

# COVID-19 in American Prisons: Solitary Confinement is Not the Solution\*

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## INTRODUCTION

As of November 12, 2020, at least 182,593 people incarcerated in American prisons, jails, and detention centers have tested positive for COVID-19; 1,412 incarcerated people have died.<sup>1</sup> As the disease spread rapidly across the country (and world) in March 2020, public and prison health experts warned that jails and prisons could become incubators of the highly infectious disease.<sup>2</sup> Recognizing the risk posed to the nation’s incarcerated population, public health officials issued interim guidance meant

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\* This paper was published in November 2020 during the COVID-19 pandemic. All dates and time descriptions refer to the 2020–21 COVID-19 pandemic unless otherwise stated.

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1. *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT (Nov. 12, 2020, 6:55 PM), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> [https://perma.cc/8QYD-PA7E].

2. Martin Kaste, *Prisons and Jails Worry About Becoming Coronavirus ‘Incubators’*, NPR (Mar. 13, 2020, 12:00 PM), <https://www.npr.org/2020/03/13/815002735/prisons-and-jails-worry-about-becoming-coronavirus-incubators> [https://perma.cc/2Y79-J7GY].

to assist prison officials seeking to protect the health and safety of incarcerated people.<sup>3</sup> Simultaneously, prisoners' rights advocates across the country filed lawsuits seeking to ensure prison systems protect incarcerated people from the risk posed by COVID-19.<sup>4</sup>

In response to these lawsuits and the public health guidance, crowded prison systems are returning to an old solution to address prison problems: solitary confinement.<sup>5</sup> The harms associated with solitary confinement are

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3. See *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> [https://perma.cc/KL7F-BT39] (Oct. 21, 2020).

4. See, e.g., *Valentine v. Collier*, 140 S. Ct. 1598, 1599–1600 (2020) (Mem.) (describing the injunction entered by the Texas district court); *Cameron v. Bouchard*, 462 F. Supp. 3d 746, 780, 784 (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 prompter, 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, 455–56 (D. Conn. 2020) (ordering identification of high-risk prisoners and process for release measures); *Carranza v. Reams*, No. 20-cv-00977-PAB, 2020 WL2320174, 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, 41 (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, 1017–18 (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 by* 961 F.3d 829 (6th Cir.); *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 ten days, make timely custody determinations that “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-CIV, 2020 WL 2086482, at \*7–8 (S.D. Fla. Apr. 30, 2020) (ordering ICE, *inter alia*, to evaluate 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), *order clarified*, 2020 WL2203576 (S.D. Fla.); *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).

5. UNLOCK THE BOX, SOLITARY CONFINEMENT IS NEVER THE ANSWER (2020), <https://static1.squarespace.com/static/5a9446a89d5abbfa67013da7/t/5ee7c4f1860e0d57d0ce8195/1592247570889/June2020Report.pdf> [https://perma.cc/DJ5Q-QSQB] (reporting of “an explosion in the use of solitary confinement” wherein “[a]t least 300,000 people have reportedly

well documented. Within days of being subjected to solitary confinement, individuals experience abnormal patterns in brain activity and quickly lose the ability to concentrate and focus.<sup>6</sup> People in solitary confinement suffer from hypertension, headaches, dizziness, panic attacks, depression, and paranoia.<sup>7</sup> Despite these well-known psychological harms caused by placement in isolating conditions, federal courts considering challenges to prison systems' responses to COVID-19 have largely, albeit implicitly, credited prison officials for embracing solitary as a way to stem the spread of the virus.<sup>8</sup>

This Essay argues that the judiciary's implicit endorsement of the use of solitary confinement as a solution to the problems posed by COVID-19 stems from three long-standing obstacles to the protection of prisoners' constitutional rights. First, the deliberate indifference standard that governs Eighth Amendment claims brought by incarcerated individuals fails to grapple with how to address ongoing harms to people in prison. The lack of a clear standard currently allows prison systems to escape constitutional liability by implementing one set of unconstitutional conditions (conditions of solitary confinement) in order to attempt to address another (conditions creating an increased risk of exposure to COVID-19).<sup>9</sup> Second, the judiciary's enduring deference to prison officials leads to an abdication of its obligation to ensure that the reach of the Constitution does not stop at the prison gates.<sup>10</sup> Finally, procedural and societal obstacles prevent the judiciary from embracing the one remedy that might protect incarcerated persons from the harms of both solitary confinement and COVID-19: release orders.<sup>11</sup>

This Essay proceeds in three parts. Part I discusses solitary confinement and its attendant harms, while Part II describes the harms suffered by the incarcerated population because of the COVID-19 pandemic. Part III details the three causes of the implicit endorsement of solitary conditions that has accompanied the judicial response to the pandemic in prison. Finally, the Essay concludes by arguing that solitary confinement is no solution to the crisis created by the COVID-19 pandemic in the nation's prisons and jails. While the use of medical isolation and the implementation of measures to ensure social distancing are necessary to minimize the loss of life in correctional facilities, prison officials and the judiciary must recognize the

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been placed in solitary since the advent of the pandemic, an increase of close to 500 percent over previous levels").

6. *See infra* Part I.

7. *See infra* Part I.

8. *See infra* Part II.

9. *See infra* Part II–III.

10. *See infra* Part III.B.

11. *See infra* Part III.C.

difference between medical isolation and punitive isolation. Finally, the Essay calls on those in power to choose release over isolation.

### I. SOLITARY CONFINEMENT AND ITS HARMS

The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) define solitary confinement as “the confinement of prisoners for 22 hours or more a day without meaningful human contact.”<sup>12</sup> Although the specific conditions in solitary confinement units and supermax prisons vary at the margins, in the main, they share a common set of features.<sup>13</sup> Cells used for solitary confinement are designed to minimize interpersonal interaction and environmental communication.<sup>14</sup> They typically have solid metal doors, provide little or no access to natural light, and are sparsely furnished, usually containing not more than a bed, a shelf, and a combined toilet-and-sink fixture.<sup>15</sup> People in solitary are often denied access to most educational and vocational programming;<sup>16</sup> televisions and radios are frequently prohibited, and there can be strict limits on art supplies and reading material.<sup>17</sup> Exercise takes place in solitary cages, sometimes with exposure to the elements though sometimes not.<sup>18</sup> If phone calls and visits with family are permitted at all, they are severely limited in frequency and duration; visits are nearly always non-contact.<sup>19</sup>

The Mandela Rules prohibit the use of prolonged solitary confinement (defined as longer than fifteen days)<sup>20</sup> and limit the use of shorter periods of

12. G.A. Res. 70/175, annex, The United Nations Standard Minimum Rules for the Treatment of Prisoners, at R. 44 (Dec. 17, 2015), [https://www.unodc.org/documents/justice-and-prison-reform/Nelson\\_Mandela\\_Rules-E-ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf) [<https://perma.cc/LQ6V-6HC6>].

13. Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 125 (2003).

14. *Id.* at 125–26, 139.

15. See, e.g., Jessica Wang, Dylan Moriarty & Lindsay Huth, *Inside a ‘Supermax’ Cell*, WALL ST. J. (July 17, 2019, 6:01 PM), <https://www.wsj.com/articles/inside-a-supermax-cell-11563400898> [<https://perma.cc/2S86-XJSE>]; James Ridgeway & Jean Casella, *Inside the American Supermax*, SOLITARY WATCH (Jan. 19, 2011), <https://solitarywatch.org/2011/01/19/inside-the-american-supermax/> [<https://perma.cc/WB47-H896>].

16. Haney, *supra* note 13, at 127.

17. Wang et al., *supra* note 15.

18. See Haney, *supra* note 13, at 126.

19. *Solitary Confinement Facts*, AM. FRIENDS SERV. COMM. <https://www.afsc.org/resource/solitary-confinement-facts> [<https://perma.cc/FD8F-JUR8>].

20. G.A. Res. 70/175, *supra* note 12, at R. 44. In the United States, the National Commission on Correctional Health Care adopted a principle that placement in solitary confinement for longer than fifteen days represents “cruel, inhumane, and degrading treatment” that is “harmful to an

solitary to situations involving “exceptional circumstances.”<sup>21</sup> The prohibition exists for good reason: solitary confinement harms people. In the United States, we have known this for well over two hundred years.<sup>22</sup> As early as the late 1700s, John Howard and Justice William Bradford argued that solitary confinement should be limited to intervals “seldom longer than 20 or 30 days at a time,”<sup>23</sup> because longer than that is “more than human nature can bear.”<sup>24</sup> Early descriptions of the harm of solitary confinement are largely anecdotal but hardly equivocal. Benjamin Rush, describing Pennsylvania’s earliest system of penal isolation, noted that “a wheelbarrow, a whipping post, nay even a gibbet, are all light punishments compared with letting a man’s conscience loose upon him in solitude.”<sup>25</sup> And in what has become an almost-obligatory quotation in any description of the harms of solitary confinement, Charles Dickens famously condemned its use at Eastern State Penitentiary, writing: “I hold this slow and daily tampering with the mysteries of the brain[ ] to be immeasurably worse than any torture of the body . . . .”<sup>26</sup>

Over the past fifty years, research, descriptive studies, and first-person accounts have demonstrated—almost without exception—that solitary confinement harms people.<sup>27</sup> In 1983, psychiatrist Stuart Grassian documented brain function abnormalities among men held in long-term isolation at Walpole, as well as a constellation of symptoms he called “SHU syndrome”—a condition that could have features of perceptual and cognitive impairment, delirium, and, potentially, psychosis.<sup>28</sup>

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individual’s health.” *Solitary Confinement (Isolation)*, NAT’L COMM’N ON CORR. HEALTH CARE (Apr. 10, 2016), <https://www.ncchc.org/solitary-confinement> [<https://perma.cc/D79Z-X8VZ>].

21. G.A. Res. 70/175, *supra* note 12, at R.44. The Mandela Rules prohibit the imposition of solitary confinement for *any* period “in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures.” *Id.* at R. 45(2).

22. *See generally* David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542 (2019).

23. Shapiro, *supra* note 22, at 557.

24. *Id.*

25. *Id.* 559 n.120 (quoting LOUIS P. MASUR, RITES OF EXECUTION 83 (1989)) (citing Letter from Benjamin Rush to Enos Hitchcock (Apr. 24, 1789), in 1 LETTERS OF BENJAMIN RUSH 512 (Lyman Henry Butterfield ed., 1951)).

26. CHARLES DICKENS, AMERICAN NOTES 44 (NY., D. Appleton & Co. 1868) (1842).

27. *See generally* Bruno M. Cormier & Paul J. Williams, *La Privation Excessive De La Liberté*, 11 CANADIAN J. PSYCHIATRY 470 (1966); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997); HANS TOCH, MEN IN CRISIS: HUMAN BREAKDOWNS IN PRISON 54 (1975); Craig Haney, *Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 366–67 (2018).

28. Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1450–54 (1983); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325 (2006) [hereinafter Grassian, *Psychiatric Effects of Solitary Confinement*].

Dr. Craig Haney, a social psychologist and one of the world's leading experts on solitary confinement, explains, "Numerous literature reviews have noted that scientists from diverse disciplinary backgrounds, working independently and across several continents, and over many decades, have reached almost identical conclusions about the negative effects of isolation in general and solitary confinement in particular."<sup>29</sup> "Empirical studies have identified a wide range of frequently occurring adverse psychological reactions to solitary confinement," including

[s]tress-related reactions (such as decreased appetite, trembling hands, sweating palms, heart palpitations, and a sense of impending emotional breakdown); sleep disturbances . . . ; heightened levels of anxiety and panic; irritability, aggression, and rage; paranoia, ruminations, and violent fantasies; cognitive dysfunction, hypersensitivity to stimuli, and hallucinations; loss of emotional control, mood swings, lethargy, flattened affect, and depression; increased suicidality and instances of self-harm; and . . . paradoxical tendencies to further social withdrawal.<sup>30</sup>

Space constraints preclude a description of even a fraction of the studies documenting the harms of solitary confinement. But two are worth brief mention, given the topic of this Essay. The first is a 2014 study showing an increased rate of suicide among men in solitary.<sup>31</sup> Also troubling is a 2020 Washington State study that found "a wide range and high prevalence of symptoms of psychiatric distress" in people housed in solitary confinement, including "symptoms associated with anxiety and depression among as many as half of our participants[ ] administrative indicators of SMI [serious mental illness] among at least one fifth of our participants." Moreover, the researchers found, "these symptoms persisted in the second year for participants in and out of solitary confinement."<sup>32</sup> This is consistent with a growing body of research showing that the damage inflicted by solitary can

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29. Haney, *supra* note 27, at 367.

30. *Id.* at 371–72. Dr. Haney's study of 100 prisoners at Pelican Bay, a California supermax prison, found that "[e]very symptom of psychological stress and trauma but one (fainting) was experienced by more than half of the assessed prisoners; many were reported by two-thirds or more and some by nearly everyone." *Id.* at 172.

31. Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, 444 (2014).

32. Keramet Reiter, Joseph Ventura, David Lovell, Dallas Augustine, Melissa Barragan, Thomas Blair, Kelsie Chesnut, Pasha Dashtgard, Gabriela Gonzalez, Natalie Pifer & Justin Strong, *Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017–2018*, 110 AM. J. PUB. HEALTH S56, S60–61.

be long-lasting, even permanent.<sup>33</sup> Such damage is only intensified when accompanied by the other harms experienced by those incarcerated during the COVID-19 pandemic, which are described below.

## II. THE HARMS OF THE COVID-19 PANDEMIC TO INCARCERATED PEOPLE

American prisons are crowded and unhygienic.<sup>34</sup> Incarcerated people live and work in very close, communal quarters where they share toilets, showers, sinks, laundry facilities, and dining halls.<sup>35</sup> They often sleep on bunk beds, either in individual cells or in dormitory (or warehouse) style housing.<sup>36</sup> Because security, not health care, is the top priority in prisons,<sup>37</sup> items like hand sanitizer are not allowed in prison,<sup>38</sup> and windows remain closed and locked, leading to poor air circulation.<sup>39</sup> In other words, the physical layout and punitive nature of American prisons create “a system designed to spread communicable disease.”<sup>40</sup>

Compounding the problems posed by the physical structure and security culture of American prisons, the medical care provided to incarcerated people is notoriously abysmal.<sup>41</sup> Even in systems run by well-meaning health

33. SHARON SHALEV, MANNHEIM CTR. FOR CRIMINOLOGY, A SOURCEBOOK ON SOLITARY CONFINEMENT 22–23 (2008); *see also* Grassian, *Psychiatric Effects of Solitary Confinement*, *supra* note 28, at 353–54.

34. Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 59, 73 (2020) (noting that “prisons are infamous for overcrowding”); Amanda Klonsky, Opinion, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html> [<https://perma.cc/PMG6-QXTW>] (explaining that toilet tanks double as sinks “for hand washing, tooth brushing and other hygiene”).

35. Talha Burki, *Prisons Are “In No Way Equipped” To Deal with COVID-19*, 395 LANCET 1411, 1411 (2020); *see also* Nick Ochsner, *Prisoners Continued Being Sent to Laundry Job After Co-Workers Tested Positive for COVID-19*, WBTW (Aug. 25, 2020, 10:46 PM), <https://www.wbtv.com/2020/08/25/prisoners-continued-being-sent-laundry-job-after-co-workers-tested-positive-covid/> [<https://perma.cc/Z59L-TEYU>] (discussing COVID-19 outbreak linked to communal laundry facility in prison).

36. Burki, *supra* note 35 at 1411; *see also* Klonsky, *supra* note 34.

37. HOMER VENTERS, LIFE AND DEATH IN RIKERS ISLAND 6 (2019) (warning that “[h]ealth care is not a top priority in jail” because “health systems in jail and prison are usually designed and controlled by people who aren’t health experts”).

38. Klonsky, *supra* note 34.

39. *See id.* (confirming that “[a]ir circulation is nearly always poor” and “[w]indows rarely open” in prison).

40. 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/R93A-T7EE>].

41. Carroll, *supra* note 34, at 73 (noting prisons’ infamy for “lack of medical care”).

officials, the conditions of incarceration itself harm the imprisoned.<sup>42</sup> The harms attendant to incarceration are amplified by the preexisting health problems found in populations prone to confrontations with the carceral system.<sup>43</sup> It is no secret, then, that the health risks of incarceration disproportionately impact Black and other minority communities.<sup>44</sup> Moreover, in 2016, the percentage of people over the age of fifty-five in state prisons surpassed the percentage of young adults between the ages of eighteen and twenty-four in prison for the first time.<sup>45</sup> Older prisoners are more likely to suffer from chronic health conditions than senior citizens living outside prison, and American prisons are not able to provide necessary care to this aging population.<sup>46</sup>

Given these well-known conditions and characteristics of American prisons and their populations, public and prison health experts warned early on in the pandemic that prisons would become incubators of the highly infectious disease.<sup>47</sup> In the months since the disease began spreading rapidly across the country (and the world), this warning has proven true as “prisons across the country have housed some of the worst clusters of COVID-19 cases since April.”<sup>48</sup> One of the first studies conducted by health policy and

42. VENTERS, *supra* note 37, at 1–2 (warning that “[i]ncarceration harms health”).

43. *Id.* at 1 (noting that “the health risks of incarceration are often connected to the very . . . people whom we seem hungry to lock up. People of color, people living in poverty, people with mental health and substance abuse problems”); *see also* Lipi Roy, *Infections and Incarceration: Why Jails and Prisons Need To Prepare for COVID-19 Now*, FORBES (Mar. 11, 2020, 5:08 PM), <https://www.forbes.com/sites/lipiroy/2020/03/11/infections-and-incarceration-why-jails-and-prisons-need-to-prepare-for-covid-19-stat/#3032d4e149f3> [<https://perma.cc/96ZJ-GCVZ>].

44. VENTERS, *supra* note 37, at 1 (acknowledging that “[t]he health risks that jail or prison brings to bear on the incarcerated—such as violence, blocked access to care, and solitary confinement—disproportionately impact those with behavioral health problems and people of color”).

45. Weihua Li & Nicole Lewis, *This Chart Shows Why the Prison Population Is So Vulnerable to COVID-19*, MARSHALL PROJECT (Mar. 19, 2020, 2:45 PM), <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19> [<https://perma.cc/T93K-933H>].

46. *Id.*; *see also* Taryn A. Merkl & Brooks Weinberger, *What’s Keeping Thousands in Prison During Covid-19*, BRENNAN CTR. FOR JUST. (July 22, 2020), <https://www.brennancenter.org/our-work/research-reports/whats-keeping-thousands-prison-during-covid-19> [<https://perma.cc/FF9R-8233>] (describing the case of Laddy Valentine, a Texas prisoner who “is at elevated risk for COVID-19—not only is he in an older age group, he has hypertension, has suffered a stroke, and uses a walker following back surgery”).

47. Kaste, *supra* note 2.

48. Merkl & Weinberger, *supra* note 46; *see also* David H. Cloud et al., *Medical Isolation and Solitary Confinement: Balancing Health and Humanity in US Jails and Prisons During COVID-19*, 35 J GEN. INTERNAL MED. 2738, 2738 (2020) (noting that “[e]vidence so far indicates that correctional facilities, including jails in New York City and Chicago and prisons in Ohio, have the highest rates of confirmed cases of COVID-19 of any setting”).



prison experts on the impact of the coronavirus on the American prison population revealed “that people in prison are over five times more likely to contract COVID-19, and three times more likely to die from the disease if they contract it.”<sup>49</sup> For those incarcerated people who are lucky enough to survive the illness, they face continued risk from the incredible assortment of enduring conditions faced by those diagnosed with COVID-19.<sup>50</sup>

In response to the harms posed by the COVID-19 pandemic to the incarcerated population, prison systems are turning back to solitary confinement, a practice that spread steadily starting in the 1980s through the early 2000s but had started to wane in recent years.<sup>51</sup> Prison officials’ reflexive use of solitary stems not only from historical reliance on the practice but also from two pieces of guidance from public health officials.<sup>52</sup> First, for individuals who become infected or are suspected to be infected with COVID-19, public health officials recommend complete physical separation from others as necessary to reduce the risk of transmission.<sup>53</sup> This physical separation is known as medical isolation.<sup>54</sup> Similarly, public health officials recommend physical separation of anyone who may have been exposed to the disease, but, who, as yet, has not demonstrated any symptoms or tested positive.<sup>55</sup> This physical separation is known as quarantine.<sup>56</sup> However, because correctional facilities are ill-equipped to provide proper facilities for medical isolation or quarantine, prison officials have turned to units reserved for solitary confinement.<sup>57</sup> Such units are separate from the rest of the prison

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49. Merkl & Weinberger, *supra* note 46 (referring to Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602, 603–03 (July 8, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2768249> [https://perma.cc/JRN8-6R3A]). Merkl & Weinberger also note that in Laddy Valentine’s prison, in the course of the first four months or so of litigation against the Texas prison confining him, “18 people held in the prison have died from COVID-19, and at least 267 others have tested positive, including Valentine.” Merkl & Weinberger, *supra* note 46

50. Jennifer Couzin-Frankel, *From ‘Brain Fog’ to Heart Damage, COVID-19’s Lingering Problems Alarm Scientists*, SCIENCE (July 31, 2020, 1:30 P.M.), <https://www.sciencemag.org/news/2020/07/brain-fog-heart-damage-covid-19-s-lingering-problems-alarm-scientists> [https://perma.cc/AU37-MFV8].

51. Cloud, *supra* note 48 at 2738.

52. *Id.* at 2738–39 (noting the need for medical isolation, quarantine, and social distancing).

53. *Id.* at 2739.

54. *Id.* at 2741 (defining medical isolation as the separation of “people with a confirmed or suspected contagious disease until no longer contagious”).

55. *Id.* at 2739.

56. *Id.* at 2741 (defining quarantine as separation of “asymptomatic people who have been exposed to a contagious disease until it is known if they will become infected”).

57. *Id.* at 2740.

and consist of tiers of single cells with solid cell doors that ensure not only physical separation from others but also extreme social isolation.<sup>58</sup>

Second, for the rest of the prison population, public health officials recommend that prison officials implement measures to ensure meaningful social distancing.<sup>59</sup> In response to this directive, prisons facing outbreaks of COVID-19 have implemented lockdowns.<sup>60</sup> When a facility locks down, the individuals incarcerated in that facility are confined to their small cells, sometimes alone, sometimes with one additional cellmate, and sometimes with multiple additional cellmates, for most of the day.<sup>61</sup> Because the coronavirus pandemic will persist for some time, the lockdown response runs the risk of placing thousands of individuals in conditions similar to those associated with long-term solitary confinement, thereby subjecting them to the harms associated with such conditions as described in Part I.

### III. SOLITARY AND THE COVID-19 PANDEMIC

Despite the well-known psychological harms caused by placement in isolating conditions, federal courts considering challenges to prison systems' responses to COVID-19 have largely credited prison official defendants for embracing solitary confinement in order to comply with public health guidance.<sup>62</sup> This is so despite warnings from public health officials that prisons should not confuse medical isolation, quarantine, and solitary confinement.<sup>63</sup> Public health officials also warn that prison officials must not "fall[ ] back on policies that subject people to living conditions known to harm their health" (i.e., conditions of solitary confinement).<sup>64</sup>

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58. *Id.*

59. *Id.* at 2738 (describing "social distancing" as "critical to slowing the spread of disease").

60. Joseph Shapiro, *As COVID-19 Spreads in Prisons, Lockdowns Spark Fear of More Solitary Confinement*, NPR (June 15, 2020, 4:53 PM), <https://www.npr.org/2020/06/15/877457603/as-covid-spreads-in-u-s-prisons-lockdowns-spark-fear-of-more-solitary-confinemen> [<https://perma.cc/4R43-63YD>].

61. *Id.* (describing lockdown conditions as variable, but "in most cases, prisoners can't leave their cells for meals, exercise or prison jobs and can't receive visits from family. There might also be limits on mail and phone calls").

62. *See, e.g., Williams v. Wilson*, No. 19A1047, 2020 WL 2988458 (U.S. June 4, 2020) (Mem.) (in order staying district court order granting preliminary relief, implicitly crediting prison system's argument in Solicitor General brief that response of "restricting" prisoner movement within facilities (i.e., locking down) was reasonable and appropriate).

63. Cloud, *supra* note 48, at 2739 (noting that the "only commonality that solitary confinement should share with quarantine and medical isolation is a physical separation from other people").

64. *Id.* at 2740.

Despite these warnings, federal courts' consideration of prison officials' response to the COVID-19 pandemic has thus far made little mention of the harms attendant to isolation. The implicit endorsement of prison officials' use of solitary conditions in response to the COVID-19 pandemic is unsurprising given three aspects of current law governing prison conditions claims: the Eighth Amendment standard's indifference to ongoing harms, the deference afforded prison officials by the judiciary, and the socio-political resistance to widespread release.

### A. *The Muddled Eighth Amendment Doctrine*

The text of the Eighth Amendment is a mere sixteen words: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>65</sup> The Eighth Amendment doctrine governing claims challenging prison conditions derives from the last six words of the amendment: the Cruel and Unusual Punishments Clause.<sup>66</sup> While federal courts declined to entertain constitutional claims challenging prison conditions for more than a century after the adoption of the Bill of Rights,<sup>67</sup> the Supreme Court articulated and developed the doctrine in a series of cases beginning in 1976 and ending in 1994.<sup>68</sup>

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65. U.S. CONST. amend. VIII.

66. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (explaining that the Cruel and Unusual Punishments Clause both places restraints and imposes duties on prison officials). The Cruel and Unusual Punishments Clause, drawn nearly verbatim from Article 10 of the English Bill of Rights, "became part of the American Bill of Rights in 1791." COLIN DAYAN, *THE STORY OF CRUEL & UNUSUAL 6* (2007). While scholars debate the intention of the English parliamentarians in drafting Article 10, most scholars accept that the American Framers intended for the clause to prohibit certain methods of punishment. *See* Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 158–59 (discussing scholarly debate around the intent of the drafters in both England and the United States).

67. Godfrey, *supra* note 66, at 165 (describing the "hands-off" doctrine that governed federal courts' review of prison conditions).

68. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that deliberate indifference to serious medical needs violates the Eighth Amendment); *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (leaving undisturbed district court's finding that conditions in Arkansas's prisons violated the Eighth Amendment); *Rhodes v. Chapman*, 452 U.S. 337, 346–47 (1981) (focusing on objective effects of double-celling to determine that practice did not violate the Eighth Amendment); *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (holding, in the context of an excessive force case, that "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause"); *Wilson v. Seiter*, 501 U.S. 294, 299–300 (1991) (confirming that a two-part test, consisting of objective and subjective components, characterized every Eighth Amendment claim); *Hudson v. McMillian*, 503 U.S. 1, 5 (1992) (upholding the rule that "the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment") (alteration in original); *Helling v. McKinney*, 509

Since then, prisoners seeking to enjoin ongoing harms posed by prison conditions must meet an exacting, two-part Eighth Amendment test colloquially known to prisoners' rights advocates as the deliberate indifference standard.<sup>69</sup> First, the prisoner must demonstrate that the condition being challenged is "sufficiently serious" in order to satisfy the objective prong of the Eighth Amendment inquiry.<sup>70</sup> A sufficiently serious condition is a condition that results in the deprivation of basic human needs,<sup>71</sup> like "food, clothing, shelter, medical care, and reasonable safety."<sup>72</sup> Prisoners need not wait for harm to befall them before seeking judicial relief from unsafe prison conditions—the Supreme Court has made clear that the Eighth Amendment protects against the risk of future harms.<sup>73</sup> Second, in order to satisfy the subjective prong of the Eighth Amendment inquiry, an incarcerated person must prove that the person or entity being sued exhibited deliberate indifference to the serious condition being challenged.<sup>74</sup> In other words, an incarcerated plaintiff must prove that the defendant being sued knew of the risk posed by the challenged condition but disregarded that knowledge by failing to take reasonable measures to abate the risk.<sup>75</sup>

For incarcerated plaintiffs seeking injunctive relief, the second part of this test—the inquiry into the defendants' state of mind—is muddled. As an initial matter, the proof required to demonstrate the knowledge component is unclear<sup>76</sup> and potentially superfluous.<sup>77</sup> But even if that is so, the inquiry then focuses on the disregard component of the subjective element of the test—i.e., whether prison officials' response to the harm is reasonable.<sup>78</sup> One might think that in the case of ongoing harm, the federal bench may be hesitant to

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U.S. 25, 33 (1993) (confirming that Eighth Amendment protects against future harm); *Farmer*, 511 U.S. at 841 (defining deliberate indifference as those instances where a prison official knows of a risk of harm attendant to a prison condition but fails to take reasonable steps to abate the risk).

69. See Godfrey, *supra* note 66, at 153.

70. *Farmer*, 511 U.S. at 834.

71. *Rhodes*, 452 U.S. at 347.

72. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989) (citing *Estelle*, 429 U.S. at 103–04).

73. *Helling*, 509 U.S. at 33.

74. *Farmer*, 511 U.S. at 834.

75. *Id.* at 837.

76. Godfrey, *supra* note 66, at 174, 187 (noting that the "knowledge component is particularly focused on the identity of the defendant" and, in injunctive cases, the defendant is almost always an entity).

77. Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1834 (2012) (asserting that "[i]f [the] harm is ongoing, the lawsuit itself notifies defendants of the challenged harm, rendering the knowledge requirement superfluous").

78. *Id.*

conclude that prison officials are “powerless to stop a damaging condition.”<sup>79</sup> However, the COVID-19 cases have proven this notion wrong.

The problem arising for prisoner litigants in the COVID-19 context is that the deliberate indifference standard, always difficult to prove, is particularly impossible to overcome when the courts are crediting prison officials for “taking *some* steps to fix the problems inside a facility, even if they’re insufficient.”<sup>80</sup> And in the context of the pandemic, almost all prison officials have done *something* to respond to the presence of coronavirus in their institutions.<sup>81</sup> But the problem is that the steps taken by prison officials to address the risks aren’t always *actually mitigating* the rates of infection and death.<sup>82</sup> This results in an apparent inconsistency in the Eighth Amendment doctrine: it leaves federal courts powerless to *actually stop* ongoing, clearly cognizable harms.

At the same time, while the courts are declining to stop ongoing harms to the incarcerated population caused by the COVID-19 pandemic, they are also implicitly approving the imposition of other harms arising from prison officials’ use of solitary confinement. In other words, because *some* of the steps prison officials are taking include locking down entire prison populations<sup>83</sup> or using solitary confinement facilities to quarantine or

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79. *Id.*

80. Merkl & Weinberger, *supra* note 46 (emphasis added).

81. *Id.*

82. *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 v. Scarantino, No. 5:20-HD-2088-FL, 2020 WL3105094, at \*6, \*14 (E.D.N.C. June 11, 2020) (finding petitioners unlikely to succeed in demonstrating deliberate indifference while explaining that FCC-Butner is facing one of the largest outbreaks within the federal prison system).

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 [prisoners] 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 [prisoner] 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.* at \*6 (footnote omitted) (citations omitted).

83. *See* Keri Blakinger, *What Happens When More Than 300,000 Prisoners Are Locked Down?*, MARSHALL PROJECT (Apr. 15, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/15/what-happens-when-more-than-300-000-prisoners-are-locked-down> [https://perma.cc/VXS8-FQ2U].

medically isolate individuals who are sick,<sup>84</sup> these are the measures courts are recognizing as reasonable to abate the risk.<sup>85</sup> The federal courts are reaching this conclusion despite the ongoing harms faced by incarcerated prisoners<sup>86</sup> and despite the harms associated with prolonged solitary confinement.

This anachronistic result—that prison conditions causing ongoing and sustained harms created by the epidemiological risk posed by the coronavirus and by prison officials’ imposition of solitary conditions in response to that risk may be deemed constitutional (i.e., not cruel and unusual)—is a direct consequence of the muddled Eighth Amendment doctrine and its current focus on the subjective intent of prison officials. This focus on subjective intent has been criticized as illogical, inconsistent, and unjust.<sup>87</sup> Importantly here, it is allowing for implicit judicial sanction of one set of unconstitutional conditions as replacement for another set of unconstitutional conditions. Such a result is perhaps unsurprising given the overwhelming deference afforded prison officials by the judiciary.

### B. Deference to Prison Officials

Although the Supreme Court has held that “[t]here is no iron curtain drawn between the Constitution and the prisons of this country,” the Court has significantly limited the Constitution’s reach by endorsing the idea that a person’s constitutional rights “may be diminished by the needs and

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84. UNLOCK THE BOX, *supra* note 5, at 4 (documenting that “some facilities are using cells built for punitive solitary confinement, with little or no modification, to house people who have been exposed to the virus and require quarantine, people who have tested positive, and even individuals who are ill” (footnote omitted)).

85. *See, e.g., Wilson*, 961 F.3d at 841 (crediting the Bureau of Prisons for isolating and quarantining prisoners who may have contracted the virus and limiting prisoner movement (i.e., locking down) and concluding that those actions amount to a “reasonable response to the risk posed by COVID-19”).

86. *See Wilson*, 961 F.3d at 849 (Cole, C.J., concurring in part and dissenting in part) (noting the irreparable harms suffered by the incarcerated population at FCI Elkton).

87. *See* Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 428 (2018) (criticizing the Eighth Amendment doctrine’s focus on the subjective intent of prison officials rather than the objective harms inflicted on the incarcerated); Glidden, *supra* note 77, at 1821 (criticizing the unpredictability of application of the current Eighth Amendment doctrine); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 890 (2009) (criticizing Eighth Amendment doctrine’s undue focus on what constitutes punishment rather than what is cruel). John F. Stinneford, in a series of articles, has also criticized current Eighth Amendment doctrine for being untethered to the original meaning of the words comprising the clause. *See* John F. Stinneford, *Experimental Punishments*, 95 NOTRE DAME L. REV. 39, 48–55 (2019); John F. Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L.J. 441, 502 (2017); John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1753–54 (2008).

exigencies of the institutional environment.”<sup>88</sup> Unwilling to fully let go of the “hands-off” doctrine that governed the federal courts’ approach to prisoners’ rights until the 1970s, the Supreme Court replaced that doctrine with one of deference to prison officials.<sup>89</sup> The Court grounded this doctrinal deference in many of the same policy justifications that informed the hands-off doctrine:

[T]he problems of prisons in America are complex and intractable, and . . . not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. . . . Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.<sup>90</sup>

In non-Eighth Amendment challenges to prison regulations that burden constitutional rights, the Court has repeatedly held that “a lesser standard of scrutiny is appropriate” and “the regulation is valid if it is reasonably related to legitimate penological interests.”<sup>91</sup> But the Court has expressly rejected reasonable-relationship review for Eighth Amendment claims, finding that “the full protections of the eighth amendment most certainly remain in force [in prison]. The whole point of the amendment is to protect persons convicted of crimes.”<sup>92</sup> Accordingly, “deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary.”<sup>93</sup> For that reason, while “[c]ourts must be sensitive to the . . . need for deference to experienced and expert prison administrators,” they “may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.”<sup>94</sup>

Although the Supreme Court has never expressly extended *Turner* deference to Eighth Amendment claims, in practice, both it and the lower

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88. *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

89. *Procunier v. Martinez*, 416 U.S. 396, 413–14 (1974) (prison’s censorship of mail does not violate First Amendment rights where regulation furthers important government interest and is no greater than necessary to protect that interest).

90. *Id.*

91. *Turner v. Safley*, 482 U.S. 78, 81, 84–89 (1987) (considering a First Amendment challenge to certain prison regulations); *Washington v. Harper*, 494 U.S. 210, 223–34 (1990) (extending *Turner* to due process claims and finding that reasonable-relationship standard of review is appropriate “even when the constitutional right claimed to have been infringed is fundamental”).

92. *Johnson v. California*, 543 U.S. 499, 511 (2005) (quoting *Spain v. Procunier*, 600 F.2d 189, 193–94 (9th Cir. 1979)).

93. *Id.*

94. *Brown v. Plata*, 563 U.S. 493, 511 (2011).

courts often defer to prison officials in analyzing claims of cruel and unusual punishment.<sup>95</sup> For example, in declining to credit prisoners' contention that Ohio's practice of double-celling violated the Eighth Amendment, the Court observed that a "prison's internal security is peculiarly a matter normally left to the discretion of prison administrators."<sup>96</sup> In the context of Eighth Amendment challenges to solitary confinement, several circuits have explicitly or implicitly imported *Turner*-like deference into their analysis, with predictable results.<sup>97</sup>

So far, judicial responses to prisoners' Eighth Amendment conditions of confinement claims during the COVID-19 pandemic indicate that while at least some district courts have eschewed rote deference to prison officials' justifications for failing to protect those in their care,<sup>98</sup> the circuit courts have been much more deferential to prison officials.<sup>99</sup> And in the few cases that have reached the Supreme Court to date, the only hard look at prison officials'

95. See generally Sharon Dolovich, *Forms of Judicial Deference in Prison Law*, PRISON LEGAL NEWS (Jan. 15, 2013), <https://www.prisonlegalnews.org/news/2013/jan/15/forms-of-judicial-deference-in-prison-law/> [<https://perma.cc/L66Z-JK5S>].

96. *Rhodes v. Chapman*, 452 U.S. 337, 349 n.14 (1981).

97. See, e.g., *Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x. 739, 754–55, 761–62 (10th Cir. 2014); *Scarver v. Litscher*, 434 F.3d 972, 976 (7th Cir. 2006) ("Federal judges must always be circumspect in imposing their ideas about civilized and effective prison administration on state prison officials") (quoting *Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985)).

98. See, e.g., *Carranza v. Reams*, No. 20-cv-00977-PAB, 2020 WL 2320174, at \*8–10 (D. Colo. May 11, 2020) (declining to credit testimony of defendant jail officials regarding efforts to implement social distancing, monitoring of COVID-19 symptoms, and intake practices to address "the elevated risk of harm that COVID-19 presents"); *Cameron v. Bouchard*, 462 F. Supp. 3d 746, 789–90 (E.D. Mich. 2020) (criticizing jail officials' lackluster efforts to release medically vulnerable people from custody), *vacated by* 815 F. App'x. 978 (6th Cir.); *Wilson v. Williams*, 455 F. Supp. 3d 467, 479 (N.D. Ohio 2020) (pointing to prison's "testing debacle" as evidence of deliberate indifference), *vacated by* 961 F.3d 829 (6th Cir.). *But see* *Valentine v. Collier*, 455 F. Supp. 3d 308, 328 (S.D. Tex. 2020) (noting "the difficulty of running a prison and that courts are 'ill equipped' to undertake the task of prison administration, which is within the province of the legislative and executive branches of government") (quoting *Turner v. Safley*, 482 U.S. 78, 84–85 (1987)); *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1129, 1133 (N.D. Ill. 2020) (noting that "running and overseeing prisons is traditionally the province of the executive and legislative branches" and "the public interest also commands respect for federalism and comity, which means that courts must approach the entire enterprise of federal judicial intrusion into the core activities of the state cautiously and with humility").

99. See, e.g., *Wilson*, 961 F.3d at 844 (accounting for "the 'constraints facing the official[s]'" (quoting *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Cameron*, 815 F. App'x at 988 n.3 (finding no deliberate indifference and categorizing jail officials failures as an "imperfect" response); *Valentine v. Collier*, 956 F.3d 797, 802–03 (5th Cir. 2020) (chastising district court for determining its "mere 'disagreement'" with prison's course of action amounted to deliberate indifference) (quoting *Cadena v. El Paso Cnty.*, 946 F.3d 717, 729 (5th Cir. 2020)); *Swain v. Junior*, 961 F.3d 1276, 1289 (11th Cir. 2020) (holding that defendant jail officials cannot be deliberately indifferent when they are "doing their best").



justifications has been in dissent.<sup>100</sup> Thus, the federal courts' reflexive deference to prison officials' judgment and responses to COVID-19 has allowed prison officials to turn to solitary confinement as a solution to the problems posed by the pandemic.

### C. Resistance to Release

The combination of the muddled Eighth Amendment conditions doctrine, which allows prison officials to escape a finding of deliberate indifference if they have taken any measures to protect prisoners from infection, coupled with the courts' readiness to defer to prison officials' judgment about whatever measures they do (or do not) take, already incentivizes prison officials to use solitary confinement to address the spread of the coronavirus. And the incentives skew even further toward solitary confinement for a third reason: the legal and socio-political obstacles to de-densifying prisons through the release of incarcerated people. While an in-depth analysis of the various mechanisms for release is beyond the scope of this Essay, we touch on a few of them below to illustrate the challenges associated with trying to achieve social distancing via release.

On their own, prison officials typically do not have the authority to reduce a person's sentence even if they were inclined to do so. The President and state governors, however, *do* have tools for release at their disposal, including clemency powers (pardons, commutations, and reprieves), as well as the ability to expand eligibility for furlough, parole, and good time credits via executive order.<sup>101</sup> So far, however, executive officials have made little use of this authority, citing "public safety" concerns.<sup>102</sup>

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100. *Valentine v. Collier*, 140 S. Ct. 1598, 1599 (2020) (Sotomayor, J., dissenting) (Mem.) ("[W]hile States and prisons retain discretion in how they respond to health emergencies, federal courts do have an obligation to ensure that prisons are not deliberately indifferent in the face of danger and death."); *Barnes v. Ahlman*, 140 S. Ct. 2620, 2623–24 (2020) (Sotomayor, J., dissenting) (Mem.) ("[W]hile 'courts must be sensitive to the . . . need for deference to experienced and expert prison administrators,' they 'may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.'" (quoting *Brown v. Plata*, 563 U.S. 493, 511 (2011))).

101. New York University's Center on the Administration of Criminal Law has compiled a state-by-state survey of options for executive action to address the spread of the coronavirus. See N.Y. UNIV. CTR. ON THE ADMIN. OF CRIM. L., SURVEY OF OPTIONS FOR EXECUTIVE ACTION TO ADDRESS CORONAVIRUS SPREAD, <https://www.law.nyu.edu/sites/default/files/Reprieve%20Power%20to%20post%29%20.pdf> [https://perma.cc/58YC-DK9M].

102. See *A Survey of Executive Action Concerning the Spread of COVID-19 in State Correctional Facilities*, N.Y. UNIV. L. CTR. ON THE ADMIN. OF CRIM. L., <https://docs.google.com/document/d/1ZOs8LtiPajxjAiKDn4VwDnhng0AkDrMi/edit>

Seeking a judicial release order also has its challenges. If the incarcerated person pursues release via a habeas petition under 28 U.S.C. § 2241, the petitioner must demonstrate they are “in custody in violation of the Constitution or laws or treaties of the United States.”<sup>103</sup> To meet this burden, they must show that “there are no conditions of confinement sufficient to prevent irreparable constitutional injury” and therefore that “the claim[s] should be construed as challenging the fact or extent, rather than the conditions, of the confinement.”<sup>104</sup> But “the decision to bring a habeas claim, rather than one challenging the conditions of confinement, limits the type of relief available to petitioners” because district courts “do[ ] not have authority to circumvent the established procedures governing the various forms of release enacted by Congress.”<sup>105</sup> On that basis, for example, the Sixth Circuit held that a district court lacked jurisdiction to order the Federal Bureau of Prisons to transfer medically vulnerable people from a prison with a significant COVID-19 outbreak to a different prison.<sup>106</sup>

If, however, the court construes the claim as an Eighth Amendment challenge to conditions of confinement, there are other hurdles. Some prison systems have argued that to the extent the COVID-19-related Eighth Amendment violation is caused by overcrowding, the Prison Litigation Reform Act’s requirements must be met before release can be sought.<sup>107</sup>

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[<https://perma.cc/GF6S-PLMQ>]; *see also Responses to the COVID-19 Pandemic—Prisons Releasing People*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> [<https://perma.cc/J3Z3-T336>].

As the pandemic claims more lives behind bars, the calls for release have grown more insistent but so far too little effect. *See, e.g.,* Chesa Boudin & Miriam Aroni Krinsky, *Prisons Are Overwhelmed with COVID-19. Why Aren’t Governors Doing More?*, APPEAL (July 17, 2020), <https://theappeal.org/prisons-are-overwhelmed-with-covid-19-why-arent-governors-doing-more/> [<https://perma.cc/R5NT-WHX5>]. In Colorado, for example, the governor let parts of an executive order expire that allowed for the release of some prisoners, stating he would not use his clemency or pardon powers to reduce the prison population because of COVID-19. Elise Schmelzer, *Medically Vulnerable Prisoners Sue Colorado Prison System Over Coronavirus Threat, Lack of Care*, DENVER POST (May 28, 2020, 4:54 PM), <https://www.denverpost.com/2020/05/28/coronavirus-colorado-prisoners-lawsuit/> [<https://perma.cc/E5MK-YMNP>].

103. 28 U.S.C. § 2241(c)(3).

104. *Wilson*, 961 F.3d at 837–38.

105. *Id.* at 338.

106. *Id.* That said, the First Appellate District of the California Court of Appeals recently ordered the California Department of Corrections and Rehabilitation to expedite the removal from San Quentin State Prison—by means of release on parole or transfer to another prison—the number of people necessary to reduce the population of San Quentin by fifty percent. *In re Von Staich*, No. A160122, 2020 WL 6144780, at \*19 (Cal. Ct. App. Oct. 20, 2020).

107. *See, e.g.,* *Cameron v. Bouchard*, 462 F. Supp. 3d 746, 769 (E.D. Mich. 2020) (finding the plaintiffs’ exhaustion efforts “thwarted by machination and intimidation”), *vacated by* 815 F.

Those requirements include a prior order for intrusive relief, reasonable time for the defendant to comply, and a three-judge court to decide whether release is appropriate.<sup>108</sup>

In sum, three longstanding obstacles to relief from unconstitutional prison conditions have resulted in prison systems turning to solitary confinement to manage overcrowded prisons being overrun by a deadly virus. The Eighth Amendment standard that applies to conditions of confinement claims allows prison officials to escape liability by locking the people in their custody in isolation cells. A culture of judicial deference<sup>109</sup> to the decisions of those prison officials leaves the judicial branch with little will to question whether a response that puts hundreds of thousands of people in solitary-like conditions<sup>110</sup> is, in fact, reasonable. And, finally, the difficulty of securing release orders and the lack of political courage on the part of executive officials to use their powers of release limit the functionality of the one mechanism that may alleviate prison officials' perceived need or desire to return to solitary.

#### CONCLUSION

In the 1960s and 1970s, repeated lockdowns of American prisons “ultimately helped lead to the rise of supermaxes and solitary confinement units.”<sup>111</sup> Prison officials, governors, and legislatures need to act now to avoid repeating the mistakes of the past. Incarcerated individuals who can be safely released must be released now.<sup>112</sup> While medical isolation and quarantine can and must be used to mitigate the impact of COVID-19 in American prisons, there are simply too many people incarcerated right now to allow for safe and

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App'x. 978 (6th Cir.); *Wilson*, 961 F.3d at 833 (explaining Bureau of Prisons' argument that the PLRA requires exhaustion even in habeas suit).

108. 18 U.S.C. § 3626(a)(3). The three-judge panel can only issue a prison release order if it finds that “(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the federal right.” *Id.* A prison may not be overcrowded but still may be unable to implement social distancing measures. *See, e.g., Cameron*, 462 F. Supp. 3d, at 738.

109. Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1506 (2004) (discussing the conflict between the “culture of judicial deference” in cases involving prison conditions and precedents protecting prisoners' rights).

110. *See UNLOCK THE BOX*, *supra* note 5.

111. *Blakinger*, *supra* note 83.

112. *Merkel & Weinberger*, *supra* note 46.

ethical medical isolation, quarantine, and social distancing.<sup>113</sup> “Unfortunately, the numbers of releases in most jurisdictions to date have been relatively small and woefully insufficient.”<sup>114</sup> We must protect the health and safety of the prison population from the risks of COVID-19 without subjecting incarcerated individuals to further harm by placing them in solitary confinement.

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113. Cloud, *supra* note 48, at 2739. (noting that “overcrowding renders social distancing efforts unlikely to be successful” in American prisons and calling for the immediate release of as many people as possible to ensure for “effective and ethical medical isolation and quarantine”).

114. *Id.*