

**SENTENCED TO SIX MONTHS AND A BODY BAG:
REDEFINING DELIBERATE INDIFFERENCE
BEHIND BARS DURING THE COVID-19
PANDEMIC**

ANNA L. BANK*

* J.D. Candidate 2022, Quinnipiac University School of Law; B.A. English, Western Connecticut State University. Special thanks to those in my life who supported and inspired this article.

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Introduction

The COVID-19 crisis inside jails and prisons has heightened awareness of the public health emergency created by mass incarceration in the United States.¹ The dehumanizing, unhealthy environments of prisons and jails have overwhelmingly adverse effects on the health and well-being of residents and staff alike.² Additionally, these harms continue when detainees are released.³ Even prior to the pandemic, it had been documented that former detainees were 12 times more likely to die during the first two weeks after their release from prison than people of similar age and gender in the same communities.⁴ The COVID-19 pandemic has further exacerbated issues of health related to the mass incarceration system in the United States – a system which prioritizes prolonged punishment and suffering of detainees over rehabilitation or health.⁵

For example, Laddy Valentine, who turned 70 in September of 2020, was incarcerated in a prison northwest of Houston at the onset of the COVID-19 pandemic in the United States.⁶ Valentine filed, as lead plaintiff, a federal class-action lawsuit trying to get the prison he was housed in to supply personal protective equipment and soap and to institute effective social distancing policies to stop the spread of COVID-19.⁷ His lawsuit, filed on March 30th of 2020, resulted in the trial court granting a temporary restraining order requiring the prison to provide basic health and hygiene equipment and instate social distancing policies.⁸ However, in the months following the trial court's order, Valentine's suit had reached the Supreme Court on appeal and was remanded back to the trial court.⁹ While on appeal,

¹ Laura Kurtzman, *For Prisoners, Pandemic Hits with Greater Force*, UCSF (Oct. 25, 2020), <https://www.ucsf.edu/news/2020/10/418876/prisoners-pandemic-hits-greater-force>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Taryn A. Merkl, *What's Keeping Thousands in Prison During COVID-19*, BRENNAN CENTER FOR JUSTICE (July 22, 2020), <https://www.brennancenter.org/our-work/research-reports/whats-keeping-thousands-prison-during-covid-19>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

18 people held in Valentine's facility died from COVID-19 and at least 267 individuals tested positive, including Valentine.¹⁰

Valentine's situation is far from unique.¹¹ The first known COVID-19 death of a prisoner was Anthony Cheek, a detainee in Georgia who died on March 26, 2020.¹² 49-year-old Cheek had been held in Lee State Prison near Albany, which had been a hot spot for the disease.¹³ By July of 2020, in U.S. prisons alone there were already over 55,000 known cases of COVID-19 and over 600 deaths (including corrections officers) since the pandemic started, a predictable situation that, even then, advocates had warned about.¹⁴ In fact, a July 2020 study revealed that people in prisons were over five times more likely to contract COVID-19, and three times more likely to die from the disease if they contracted it.¹⁵ Due to close quarters and limited access to basic hygiene products, prisons have long been hotbeds of disease outbreaks, and prisons across the country have housed some of the worst clusters of COVID-19 cases since at least April of 2020.¹⁶ By January of 2021, over 433,000 detained individuals and staff had been infected with the virus and at least 1,960 had died, with numbers likely grossly under representative in view of the limited testing conducted on detained individuals.¹⁷ By March of 2021, at least 2,502 detainees in prisons alone had died from COVID-19.¹⁸

Detainees in states other than Valentine's echo similar concerns – many desperate to be released due to age and/or on-going health concerns. For example, “as COVID-19 cases surged, the pleas to release Askia Asmar from a Virginia prison became increasingly

¹⁰ *Id.*

¹¹ *Id.*

¹² The Marshall Project, *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT (updated Mar. 26, 2021, 6:00 PM), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Merkl, *supra* note 6.

¹⁶ *Id.*

¹⁷ Equal Justice Initiative, *Covid-19's Impact on People in Prison*, EQUAL JUSTICE INITIATIVE (updated Jan. 7, 2021), <https://eji.org/news/covid-19s-impact-on-people-in-prison/>.

¹⁸ The Marshall Project, *supra* note 12.

desperate.¹⁹ The 67-year-old inmate's term, family and advocates warned, became a death sentence because he suffered from lung and liver cancer, diabetes and hepatitis C."²⁰ Asmar is among 18 inmates at the Deerfield Corrections Center to die of COVID-19 during what had been the largest outbreak in Virginia's prison system.²¹ By October of 2020, officials stated that 733 inmates had tested positive for the novel coronavirus at the southeastern Virginia facility, which is home to many of the state's geriatric detainees.²² Asmar's family and advocates for detainees asserted that the case showed that the state moved too slowly to release the most vulnerable detainees and failed to safeguard those that remained inside.²³ However, corrections officials contended that they have worked vigorously to do both.²⁴ Whether true or not, the resulting infections and deaths call to question whether their "vigor" mattered.

By March of 2021, COVID-19 remained rampant in numerous jails and prisons across the United States, fueled by the mix of factors, including overcrowding, limited testing, lack of necessary sanitation,²⁵ and, more recently, limited efforts by some states to vaccinate inmates.²⁶ Additionally, COVID-19 represents a challenge to prisons because of close confinement, limited access to personal protective equipment, and the elevated burden of confounding cardiac and respiratory conditions endemic to incarceration in the United States that exacerbate COVID-19 risk among detainees.²⁷

¹⁹ Justin Jouvenal, *Suffering from cancer and diabetes, a Virginia inmate died of COVID-19 just months before his release date*, THE WASHINGTON POST (Oct. 2, 2020, 10:34 AM), https://www.washingtonpost.com/local/public-safety/virginia-prison-covid-outbreak/2020/10/02/8e7b4798-03fd-11eb-a2db-417cddf4816a_story.html.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Stacy Weiner, *Prison Should Not Be a COVID-19 Death Sentence*, ASSOCIATION OF AMERICAN MEDICAL COLLEGES (Aug. 27, 2020), <https://www.aamc.org/news-insights/prison-should-not-be-covid-19-death-sentence>.

²⁶ Katie Rose Quandt, *Incarcerated People and Corrections Staff Should Be Prioritized in COVID-19 Vaccination Plans*, PRISONPOLICY (Dec. 8, 2020), <https://www.prisonpolicy.org/blog/2020/12/08/covid-vaccination-plans/>.

²⁷ Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, JAMA NETWORK (July 8, 2020), <https://jamanetwork.com/journals/jama/fullarticle>

In this paper, I contend that the Eighth Amendment should provide heightened protection for inmates during a pandemic. The inability for institutions to safely house individuals for any period of time substantially increases the punitive aspects of incarceration to the level that incarceration of at-risk individuals during a pandemic itself rises to be a cruel and unusual punishment. Additionally, the Eighth Amendment should create a lower standard for what we consider deliberate indifference on the part of institutional actors in their efforts, or lack thereof, to curb the spread of known deadly infectious diseases. Part I details the background of the pandemic and its spread within detention facilities in the United States. Part II will review how trial courts have considered Eighth Amendment petitions by detainees in view of the risk presented by COVID-19. Part III will review more recent shifts in Supreme Court Eighth Amendment jurisprudence and the cruel and unusual punishment clause. Lastly, part IV will propose actions by prisons, necessary under the Eighth Amendment, to help protect detainees during a pandemic and bring incarceration in the United States back into compliance with the cruel and unusual punishment clause of the Eighth Amendment, and how courts must hold detention facilities accountable for establishing and maintaining Eighth Amendment compliance.

I. Background

The pandemic has provided impetus to the growing movement to depopulate jails and prisons.²⁸ Since the pandemic began, states such as California, Michigan, Massachusetts, and North Dakota, as well as local jurisdictions, have taken steps to reduce inmate populations by releasing nonviolent offenders, granting more compassionate-releases, and issuing citations rather than arresting alleged offenders.²⁹ The U.S. Immigration and Customs Enforcement

/2768249#:~:text=The%20COVID%2D19%20case%20rate,per%20100%20000%20(Table)%20%20.

²⁸ Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, THE PEW CHARITABLE TRUSTS (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>.

²⁹ *Id.*

(“ICE”) and Removal Operations further decreased their own detained populations to allow for social distancing, reducing its peak population of 55,000 in 2019 to just 20,000 by the end of 2020.³⁰ However, other states have done relatively little.³¹ Meanwhile, public health experts insisted that reducing jail and prison populations during the pandemic must continue, for the greater good of all.³²

The United States criminal justice system holds close to 2.3 million people in 1,833 state prisons, 110 federal prisons, 1,772 juvenile correctional facilities, 3,134 local jails, 218 detention facilities, and 80 Indian County jails.³³ This number does not include individuals detained in military prisons, civil commitment centers, state psychiatric hospitals, prisons in the U.S. territories,³⁴ and ICE detention facilities.³⁵ Prisons and jails are notorious incubators and amplifiers of infectious diseases such as the coronavirus.³⁶ On any day, more than 600,000 people – roughly 75 percent of whom have not been convicted of a crime – are being held in one of our nation’s 3,000 local jails, most in congregate confinement, often in overcrowded conditions and with poor sanitation.³⁷ As of mid 2020, state and federal prisons held an estimated 1,311,100 people.³⁸ Due to the fact that social distancing is impossible inside most facilities and movement in and out of facilities is common, it is difficult to stop the spread of infectious disease amongst both detainees and workers.³⁹ COVID-19 is also likely to be deadlier inside jails and prisons, where a large share of the population has underlying health

³⁰ *U.S. Immigration and Custom Enforcement Fiscal Year 2020 Enforcement and Removal Operations Report*, U.S. ICE, 3, <https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf> (last visited Mar. 28, 2021).

³¹ Ollove, *supra* note 28.

³² *Id.*

³³ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISONPOLICY (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

³⁴ *Id.*

³⁵ *U.S. Immigration and Custom Enforcement*, *supra* note 30, at 9.

³⁶ Kelsey Kauffman, *Why Jails Are Key To ‘Flattening the Curve’ Of Coronavirus*, THE APPEAL (Mar. 13, 2020), https://theappeal.org/jails-coronavirus-covid-19-pandemic-flattening-curve/?fbclid=IwAR1K9cf0ardpNwIfxtzjLlegqusQ4l_ZpY1MEuagMfcnqstzMi5aGiknCQ.

³⁷ *Id.*

³⁸ Jacob Kang-Brown et al., *People in Jail and Prison in 2020*, VERA INSTITUTE OF JUSTICE (Jan. 2021), <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020.pdf>.

³⁹ Kauffman, *supra* note 36.

conditions.⁴⁰ Since the disease can spread quickly in incarcerated conditions, the spread of the virus did overwhelm not just each jail or prison's primitive healthcare system, but also hospitals to which the very sick and dying will be transferred.⁴¹ In response to the COVID-19 pandemic, and in order to mitigate the spread of COVID-19, the Federal Bureau of Prisons ("BOP") began operating under a restricted response plan.⁴² This response plan outlines limits and modifications to the following: social visits, inmate movement, legal visits, official staff travel, training, numbers of contractors, numbers of volunteers, screening of staff, screening of inmates, tours, and numbers of private detention contractors.⁴³ However, the plan itself stated that: "Inmate internal movement is suspended with limited exceptions. This suspension, however, does not mean the BOP has ceased all inmate movements because the federal judicial system as well as state courts continue to process criminal cases."⁴⁴ According to the response plan, inmate movement would be "limited" to movement "necessary" to better manage bedspace and assure that facilities do not become overcrowded beyond available resources.⁴⁵ Further, the BOP and the United States Marshals Service ("USMS") have ostensibly been coordinating to "carefully" transport and transfer federal inmates into the Bureau's custody.⁴⁶ This process has, as per the response plan, involved taking proactive steps, such as aggressive testing, to mitigate the spread of COVID-19 into the federal prison environment.⁴⁷ By March of 2021, of approximately 125,000 detainees in federally managed criminal detention facilities, over 47,000 detainees and 5,400 staff had contracted COVID-19.⁴⁸

⁴⁰ *Id.* at 2.

⁴¹ *Id.*

⁴² Federal Bureau of Prisons, *BOP Modified Operations*, BOP, https://www.bop.gov/coronavirus/covid19_status.jsp (last visited Oct. 2, 2020).

⁴³ *Id.*

⁴⁴ Federal Bureau of Prisons, *Updates to BOP COVID-19 Action Plan*, BOP, https://www.bop.gov/resources/news/20200319_covid19_update.jsp (last updated March 19, 2020).

⁴⁵ *Id.*

⁴⁶ Federal Bureau of Prisons, *Bureau of Prisons Announces Update on Inmate Movement*, BOP (May 22, 2020), https://www.bop.gov/resources/news/pdfs/20200527_press_release_inmate_movement.pdf.

⁴⁷ Federal Bureau of Prisons, *BOP Modified Operations*, *supra* note 42.

⁴⁸ Federal Bureau of Prisons, *COVID-19 Coronavirus*, BOP, <https://www.bop.gov/coronavirus/> (last visited Mar. 28, 2021).

The Prison Litigation Reform Act (“PLRA”) provides the rigorous requirements necessary for a detainee to file a lawsuit in federal court.⁴⁹ It subjects lawsuits brought by detainees “to a host of burdens and restrictions that apply to no other persons.”⁵⁰ As a consequence of these restrictions, many detainees seeking protection of the courts against unhealthy or dangerous conditions of confinement or those seeking a remedy for injuries inflicted by prison staff and others, have had their cases dismissed.⁵¹ These restrictions apply not just to those who have been convicted of crime, but also to pretrial detainees who have not yet been tried and are presumed innocent.⁵² There are many parts to the PLRA, but the following restrictions are essential to initiate litigation.⁵³ First, *the exhaustion of administrative remedies requirement*, that before a detainee files a lawsuit, they must try to resolve their complaint through the prison’s grievance procedure.⁵⁴ Second, *filing fees* are required to be paid to the court in full.⁵⁵ However, if money is not paid up front, the fees may be paid over time in installments, but the fees will *not* be waived.⁵⁶ Third, *the three strikes provision*, a restriction where each lawsuit or appeal filed that is dismissed because a judge decides that it is frivolous, malicious, or does not state a proper claim counts as a “strike.”⁵⁷ After three strikes are received, one cannot file another lawsuit unless the entire court filing fee is paid upfront.⁵⁸ Finally, *the physical injury requirement* that one cannot file a lawsuit for mental or emotional injury unless physical injury can also be shown.⁵⁹ Nevertheless, although detainees have fewer rights and protections

⁴⁹ *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, ACLU, https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf (last visited Oct. 4, 2020).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at I.

⁵⁵ *Id.* at II.

⁵⁶ *Id.*

⁵⁷ *Id.* at III.

⁵⁸ *Id.*

⁵⁹ *Id.* at IV.

under the law compared to the general public, the Constitution still ostensibly applies within prison walls.⁶⁰

II. Pandemic Prison Conditions and the Courts

Jurisdictions have taken varied approaches regarding the protections that prisons are required to provide under the Eighth Amendment in view of the COVID-19 pandemic. Courts in some jurisdictions, including California, Colorado, Connecticut, the District of Columbia, Illinois, Maryland, Michigan, New York, Pennsylvania, Texas, and Washington, have granted detainees at least some form of relief under the Eighth Amendment in view of COVID-19.⁶¹ For example, as briefly discussed in the introduction to this note,

⁶⁰ *Prison Litigation Reform Act*, FINDLAW (Feb. 14, 2019), <https://criminal.findlaw.com/criminal-rights/prison-litigation-reform-act.html>.

⁶¹ See, e.g., *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 442-45 (D. Conn. 2020) (Connecticut, granting temporary restraining order in part based on prison warden's deliberate indifference in failing to implement adequate measures to prevent the continued spread of COVID-19, for example by "falsely discount[ing] the readings of elevated temperatures in order to avoid taking appropriate follow-up action."); *Banks v. Booth*, 468 F. Supp. 3d 101, 126 (D.D.C., 2020) (District of Columbia, granting preliminary injunction order requiring county jail to provide prisoners with medical care within 24 hours, enforce CDC policies on social distancing, provide prisoners with necessary materials to clean their cells, provide access to confidential legal calls, and improve non-punitive isolation conditions for those exposed to COVID-19.) (D.D.C. Jan. 26, 2021) (District of Columbia, order denying reconsideration); *Mays v. Dart*, 974 F.3d 810, 815-16 (7th Cir. 2020) (Illinois, affirming grant of temporary restraining order compelling Sheriff to improve jail conditions by increasing rapid testing of detainees, continue quarantining new detainees, medically isolate COVID-19 positive detainees, provide sanitation supplies and educate staff and detainees regarding the supplies, and provide facemasks to detainees who are quarantined,); *Seth v. McDonough*, 461 F. Supp. 3d 242, 264 (D. Md., 2020) (Maryland, granting temporary injunctive relief requiring jail to provide comprehensive written plan to address "systemic testing and identification of COVID-19 positive detainees; long term provision of PPE; increased training, education, and supervision of medical staff so that COVID-19 symptomatic and positive detainees receive timely and appropriate care; and prophylactic protections for high-risk detainees); *Cameron v. Bouchard*, 462 F. Supp. 3d 746, 778-79 (E.D.Mich.2020) (Michigan, requiring county jail to commit to home confinement or early release plaintiff class of medically-vulnerable detainees, holding that "Any response other than release or home confinement placement constitutes deliberate indifference."); *U.S. v. Salvagno*, 456 F. Supp. 3d (N.D. N.Y. 2020) (New York, granting motion for compassionate release of detainee in New York prison based on increased risk from hypertension); *People ex rel. Gregor v. Reynolds*, 124 N.Y.S.3d 118, 123 (Sup. Ct. 2020) (New York, granting motion-in-part requiring Sheriff to implement in jails adequate social distancing by staggering meal and recreation times, limiting meal seating, providing no-touch receptacles, providing hand sanitizer, and providing reminders regarding hygiene practices); *Thakker v. Doll*, 451 F. Supp. 3d 358, 372 (M.D. Pa. 2020) (Pennsylvania, granting temporary restraining order compelling ICE facility to immediately release of detainees that could not be socially distanced and could not, given the facilities, practice proper hygiene);

in *Valentine v. Collier*, inmates at Wallace Pack Unit, a Texas state geriatric prison, alleged that prison officials' failure to implement adequate protections against COVID-19 transmission constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.⁶² In the face of the rapidly growing pandemic, the disproportionately elderly and ill inmate population feared health repercussions if the virus made its way into the Unit.⁶³ Accordingly, that population requested emergency injunctive relief in the form of protective health measures that help lower the risk of transmitting COVID-19.⁶⁴ The United States District Court for the Southern District of Texas granted a preliminary injunction and an order for the prison officials to implement specific health and safety policies, as well as to provide essential hygiene products to the detainees in order to combat the surge of COVID-19.⁶⁵

Similarly, in *Ahlman v. Barnes*, inmates at a California county jail filed a putative class action against the county and the sheriff, alleging constitutional violations and disability discrimination arising from pretrial and post-conviction confinement during the COVID-19 pandemic. The inmates moved for a provisional class certification

Pimentel-Estrada v. Barr, 458 F. Supp. 3d 1226, 1253 (W.D. Wash., 2020) (Washington, granting temporary restraining order requiring release of high-risk detainee of ICE facility), *see also, e.g.*, *Valentine v. Collier*, 956 F.3d 797, 806 (5th Cir. 2020) (Texas, granting preliminary injunction); *Ahlman v. Barnes*, 445 F. Supp. 3d 671, 694 (C.D. Cal. 2020); and *Carranza v. Reams*, 2020 WL 2320174, at 45-47 (D. Colo.2020) (Colorado, granting preliminary injunction requiring the amelioration of conditions in jail that failed to take adequate measures to protect members of plaintiff's class of medically vulnerable inmates, including social distancing, enhanced sanitation, and sufficient mask supply, and increased monitoring), each discussed separately.

⁶² *Valentine*, 956 F.3d 797 at 2.

⁶³ *Id.*

⁶⁴ *Id.* at 3.

⁶⁵ *Id.* at 3-7 (granting preliminary injunction requiring prison to provide detainees with unrestricted access to hygienic products throughout facilities, provide cleaning supplies for each housing area, provide new gloves and masks for each inmate during each time they are cleaning or performing janitorial services; require common surfaces to be cleaned regularly and adequately, institute limitations on the introduction of new inmates; have socially distanced transportation on hand necessary for prisoners to receive medical treatment or be released; post signage and information regarding the COVID-19 pandemic and due care to be taken; orally inform all inmates that co-pays for medical treatment are suspended for the duration of the pandemic, and encourage all inmates to seek treatment if they are feeling ill; provide the plaintiffs and the court with a detailed plan to test detainees for COVID-19, prioritizing vulnerable populations, including a plan for any inmates who test positive for how to quarantine them while minimizing their exposure to inmates who test negative, a plan for testing all staff who will continue to enter the unit, and a plan for minimizing inmates' exposure to staff who have tested positive.

and applied for a temporary restraining order or a preliminary injunction.⁶⁶ The court granted the preliminary injunction, which ordered the prison officials to implement policies in accordance with CDC guidelines, provide necessary hygiene and disinfectant products, and efficiently communicate necessary information about the virus with inmates.⁶⁷

Even where courts have demanded action from detention facilities in view of the COVID-19 pandemic, some detention facilities failed to comply. In *Carranza v. Reams*, the United States District Court for the District of Colorado granted a preliminary injunction requiring the amelioration of conditions in the Weld County Jail after it failed to take adequate measures to protect members of a class of medically vulnerable detainees.⁶⁸ In the injunction, the court required social distancing in the jail, enhanced sanitation, sufficient mask supply, and increased monitoring.⁶⁹ The Weld County Jail in Colorado failed to comply with the order. By December of 2020, a harsher consent decree was proposed, intensifying the protections for current and incoming detainees to the jail.⁷⁰ The decree orders that the Sheriff

⁶⁶ Ahlman, 445 F. Supp. 3d 671 (C.D. Cal. 2020), *aff'd* in Ahlman v. Barnes, No. 20-55568, 2020 WL 3547960 (9th Cir. 2020) (granting stay of preliminary injunction); Barnes v. Ahlman, 140 S. Ct. 2620 (2020) (denying stay of preliminary injunction pending Ninth Circuit decision on the merits)

⁶⁷ Ahlman, 445 F. Supp. 3d. 671 at 694-95 (granting preliminary injunction requiring jail to provide adequate spacing of six feet or more between incarcerated people, effectively communicate to all incarcerated people, including low literacy and non-English-speaking people, sufficient information about COVID-19 including measures taken to reduce the risk of transmission, provide detainees with individual supplies of hand soap and paper towels sufficient to allow frequent hand washing and drying each day free of charge, an adequate supply of cleaning implements for daily cleanings; ensure that all incarcerated people have access to adequate hand sanitizer, provide access to daily showers and daily access to clean laundry, require that all staff wear PPE, including CDC-recommended surgical masks, when interacting with any person or when touching surfaces in cells or common areas; take the temperature of all class members, staff, and visitors daily assess (through questioning) each incarcerated person daily to identify potential COVID-19 infections; conduct immediate testing for anyone (class members, staff and visitors) displaying known symptoms of COVID-19; ensure that individuals identified as having COVID-19 or having been exposed to COVID-19 receive adequate medical care and are properly quarantined in a nonpunitive setting, respond to all medical emergency requests within an hour, and waive all medical co-pays for those experiencing COVID-19-related symptoms.)

⁶⁸ Logan Smith, *COVID In Colorado: Lawsuit Forces Weld County To Upgrade Jail Protections*, CBS DENVER (Dec. 2, 2020), <https://denver.cbslocal.com/2020/12/02/aclu-weld-county-jail-inmates-sheriff-covid-19-outbreak/>.

⁶⁹ *Id.*

⁷⁰ The proposed decree mandated that: (1) medically vulnerable persons are identified when they arrive at the jail and afforded heightened protections including single-celling when

will provide regular reports to the Chief Judge of the Weld County District Court, so that the court can undertake reviews to consider persons for release from the jail when feasible.⁷¹

However, where facilities have made aggressive efforts to establish and maintain procedures to combat the COVID-19 pandemic, results have greatly outpaced facilities that have not made such efforts. For example, in *Mays v. Dart*, the United States District Court for the Northern District of Illinois affirmed a grant of temporary restraining order compelling the Sheriff of Cook County Jail to improve jail conditions by increasing rapid testing of detainees, continue quarantining new detainees, medically isolate COVID-19 positive detainees, providing sanitation supplies as well as educating staff and detainees regarding the supplies, and providing facemasks to detainees who were quarantined. In February 2021, a study by researchers at Yale and Stanford universities reported that the measures taken to slow the spread of the coronavirus at Cook County Jail helped to save dozens of lives and prevent hundreds of hospitalizations.⁷² In the study, researchers determined that “[r]educing the jail’s population and holding detainees in single cells were among the most effective steps taken to contain the virus and should be used in other institutional settings.”⁷³ The study indicated that “those measures, as well as widespread asymptomatic testing, led to an 83% reduction of new cases at the jail over an 83-day period.”⁷⁴ “By reducing new cases, the researchers believe an estimated 435 additional COVID-related hospitalizations and 30 deaths of people held or working at the jail were prevented.”⁷⁵

possible, and regular medical monitoring; (2) measures be put in place to promote social distancing; (3) masks be distributed to and required to be worn by all persons at the jail; (4) detainees receive COVID-19 testing; (5) the jail not accept persons charged with misdemeanors, municipal offenses, and petty offenses; (6) police chiefs in Weld county be advised to minimize custodial arrests; and (7) regular reports be provided to the Chief Judge of the District Court to review persons for release. *See id.*

⁷¹ *Id.*

⁷² Matthew Hendrickson, *30 COVID-related deaths, 400 hospitalizations averted by measures taken at Cook County Jail: study finds*, CHICAGO SUN TIMES (Feb. 19, 2021), <https://chicago.suntimes.com/2021/2/19/22291638/cook-county-jail-covid-19-coronavirus-yale-standford-study-tom-dart>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

Nevertheless, the benefit of hindsight provided to the author of this note notwithstanding, some courts have denied detainees' Eighth Amendment petitions requesting the same safeguards during the COVID-19 pandemic.⁷⁶ For example, in *Lucero-Gonzalez v. Kline*, the plaintiff detainees alleged that the defendant prison violated their Eighth Amendment rights by placing them at unconstitutional risk from exposure to COVID-19 and moved for a preliminary injunction.⁷⁷ The court determined that although there were instances in which the prison's policies had not been *followed* — such as lack of cleaning supplies or inconsistent cleaning, or where the detainees themselves did not practice social distancing or wear their masks — it did not reflect that the policies *themselves* were objectively

⁷⁶ See e.g., *Frazier v. Kelley*, 460 F. Supp. 3d 799 (E.D. Ark. 2020) (denying detainees' request for preliminary injunction in view of the measures taken by facility); *Grinis v. Spaulding*, 459 F. Supp. 3d 289 (D. Mass. 2020) (Massachusetts, denying motion for compassionate release or home confinement of medically vulnerable detainees at federal prison based on adequacy of measures taken by facility); *Coreas v. Bounds*, 451 F. Supp. 3d 407 (D. Md. 2020) (Maryland, denying detainees' motion challenging their detention at immigration facility, holding that although it was confirmed the facility had not been taking proper precautions, at the time the case was being tried no COVID-19 cases had been reported at the prison); *United States v. Cox*, 449 F. Supp. 3d 958 (D. Nev. 2020) (Nevada, denying motion for temporary release of an at-risk detainee of jail); *Rodriguez-Francisco v. White*, 2020 WL 4260766, at *12 (M.D.Pa., 2020) (Pennsylvania, denying compassionate release of high-risk detainee at federal prison based on adequacy of measures taken by facility); *People ex rel. Carroll v. Keyser*, 184 A.D.3d 189, 125 N.Y.S.3d 484 (2020) (New York, affirming trial court's grant of prison's motion to dismiss detainee's claims under the Eight Amendment, in view of the measures taken by facility to reduce COVID-19 spread, holding that deliberate indifference "means more than being caught flat footed, or even negligent", and that failure by the facility to properly alleviate significant risks that should have been perceived but were not did not rise to the infliction of unconstitutional punishment); *Hallinan v. Scarantino*, 466 F. Supp. 3d 587 (E.D.N.C. 2020) (North Carolina, denying detainees of prison's request for a temporary restraining order and preliminary injunction in view of "extensive" measures taken by facility); *Camacho Lopez v. Lowe*, 452 F. Supp. 3d 150 (M.D. Pa. 2020) (denying COVID-19 positive detainee at ICE facility's motion for temporary restraining order, in view of treatment and monitoring provided to detainee); see also *Lucero-Gonzalez v. Kline*, 464 F. Supp. 3d 1078 (D. Ariz. 2020) (Arizona, denying detainees of prison's request for a temporary restraining order and preliminary injunction in view of the measures taken by facility to follow CDC guidelines); *Peterson v. Diaz*, 2020 WL 1640008 (E.D.Cal., 2020) (California, denying at-risk detainee's request for emergency release in view of possible actions prison could have undertaken), and *United States v. Hill*, 2020 WL 4480913 (M.D. Pa. Aug. 4, 2020) (Pennsylvania, detainee's motion for compassionate release and reduction of sentence based on his medical condition and concern regarding potential spread of the COVID-19 virus at the Schuylkill Federal Correctional Institution where he was incarcerated denied. Court argued that there was no support for the intimation that the BOP was not equipped to treat Hill or that he had been inadequately treated so far).

⁷⁷ *Lucero-Gonzalez v. Kline*, 464 F. Supp. 3d 1078 (D. Ariz. 2020)

insufficient.⁷⁸ The court determined that the inmates had failed to demonstrate that they were likely to succeed on the merits of their claim and were not entitled to preliminary injunctive relief.⁷⁹

Similarly, in *Peterson v. Diaz*, a detainee at a California state prison requested emergency release from prison due to the pandemic.⁸⁰ In light of being a high health risk individual to COVID-19, as a cancer patient with a compromised immune system and having reached 68 years of age, the detainee asserted his health was in “imminent threat” which “represents an unconstitutional change in terms of his sentence.”⁸¹ Accordingly, he argued that due to the change of circumstances in the prison environment, his current incarceration constituted cruel and unusual punishment under the Eighth Amendment.⁸² However, the court determined that the detainee had not shown that prison authorities “were unable or unwilling to address” the “serious problem” of COVID-19 within prisons, that the prison “may be able” to isolate highly at-risk detainees more easily than isolation or social distancing would be achievable in the general population outside of the prison (giving examples including administration segregation, partial lockdowns, and transfers), are “able to” order afflicted employees to stay at home, and “can probably,” more easily find testing opportunities for their essential employees “than is yet possible for the general population.”⁸³ The court further held that “prison and state officials are more likely to know who may be best subject to compassionate release under state laws than is the undersigned.”⁸⁴ Therefore, the detainee’s motion for emergency request for interim release was denied.⁸⁵

In another example, in *United States v. Hill*, a detainee at a detention facility motioned for temporary release from the facility in

⁷⁸ *Id.* at 1093.

⁷⁹ *Id.*

⁸⁰ *Peterson v. Diaz*, No. 219CV01480WBSGGHP, 2020 WL 1640008 (E.D. Cal. Apr. 2, 2020).

⁸¹ *Id.* at 1.

⁸² *Id.* at 1-2.

⁸³ *Id.* at 2.

⁸⁴ *Id.*

⁸⁵ *Id.*

view of risk from the COVID-19 virus.⁸⁶ The court determined that there was a lack of evidence that the facility was “unable” to provide sufficient medical treatment to the detainee if he were to contract COVID-19 while in custody, and no evidence that the detainee had a higher risk of contracting COVID-19 in custody than when released.⁸⁷ Therefore, the detainee’s motion for emergency request for interim release was denied.⁸⁸ By October of 2020, an inmate and a detention officer at the facility had died from the virus, with the number of positive tests for the virus “nearly four times more than that for all state prisoners” and “by far the highest number of any detention center in Nevada.”⁸⁹

III. Eighth Amendment Jurisprudence and the Supreme Court

The Eighth Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁹⁰ This amendment, on its face, prohibits the federal government from imposing unduly harsh penalties on criminal defendants, either as the price for obtaining pretrial release or as punishment for crime after conviction, including prohibiting unduly harsh detention conditions.⁹¹

The United States Supreme Court has held that a successful detention conditions claim under the Eighth Amendment requires a two prong approach: (1) the detainee faced substantial risk of serious harm, and (2) the incarcerator was “deliberately indifferent” to that risk.⁹²

⁸⁶ United States v. Hill, No. 220CR00031APGDJA, 2020 WL 1991405 (D. Nev. Apr. 27, 2020).

⁸⁷ *Id.* at 4.

⁸⁸ *Id.* at 7.

⁸⁹ Katelyn Newberg, ‘Time bomb’: Inside an outbreak at Pahrump’s federal detention center, PVTIMES (Oct. 29, 2020, 5:40 PM), <https://pvtimes.com/news/time-bomb-inside-an-outbreak-at-pahrumps-federal-detention-center-91441/>.

⁹⁰ U.S. CONST. amend. VIII.

⁹¹ Bryan A. Stevenson & John F. Stinneford, *Common Interpretation: The Eighth Amendment*, CONSTITUTION CENTER, <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103> (last visited Oct. 2, 2020).

⁹² Farmer v. Brennan, 511 U.S. 825, 828 (1994) (“A prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.”).

The *objective* first element of claims for unconstitutional conditions requires the detainee prove that the risk of serious harm is sufficiently substantial.⁹³ If there is not yet an injury, the detainee must demonstrate three aspects of the risk for it to be deemed sufficiently substantial: the injury's seriousness, the likelihood of the injury occurring, and that the risk "violates contemporary standards of decency to expose *anyone* unwillingly to such a risk."⁹⁴

A second *subjective* element, that the detainee must establish, is that the incarcerator was indifferent to the risk, it is often the more difficult element for detainees to prove.⁹⁵ A detainee can prove deliberate indifference by presenting evidence of the incarcerator's attitude and conduct,⁹⁶ or by offering circumstantial evidence that allows for the inference that the incarcerator had knowledge of the risk and failed to mitigate it.⁹⁷ Additionally, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."⁹⁸

The Supreme Court has given some structure to the two-prong requirement and has provided guidance regarding the health and safety risks to detainees in a variety of contexts.⁹⁹ For example, the Court has employed the cruel and unusual punishment clause of the Eighth Amendment to prohibit "barbarous punishment."¹⁰⁰ This includes prohibiting prison officials from failing to provide medical care,¹⁰¹ behaving with deliberate indifference to the medical needs of inmates,¹⁰² or knowingly exposing inmates to serious and communicable diseases.¹⁰³

⁹³ Brenna Helppie-Schmieder, *Toxic Confinement: Can the Eighth Amendment Protect Prisoners from Human-Made Environmental Health Hazards?*, 110 NW. U. L. REV. 3 (2016).

⁹⁴ *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

⁹⁵ *Id.* at 28.

⁹⁶ *Id.* at 36.

⁹⁷ *Farmer*, 511 U.S. 825 at 842-43.

⁹⁸ *Id.* at 842.

⁹⁹ Jenny E. Carroll, *Pretrial Detention in the Time Of COVID-19*, 115 NW. U. L. REV. Colloquy (2020), https://scholarlycommons.law.northwestern.edu/nulr_online/292.

¹⁰⁰ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (In *Estelle*, the Court recognized an inmate's civil rights claim after denying adequate medical care for inmate following an injury sustained while "performing [his] prison work assignment").

¹⁰¹ *Id.* at 103.

¹⁰² *Id.* at 104.

¹⁰³ *Helling*, 509 U.S. 25 at 33.

In *Estelle v. Gamble*, the Supreme Court ruled that people who are incarcerated have a right to health care; denying health care access or deliberate indifference to an inmate's health falls under cruel and unusual punishment.¹⁰⁴ The Court "ruled that the Eighth Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency and therefore proscribes more than physically barbarous punishments."¹⁰⁵ The Court wrote, "punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain violate the Eighth Amendment."¹⁰⁶ *Estelle* instructed courts to scrutinize the conditions in which detainees were incarcerated to determine whether they complied with society's conception of humane treatment.¹⁰⁷

The Court in *Estelle* highlighted that "deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," proscribed by the Eighth Amendment."¹⁰⁸ This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or purposefully interfering with the treatment once prescribed.¹⁰⁹ Regardless of how it was demonstrated, deliberate indifference to a prisoner's serious illness or injury states a cause of action under 42 U.S.C. § 1983.¹¹⁰

However, in more recent jurisprudence, the Court has heightened the standards for succeeding on an Eighth Amendment claim based on detention conditions. In *Wilson v. Seiter*, the Supreme Court articulated the standard for proving the subjective element of an unconstitutional conditions claim; that is, a plaintiff must prove that defendants had acted with deliberate indifference.¹¹¹ In *Wilson*, a

¹⁰⁴ *Estelle*, 429 U.S. 97, 102; see also Daniel Yves Hall, *The Eighth Amendment, Prison Conditions and Social Context*, 58 MO. L. REV. 207, 209 (1993).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Estelle*, 429 U.S. 97, at 104.

¹⁰⁹ *Id.* at 105.

¹¹⁰ *Id.*

¹¹¹ *Wilson v. Seiter*, 501 U.S. 294 (1991).

state prisoner filed a §1983 action alleging that several conditions of his confinement violated the cruel and unusual punishment clause.¹¹² Wilson argued that “to the extent officials’ state of mind is relevant at all, the proper standard is deliberate indifference.”¹¹³ The defendants responded that deliberate indifference is only proper in cases with a physical injury, but otherwise a malice standard should be required.¹¹⁴ The Court rejected distinctions between different categories of conditions claims and held that the proper standard was deliberate indifference.¹¹⁵ The definition of deliberate indifference is far from concrete, with the Court clarifying only that it is more culpable state of mind than “mere negligence,” but not as culpable as acting “maliciously and sadistically for the very purpose of causing harm.”¹¹⁶

The Seventh Circuit highlighted the difficulty of implementing the deliberate indifference standard in *McGill v. Duckworth*.¹¹⁷ In *McGill*, a detainee sued four prison administrators under 42 U.S.C. § 1983, maintaining that they violated the Eighth Amendment’s prohibition of cruel and unusual punishment and the due process clause of the Fourteenth Amendment.¹¹⁸ The court analyzed the Supreme Court’s decisions in *Estelle* and other successive cases, and expressed that these past decisions equated “deliberate indifference” with the high standard of intent, giving weight to the term “deliberate” but little weight to the term “indifference.”¹¹⁹ The court noted that “[t]his seeming oxymoron has given us, in company with other courts of appeals, fits.”¹²⁰

In *Helling v. McKinney*, a prisoner brought a civil rights action against prison officials, alleging a violation of his Eighth Amendment rights due to his exposure to environmental tobacco smoke.¹²¹The

¹¹² *Id.*

¹¹³ *Id.* at 303.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 305.

¹¹⁷ *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991).

¹¹⁸ *Id.* at 346.

¹¹⁹ *Id.* at 347.

¹²⁰ *Id.* at 351.

¹²¹ *Helling*, 509 U.S. at 25.

Supreme Court was confronted with a question regarding the objective element of a plaintiff's claim – whether the plaintiff must have a current injury, or whether a potential future injury can be deemed sufficiently substantial to overcome the objective element.¹²² The Court determined that future injuries could suffice under certain circumstances.¹²³ Therefore, the Court recognized McKinney's claim that the prison's failure to protect him from environmental tobacco smoke violated the Eighth Amendment's prohibition of cruel and unusual punishment by posing an unreasonable risk to his health.¹²⁴

In *Farmer v. Brennan*, detainee Dee Farmer, who was transsexual, brought a suit against federal prison officials, claiming that the officials showed "deliberate indifference" by placing the detainee in a general prison population, thus failing to keep him from harm allegedly inflicted by other inmates.¹²⁵ Farmer claimed that the prison officials "violated the Eighth Amendment by their deliberate indifference to his safety."¹²⁶ The Court held that: (1) prison officials may be held liable under the Eighth Amendment for denying humane conditions of confinement *only* if they know that detainees face substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it, and (2) remand would be required to determine whether prison officials would have liability, under the above standards, for not preventing harm allegedly occurring in the present case.¹²⁷

¹²² *Id.*

¹²³ *Id.* at 36.

¹²⁴ *Id.* at 25.

¹²⁵ *Farmer v. Brennan*, 511 U.S. 825 (1994).

¹²⁶ *Id.* at 829.

¹²⁷ *Id.* at 856.

IV. The Eighth Amendment Requires That Detention Facilities Impose Sufficient Protections to Halt Covid-19 Deaths, Including Releasing Detainees if Necessary, And Courts Must Impose These Protections

This paper proposes that courts should, and must, require that detention facilities impose sufficient protections to halt COVID-19 deaths, including releasing detainees, and courts should and must impose these protections. The paper proposes that prison facilities, in the event of a viral outbreak in a community, should take all measures necessary to halt virus deaths. In the case of COVID-19, for example, and as discussed in detail below, this means a requirement that detainees be provided with six-feet of separation at all times.

Since the beginning of the COVID-19 pandemic, the most effective strategy to slowing its spread behind bars was clear – a reduction in the number of people in jails and prisons.¹²⁸ In March of 2020, public health and medical officials were already warning that incarcerated people would be particularly vulnerable to the spread of the disease and its serious medical consequences, due to the close quarters and high rates of preexisting health conditions.¹²⁹ “Significantly reducing prison and jail populations remains the best way to protect the health and safety of incarcerated people, correctional staff, and communities from COVID-19.”¹³⁰ Reducing populations helps to lower the risk, not only for those who are released, but also for those who remain incarcerated.¹³¹

However, more than eight months after the World Health Organization announced the pandemic, prisons and jails generally failed to decrease their populations enough to protect the health and lives of those incarcerated.¹³² “While state prison populations have

¹²⁸ Emily Widra, *As COVID-19 continues to spread rapidly, state prisons and local jails have failed to mitigate the risk of infection behind bars*, PRISON POLICY INITIATIVE (Dec. 2, 2020), <https://www.prisonpolicy.org/blog/2020/12/02/jail-and-prison-covid-populations/>.

¹²⁹ *Id.*

¹³⁰ Unlock the Box, *Confinement Is Never The Answer*, THE RABEN GROUP (June 2020), <https://static1.squarespace.com/static/5a9446a89d5abbfa67013da7t/5ee7c4f1860e0d57d0ce8195/1592247570889/June2020Report.pdf>.

¹³¹ *Id.*

¹³² Widra, *supra* note 128.

slowly declined from pre-pandemic levels, the pace of these modest reductions has slowed since the spring, even as national infection rates continue to rise.¹³³ And county jails – which initially made promising reductions in the spring – have failed to sustain those reforms.”¹³⁴ As a result of these failures to sufficiently de-incarcerate, the early warnings of health experts have become reality: the COVID-19 case rate in state and federal prisons is more than four times as high as that of the general public, with a death rate more than twice as high.¹³⁵ Further, since people working within prisons and jails regularly return to their communities, correctional facilities are dangerously poised to become incubators for the disease, therefore contributing to rising infection rates in neighboring communities.¹³⁶

Inmates should be provided with living situations that create and enforce a six-foot separation mandate. Currently, some prisons have attempted to enforce such a concept – placing two individuals per cell as “family units.” According to the American Correctional Association (“ACA”), cells in correctional facilities should have at least 25 feet of space per person in each cell that is “unencumbered,” meaning they are not taken up by the bunk, desk, and other various furnishings.¹³⁷ That leaves a 5x5-foot space for each person, leaving little to no room for maneuvering while also maintaining the recommended 6 feet of distance between people.¹³⁸ Further, in some facilities, beds can be as close as 3 feet apart.¹³⁹

Courts must hold that these measures are inadequate. Detention facilities must provide housing to individuals during a pandemic that provides the detainee with adequate protection from an infectious disease while remaining otherwise Eighth Amendment compliant. That is to say, for example, prolonged isolation, albeit providing six feet of separation during the COVID-19 pandemic would

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Aleks Kajstura & Jenny Landon, *Since you asked: Is social distancing possible behind bars?*, PRISON POLICY INITIATIVE (Apr. 3, 2020), <https://www.prisonpolicy.org/blog/2020/04/03/density/>.

¹³⁸ *Id.*

¹³⁹ *Id.*

independently create an Eighth Amendment violation that would inherently fail to be Eighth Amendment compliant. If a facility, taking any and all means necessary, is unable to safely house a detainee, then the Eighth Amendment must be held to require that the facility transfer or release detainees.

However, such mass releases are likely avoidable with appropriate effort from prison officials. In the same manner that cities and states created Intensive Care Units with tent facilities to help with the widespread pandemic, prisons can develop the same. Moreover, such facilities not only provide increased temporary housing for detainees to increase separation between the detained, but also facilitate additional regular testing for detainees and staff as well. Currently, some prisons have already incorporated these types of emergency care facilities into their COVID-19 protocols, erecting tents within the recreational grounds on the facility.¹⁴⁰

Absent the above proposed protections, any single detention is at risk of becoming a death sentence prohibited by the Eighth Amendment. Unfortunately, as the number of deaths from COVID-19 in detention facilities has made clear, many violative and tragic “death sentences” have come to pass. The lack of proper medical treatment, and inability to stop the spread of the virus as the pandemic ran rapid within correctional facilities highlights the need for courts to provide the Eighth Amendment with the teeth needed to protect detainees. Just as the general public is no longer abiding by normal protocols, the prison environment should no longer be abiding by normal, pre-pandemic, standards. For example, in normal conditions, the protocol to house multiple people together in a small cell would not generally be considered cruel and unusual punishment. However, during a pandemic, the consequences of keeping people confined in a small space together, unable to even meet the 6-foot mandate, have exacerbated the spread of a deadly illness.

It is clear that detainees are not safe within facility walls during the pandemic until established safeguards are put in place and

¹⁴⁰ Meredith Deliso & Meredith Longo, *California's San Quentin prison using tents, warehouse to treat inmates infected with COVID-19*, ABC NEWS (July 9, 2020), <https://abcnews.go.com/US/californias-san-quentin-prison-tents-warehouse-treat-inmates/story?id=71690138>.

followed. There is a clear trend showing that the prisons have been unable to handle the COVID-19 influx, and the courts' denial of emergency interim releases has been severely detrimental. For example, as highlighted in the tragedy following the trial court's decision in *United States v. Hill*, despite the court's determination that the prison at issue could handle an individual infected with the virus and prevent the virus' spread – the prison system clearly was not able to. Not only were the court's legal findings wrong, but the factual findings proved to be tragically incorrect.

In contrast, the positive results in Cook County Jail show that steps such as reducing population size and holding detainees in single cells were effective to contain the virus. Further, widespread asymptomatic testing has also shown to be a necessary measure for monitoring the spread. Therefore, these measures should be implemented in all jail and prison facilities going forward. Housing fewer detainees together or allowing for more detainees to be given the option of home arrest are proven to be effective means of slowing the spread and helping to eliminate overcrowding. If the choice for a detainee is either home arrest or prison – which has become a death sentence within itself – then home arrest is the only acceptable option under the Eighth Amendment.

To ensure that all detention facilities comply with the standards that the Eighth Amendment requires, courts will need to hold prison officials accountable for their failures to protect detainees. As made clear by the Supreme Court in *Helling*, the Eighth Amendment protects against serious harms from future risks – such as infectious disease – even though the disease may not infect all those exposed.¹⁴¹ As the court stated, “We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.”¹⁴²

¹⁴¹ See *Helling*, 509 U.S. 25 at 25.

¹⁴² *Id.* at 33.

However, as noted by the Seventh Circuit in *McGill v. Duckworth*, whether intentional or not, the “deliberate indifference” standard has become a standard in function on par with intent.¹⁴³ The COVID-19 pandemic has brought to bear this critical issue in Eighth Amendment jurisprudence – that the deliberate indifference standard as presently interpreted denies detainees rightful relief. Currently, a prison official acts with “deliberate indifference” if he or she recklessly disregards a substantial risk of harm to the detainee. This is a higher standard than negligence and requires that the official *knows of and disregards* an excessive risk of harm to the detainee. The prison official does not, however, need to know of a specific risk from a specific source. As is clear from the numerous decisions discussed in Part II of this paper, denying detainees necessary protections to prevent the spread of COVID-19, the “deliberate indifference” standard has frequently become an insurmountable hurdle to detainees’ claims, *even where* prison officials objectively failed to prevent the spread of COVID-19, a specific risk from a specific source.

As a result, presently, litigation often fails to provide sufficient remedies to detainees.¹⁴⁴ For example, under present Eighth Amendment jurisprudence as interpreted by some courts, a facility may not yet have reached a high rate of incidence at the time a suit is brought. In cases where plaintiffs must meet the subjective element, prison officials may demonstrate or promise some corrective action, often leading to continued litigation. Moreover, even where correctional facilities increase cleaning practices, provide masks, and conduct testing, the critical safety factor of social distancing is held to be impractical and therefore appropriate action is not mandated.

Courts must hold detention facilities accountable for their actions and impose sufficient protections to halt COVID-19 deaths. Deaths from COVID-19 in detention facilities are clearly violative of the Eighth Amendment, and the notion that they are not feasibly preventable by prison officials is a fiction borne out by successful

¹⁴³ *McGill*, 944 F.2d at 347.

¹⁴⁴ Sarah D. Schotland, *A plea to apply principles of quarantine ethics to prisoners and immigration detainees during the COVID-19 crisis*, OXFORD ACADEMIC (Aug. 24, 2020), <https://academic.oup.com/jlb/article/7/1/Isaa070/5896421>.

prevention of COVID-19 infections in several detention facilities in the United States. The reality is borne out in detention facilities that took measures to save lives. The reality is borne out in the facilities that came with the threat of a body bag. That difference in action is deliberate indifference. That difference in action is violative of the Eighth Amendment. That difference in action has been a national tragedy.

Conclusion

As demonstrated, prisons and jails are notoriously dangerous places during a viral outbreak and continue to be a major source of a large number of infections in the U.S.¹⁴⁵ As the pandemic continued to remain uncontained into 2021, it was already clear that patterns of policy failures, along with implementation and enforcement problems, would continue to persist. Courts must begin recognizing that these recurring problems are enough to establish deliberate indifference, if not recklessness on the part of detention facility officials. Further, it should be glaringly clear that protections necessary to stop inmate deaths from the virus, above what is normally required of prison facilities, must be imposed under the Eighth Amendment.

The tragic numbers bear out that the measures presently being taken within most detention facilities have not prevented detainees from contracting the COVID-19 virus and are incapable of taking appropriate action without judicial supervision. The conditions that detainees have been forced to endure during the COVID-19 pandemic are clear violations of the Eighth Amendment's prohibition against cruel and unusual punishment. Prison sentences are turning into unnecessary *death* sentences, and if no preventative measures are implemented and enforced, the chilling prospect of another deadly prison outbreak is an inevitability.

¹⁴⁵ Kajstura & Landon, *supra* note 137.