Us About Female Incarceration*, MARSHALL PROJECT (May 14, 2020), <https://www.themarshallproject.org/2020/05/14/what-women-dying-in-prison-from-covid-19-tell-us-about-female-incarceration> [<https://perma.cc/N2ZR-5Y2Y>].

<sup>59</sup> *Id.*; Tana Ganeva, *Death of New Mother at Federal Prison Hospital Prompts Calls for Accountability in Texas*, APPEAL (May 6, 2020), <https://theappeal.org/death-of-new-mother-at-federal-prison-hospital-prompts-calls-for-accountability-in-texas> [<https://perma.cc/Y9QH-KBTE>].

<sup>60</sup> Ganeva, *supra* note 59.

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

<sup>62</sup> *Id.*

Prison and jail administrators' response to the pandemic has been predominately punitive, rather than precautionary and protective. In early to mid-March 2020, prison systems uniformly suspended all family and legal visits.<sup>63</sup> As of April 2021, six systems maintained the suspension of all visitation; twenty-two systems maintained their suspension of family visits but have resumed legal visits; and twenty-three systems had resumed visitation with additional precautions and limits.<sup>64</sup> Prison systems have also resorted to increased use of solitary confinement to mitigate the virus's spread, despite the well-documented health risks of doing so.<sup>65</sup>

In many jurisdictions, failures of prison and jail administrators to appropriately prepare for the pandemic have exacerbated the risks in already-susceptible environments. In California, the Office of the Inspector General found that vague and inconsistent screening and testing policies, faulty testing equipment, and poor training likely contributed to the crisis in California's prisons:<sup>66</sup> In San Quentin State Prison alone, there have been more than two thousand confirmed cases of COVID-19<sup>67</sup> and twenty-eight deaths.<sup>68</sup> In the California Institution for Men, a primarily minimum-security prison where approximately one hundred men sleep in a large open-air hall and the prison which is believed to have imported the virus to San Quentin, more than two-thirds of the incarcerated population had tested positive for COVID-19 and one had died by late April 2020.<sup>69</sup> More than 9,700 incarcerated people have been infected and fifty-five killed throughout the state's prison system.<sup>70</sup> In late August 2020, as wild-

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<sup>63</sup> *How Prisons in Each State Are Restricting Visits Due to Coronavirus*, MARSHALL PROJECT (Feb. 2, 2021, 11:40 AM), <https://www.themarshallproject.org/2020/03/17/tracking-prisons-response-to-coronavirus> [https://perma.cc/8RVD-B4YX]; *BOP Modified Operations*, FED. BUREAU PRISONS (Nov. 25, 2020), [https://www.bop.gov/coronavirus/covid19\\_stat\\_us.jsp](https://www.bop.gov/coronavirus/covid19_stat_us.jsp) [https://perma.cc/4WU5-5B7E].

<sup>64</sup> *How Prisons in Each State Are Restricting Visits Due to Coronavirus*, *supra* note 63.

<sup>65</sup> See Godfrey & Rovner, *supra* note 41, at 135.

<sup>66</sup> OFF. OF THE INSPECTOR GEN., *supra* note 2, at 1–2.

<sup>67</sup> See Jordan Allen et al., *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> [https://perma.cc/B4AC-C8NZ].

<sup>68</sup> 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> [https://perma.cc/2Y3N-P5HU]; see Holly Honderich & Shrai Papat, *Coronavirus: Can This California Prison Save Itself from Covid-19?*, BBC NEWS (July 27, 2020), <https://www.bbc.com/news/world-us-canada-53476208> [https://perma.cc/9LBB-GNXP].

<sup>69</sup> John Thomason, *Inside the Prison Where California's Coronavirus Outbreak Exploded*, INTERCEPT (Aug. 15, 2020, 5:00 AM), <https://theintercept.com/2020/08/15/california-institution-men-coronavirus-prison-outbreak> [https://perma.cc/3ZTN-TMU7].

<sup>70</sup> Sam Levin, *'Severe Inhumanity': California Prisons Overwhelmed by Covid Outbreaks and Approaching Fires*, GUARDIAN (Aug. 21, 2020, 8:35 AM), <https://www.theguardian.com/us-news/2020/aug/21/california-fires-prisons-covid-outbreaks> [https://perma.cc/P5FQ-6ZE2].

fires ravaged the state, prison administrators declined to evacuate several prisons adjacent to evacuation zones, some of which had also been sites of COVID-19 outbreaks.<sup>71</sup>

As the world commenced mitigation efforts to control the virus's spread, incarcerated people and advocates turned to the courts to seek protection from the pandemic's toll.

## II. MEASURING PUNISHMENT

The COVID-19 pandemic is an unprecedented—one might say, entirely unusual—event in the modern world. As discussed above, there are few facets of life that the virus has not impacted.<sup>72</sup> For incarcerated people, in particular, the virus poses a serious and substantial risk to health and life. Yet, as prisoners and lawyers litigated challenges to prisons' and jails' response to the pandemic, one court after another concluded the plaintiffs were unlikely to succeed on their claims, thereby endorsing the conclusion that the pandemic's risk to incarcerated people is simply punishment as usual.

The U.S. Constitution's Eighth Amendment provides for the right to be free from the infliction of "cruel and unusual punishments,"<sup>73</sup> and is one of the primary constitutional provisions regulating American incarceration.<sup>74</sup> Slightly different standards govern jails and detention facilities<sup>75</sup> but the underlying premise remains consistent: as a society, we tolerate certain features of incarceration, either as a consequence of a criminal sentence or as a putatively administrative measure pending the resolution of a legal proceeding, and anything outside those bounds of tolerance is "cruel and usual" and, accordingly, unconstitutional.<sup>76</sup> But who defines "cruel and unusual punishment?" To isolate one of those descriptors, by what measure is a form of punishment "usual" and by what measure it is "unusual?"

<sup>71</sup> *Id.* ("To increase social distancing and limit the spread of Covid, CMF had moved 80 people to sleep in outdoor tents instead of indoor cells, but with the fire approaching and air pollution rising, the prison moved them back indoors. [A family member of an incarcerated person] said she now fears a major Covid outbreak inside the prison, and noted that mass evacuations could also spread the virus if people are packed in buses together.").

<sup>72</sup> *See supra* notes 3–10 and accompanying text.

<sup>73</sup> U.S. CONST. amend. VIII.

<sup>74</sup> The Fourth Amendment governs searches in prisons to a limited degree. *See, e.g.*, *Henry v. Hulett*, 969 F.3d 769, 773–74 (7th Cir. 2020). The First Amendment regulates speech and religious exercise in prison. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 81, 88, 90, 93, 96 (1987); *Holt v. Hobbs*, 574 U.S. 352, 356, 369 (2015). And other statutory provisions shape the degree of religious freedom, accommodations for disabilities, etc. *See, e.g.*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb–1; Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111–12112.

<sup>75</sup> *See, e.g.*, *Kingsley v. Hendrickson*, 576 U.S. 389, 399–402 (2015).

<sup>76</sup> *See, e.g.*, *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (finding that while it is the Fifth Amendment that protects civil immigration detainees, they must nonetheless be afforded at minimum the Eighth Amendment's protections).

According to the Supreme Court, “[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>77</sup> Indeed,

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending on the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of [twelve] years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character.<sup>78</sup>

While the “traditional penalt[y]”<sup>79</sup> of imprisonment may not be unusual on its face, at least according to the Court, the conditions of imprisonment have been the subject of decades of litigation since the Court introduced a standard to guide the application of the Amendment. Since its “evolving standards of decency” pronouncement in *Trop v. Dulles*, the Court *has* given precise content to the Eighth Amendment as applied to certain conditions, including the adequacy of prison medical care,<sup>80</sup> prison population levels,<sup>81</sup> prison officers’ use of force,<sup>82</sup> and the risk of future harm due to prison conditions.<sup>83</sup> For each of these conditions, the Court has measured the condition at issue against its “evolving standards” test: (1) is this particular feature of confinement one that a “maturing society” would tolerate?, and (2) is it a feature of incarceration “within the limits of civilized standards”?<sup>84</sup>

Lower courts have struggled to apply the Supreme Court’s Eighth Amendment standard, and many have criticized the doctrine as “illogical, inconsistent, and unjust.”<sup>85</sup> A comprehensive analysis of the specific doctrinal failures is beyond the scope of this piece, though Professor Godfrey and others have written on the flaws in Eighth Amendment jurisprudence and, specifically, the ways in which the doctrine’s “deliberate indifference” standard fails to protect incarcerated people from ongoing systemic harm.<sup>86</sup> Other scholars have ac-

<sup>77</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>78</sup> *Id.* at 100.

<sup>79</sup> *Id.*

<sup>80</sup> *See Estelle v. Gamble*, 429 U.S. 97, 104–06 (1976).

<sup>81</sup> *See Hutto v. Finney*, 437 U.S. 678, 682–87 (1978); *Rhodes v. Chapman*, 452 U.S. 337, 339–40, 347–48 (1981).

<sup>82</sup> *See Whitley v. Albers*, 475 U.S. 312, 312, 326 (1986).

<sup>83</sup> *See Helling v. McKinney*, 509 U.S. 25, 33–35 (1993); *Farmer v. Brennan*, 511 U.S. 825, 832–37, 843–44, 847 (1994).

<sup>84</sup> *See Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

<sup>85</sup> Godfrey & Rovner, *supra* note 41, at 140 & n.87.

<sup>86</sup> *See, e.g.,* Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 153–54, 167–69 (2020); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103

counted the legislative barriers to civil justice enacted by the Prison Litigation Reform Act<sup>87</sup> and the judicial barriers of the qualified immunity doctrine.<sup>88</sup> My own work has exposed the law's disparate treatment of people incarcerated in federal facilities versus state facilities.<sup>89</sup>

Many of those criticisms are present in the civil litigation pertaining to COVID-19 prisoner releases and facility mitigation requirements. Initially, the district courts considering the litigants' motions for temporary restraining orders and preliminary injunctions issued orders granting the temporary relief requested by the incarcerated plaintiffs.<sup>90</sup>

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CORNELL L. REV. 357, 358–59 (2018); John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 456–58 (2017); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 943–48 (2009).

<sup>87</sup> See, e.g., Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 299–300 (2007).

<sup>88</sup> See, e.g., David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2023 (2018); Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 932–33 (2010).

<sup>89</sup> See generally Danielle C. Jefferis, *Delegating Care, Evading Review: The Federal Tort Claims Act and Access to Medical Care in Federal Private Prisons*, 80 LA. L. REV. 37 (2019).

<sup>90</sup> See, e.g., *Valentine v. Collier*, 140 S. Ct. 1598, 1599–1600 (2020) (describing the injunction entered by the Texas district court); *Cameron v. Bouchard*, 462 F. Supp. 3d 746, 780 (E.D. Mich. 2020) (issuing a temporary injunction and finding that “in light of Defendants’ awareness of the deathly risk that COVID-19 poses to the medically-vulnerable population, Defendants’ failure to make prompt, broader, and more meaningful use of their authority to implement what appears to be the only solution capable of adequately protecting medically vulnerable inmates may constitute deliberate indifference under the Eighth Amendment”); *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 447, 454–56 (D. Conn. 2020) (ordering identification of high risk prisoners and process for release measures); *Carranza v. Reams*, No. 20-CV-00977, 2020 WL 2320174, at \*15 (D. Colo. May 11, 2020) (ordering identification of medically vulnerable incarcerated persons, implementation of processes to ensure such persons are socially distanced, increased access to PPE, and increased medical monitoring); *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36, 38 (N.D. Cal. 2020) (ordering ICE to identify all detainees at given facilities, including any health vulnerabilities and criminal case information, ensure adequate access to counsel, and implement a bail application system); *Mays v. Dart*, 456 F. Supp. 3d 966, 979 (N.D. Ill. 2020) (ordering testing of incarcerated people and establishing hygiene, sanitation, and social distancing requirements); *Wilson v. Williams*, 455 F. Supp. 3d 467, 481 (N.D. Ohio 2020) (ordering federal prison to identify all members of a high risk subclass within one day and to evaluate their eligibility for transfer out of the facility by any means), *vacated*, 961 F.3d 829 (6th Cir. 2020); *Fraihat v. U.S. Immigr. & Customs Enf’t*, 445 F. Supp. 3d 709, 750–51 (C.D. Cal. 2020) (ordering ICE to identify people with COVID-19 risk factors within 10 days, make timely custody determinations which “consider the willingness of detainees with Risk Factors to be released,” regardless of whether detainees have petitioned for relief, and develop, monitor, and enforce performance standards defining the minimum acceptable conditions for detainees with risk factors); *Savino v. Souza*, 453 F. Supp. 3d 441, 453 (D. Mass. 2020) (explaining decision to consider bail for all immigration detainees held at two facilities in Massachusetts, given the “exceptional circumstances” of “this nightmarish pandemic”); *Gayle v. Meade*, No. 20-21553, 2020 WL 2086482, at \*7 (S.D. Fla. Apr. 30, 2020) (ordering ICE, *inter alia*, to eval-

However, as appellate courts began their review of the lower courts' orders, the appellate courts often stayed or vacated the grants of relief.<sup>91</sup> In the vast majority of the decisions vacating or denying preliminary injunctions, the courts justified the decision by concluding that the plaintiffs failed to demonstrate that prison officials are acting with deliberate indifference to the risks posed by the pandemic.<sup>92</sup> Even while determining that plaintiffs cannot prevail on their Eighth Amendment claim, however, courts have found that plaintiffs made a sufficient showing to demonstrate that they faced a risk of irreparable harm absent preliminary relief.<sup>93</sup> In other words, incarcerated individuals are facing risk of irreparable harm absent court intervention, but courts are refusing to intervene because of a belief that, under current Eighth Amendment doctrine, nothing can be done to rectify the potential harms because prison officials are *trying* to address the risks. This remains true even where current rates of infection and death indicate that prison officials' efforts are failing.<sup>94</sup> Put another

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uate each named detainee for release, to brief the court on a plan to accelerate its review of "Alternatives to Detention," and provide the Court with frequent updates on housing and release of detainees), *modified*, No. 20-21553, 2020 WL 2203576 (S.D. Fla. May 2, 2020); *Banks v. Booth*, 459 F. Supp. 3d 143, 162–63 (D.D.C. 2020) (ordering sanitation and social distancing procedures as well as unmonitored legal calls).

<sup>91</sup> See, e.g., *Williams v. Wilson*, No. 19A1047, 2020 WL 2988458, at \*1 (U.S. June 4, 2020) (staying the district court's orders granting preliminary relief); *People ex rel. Carroll v. Keyser*, 125 N.Y.S.3d 484, 489–90 (N.Y. App. Div. 2020) (finding petitioner failed to demonstrate deliberate indifference on the part of prison officials because prison superintendent took some steps to address the risk posed by COVID-19); *Wilson*, 455 F. Supp. 3d at 844–45 (reversing the district court's grant of a preliminary injunction and determining that BOP's failure to remove prisoners belong to medically-vulnerable subclass did not amount to deliberate indifference); *Valentine v. Collier*, 960 F.3d 707, 707 (5th Cir. 2020) (vacating preliminary injunction but remanding for further proceedings on permanent injunction); *Swain v. Junior*, 958 F.3d 1081, 1085 (11th Cir. 2020) (granting stay of preliminary injunction pending appeal of incarcerated plaintiffs' Eighth Amendment claims); *Valentine v. Collier*, 956 F.3d 797, 799, 802 (5th Cir. 2020) (staying injunction and criticizing district court for "treating inadequate measures as dispositive of the Defendants' mental state"); *Marlowe v. LeBlanc*, 810 F. App'x 302, 303 (5th Cir. 2020) (relying on *Valentine* stay order to determine that prison's mitigation efforts could not be said to be insufficient under the circumstances).

<sup>92</sup> See, e.g., *Chunn v. Edge*, 465 F. Supp. 3d 168, 206 (E.D.N.Y. 2020) (finding no evidence of deliberate indifference because the prison officials took some steps to prevent the spread of COVID-19); *Hallinan v. Scarantino*, 466 F. Supp. 3d 587, 609 (E.D.N.C. 2020) (finding petitioners unlikely to succeed in demonstrating deliberate indifference where prison officials took some steps to alleviate risk); *Maney v. Brown*, 464 F. Supp. 3d 1191, 1210, 1215 (D. Or. 2020) (finding no deliberate indifference despite prison system's failures to mark common areas to ensure social distancing and to conduct prevalence testing).

<sup>93</sup> See *Hallinan*, 466 F. Supp. 3d at 608.

<sup>94</sup> See, e.g., *Wilson v. Williams*, 961 F.3d 829, 845–46 (6th Cir. 2020) (Cole, C.J., concurring in part and dissenting in part) (noting that at the time the district court entered its preliminary injunction on April 22, 2020 six incarcerated people had died, "and more clung to life only with the aid of ventilators, all while the BOP failed to take action to allow the 837 medically vulnerable [prisoners] in its charge at Elkton to follow public health guidelines by maintaining an appropriate distance between themselves and their fellow [prisoners]"); *Hallinan*, 466 F. Supp. 3d at 596 (explaining that FCC-Butner is facing one of the largest outbreaks within the federal prison system).

way, federal courts are hamstrung by current Eighth Amendment doctrine from actually protecting the incarcerated population from ongoing, clearly recognizable harms.<sup>95</sup>

The law has repeatedly failed to protect incarcerated people from the substantial risk of harm that COVID-19 presents, but this is not a new feature of conditions-of-confinement doctrine. The law has also failed to protect incarcerated people before. As Professor Levin identifies, the pandemic has made certain phenomena of the criminal system easier to identify, though those phenomena, including what he terms “sentencing realism” and the systemic shortcomings of the criminal “system,” were present in “normal” times.<sup>96</sup> The same is true of the law governing prison conditions. This structural failure perpetuates and exacerbates the harms of American punishment, as well as racial inequities, and disproportionately harms people and communities of color. To echo Professor Levin’s words, these outcomes are not exceptional but rather entirely too ordinary.<sup>97</sup>

#### CONCLUSION

How do we reckon with a system of incarceration that confines people in conditions known to intensify the risks of a global pandemic, scaffolded and legitimized by laws that consider those conditions “usual?” Under whose standard is it “usual” for people and communities of color to be multiply-burdened<sup>98</sup> by a virus that, on its own, does not appear to differentiate based on race?<sup>99</sup>

At some point, the COVID-19 infection pace will recede but its toll will persist. With the pandemic’s shadow hanging heavily over prisons and jails, this Essay aims to elevate the notion that a true reckoning with the law’s structural racism, inequities, and oppression, especially as it pertains to policing, requires a close examination of the civil justice contours of American carceral

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As of June 8, 2020, the FBOP reported 19 [prisoner] deaths and 664 active [prisoner] and staff infections at FCC-Butner. One staff member death also has been reported. The majority of the inmates who died suffered from long-term preexisting health conditions that the CDC lists as risk factors for developing more severe COVID-19 disease. From April 22 to June 8, 2020, the number of inmate infections at FCI Butner-low has increased from 7 to 617 [prisoners] (out of approximately 1,162 total [prisoners] at the institution), indicating a significant outbreak is unfolding.

*Id.* (citations omitted).

<sup>95</sup> Godfrey & Rovner, *supra* note 41, at 139.

<sup>96</sup> Levin, *supra* note 23, at 2–3.

<sup>97</sup> *Id.* at 3.

<sup>98</sup> See generally Crenshaw, *supra* note 11.

<sup>99</sup> See, e.g., Patti Verbanas, *Social and Structural Factors, Not Biology, are Strong Influencers of Racial Disparities in COVID-19 Mortality*, RUTGERS UNIV. (Jan. 28, 2021), <https://www.rutgers.edu/news/social-and-structural-factors-not-biology-are-strong-influencers-racial-disparities-covid-19> [<https://perma.cc/BQ3M-EK58>].

punishment. For if the law does not protect people during crisis, it is will continue to fail to do so during “normal times.”