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WHEN JAIL & PRISON SENTENCES BECOME DEATH SENTENCES: HOW WILLFULLY EXPOSING INCARCERATED PERSONS TO COVID-19 AMOUNTS TO CRUEL & UNUSUAL PUNISHMENT

by Arielle Aboulafia*

I. INTRODUCTION

Eric Warner called his older brother Hank from San Quentin State Prison almost every Sunday.¹ Though the prison only allowed the brothers to speak for fifteen minutes each week, the two spoke about their lives.² In June 2021, Eric stopped calling, and Hank became worried.³ Hank tried to get in touch with the prison. However, his calls were met with a dead-end voicemail each time.⁴ He recalls that he “knew, by not hearing anything, that something was not good.”⁵ The following month, prison personnel returned Hank’s calls and told him that his brother Eric had been hospitalized.⁶ Later that month, the prison called Hank again to tell him that his brother Eric had died after contracting coronavirus while incarcerated at

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1 Jacey Fortin, *Losing a Loved One Twice: First to Prison, Then to Covid*, N.Y. TIMES, (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/covid-prison-inmates-family.html>.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

San Quentin.⁷ Eric Warner was fifty-seven years old.⁸

Incarcerated persons are among the most vulnerable to the risks of the ongoing COVID-19 pandemic.⁹ Accordingly, carceral facilities¹⁰ have an ethical duty to enact robust health and safety measures that adequately prevent the virus’s spread and meaningfully treat individuals when they fall ill. In the United States, carceral facilities also have a legal obligation to incarcerated persons. Specifically, the Eighth Amendment of the United States Constitution provides that incarcerated individuals have the right to be free from cruel and unusual punishment.¹¹

Throughout the pandemic — especially during peak periods — carceral facilities failed to adequately respond to rampant internal COVID-19 outbreaks, thereby exposing incarcerated persons to egregiously unsafe and terminal living conditions; in doing so, carceral facilities violated the Eighth Amendment’s constitutional prohibition on cruel and unusual punishment.¹²

7 *Id.*

8 *Id.*

9 *Covid-19’s Impact on People in Prison*, EQUAL JUST. INITIATIVE (Apr. 16, 2021), <https://eji.org/news/covid-19s-impact-on-people-in-prison/>.

10 The author uses the term “carceral facilities” as a catch-all phrase to describe prisons, jails, and juvenile detention centers within the state and federal systems.

11 U.S. Const. amend. VIII.

12 Kalani Seymore & Shaanth Nanguneri, *Report Finds Systemic Issues Increase COVID-19 Cases in Incarcerated Communities*, DAILY BRUIN (Apr. 10, 2022), <https://dailybruin.com/2022/04/10/report-finds-systemic-issues-increase-covid-19-cases-in-incarcerated-communities> (explaining that while national rates of COVID-19 among non-incarcerated persons are no longer at peak rates, rates among incarcerated persons remain high).

II. BACKGROUND

A. *Mass incarceration and mass exposure to COVID-19*

Overwhelmingly, the United States has the highest rate of incarceration in the world.¹³ While the U.S. population encompasses less than five percent of the global population, it imprisons a quarter of the world's entire prison population.¹⁴ Fueled by an irrational, ineffective, and unsustainable response to crime,¹⁵ the United States imprisons its people at a rate five to ten times higher than other western democracies.¹⁶ Since 1970, the U.S. prison population rose 700 percent.¹⁷

Even before the pandemic, such high rates of incarceration raised severe overcrowding concerns; throughout the pandemic, those concerns increased exponentially.¹⁸ In general, overcrowding in carceral facilities is dangerous because it leads to unsanitary conditions, increased violence among incarcerated persons, and the use of degrading practices like forcing incarcerated individuals to sleep on the floor.¹⁹ In the wake of the pandemic, overcrowding in

¹³ *United States Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/US.html#:~:text=With%20over%20two%20million%20people,1%25%20of%20our%20adult%20population> (last visited Apr. 13, 2022).

¹⁴ *Overcrowding and Overuse of Imprisonment in the United States*, ACLU 1, 1 (May 2015), <https://www.ohchr.org/sites/default/files/Documents/Issues/RuleOfLaw/OverIncarceration/ACLU.pdf>

¹⁵ Alexi Jones, *Reforms Without Results: Why States Should Stop Excluding Violent Offenses from Criminal Justice Reforms*, PRISON POL'Y INST. (Apr. 2020), <https://www.prisonpolicy.org/reports/violence.html>; Ronnie K. Stephens, *Explainer: Incarceration Rates vs. Crime Rates*, INTERROGATING JUST. (May 24, 2021), <https://interrogatingjustice.org/ending-mass-incarceration/explainer-incarceration-rates-vs-crime-rates/>.

¹⁶ *Overcrowding and Overuse of Imprisonment in the United States*, *supra* note 14, at 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Overcrowding and Other Threats to Health and Safety*, ACLU, <https://www.aclu.org/issues/prisoners-rights/cruel-inhuman-and-degrading-conditions/overcrowding-and-other-threats-health#:~:text=Prison%20overcrowding%20leads%20to%20increased,to%20sleep%20on%20the%20floor> (last visited Apr. 13, 2022).

carceral facilities is especially concerning because it makes it more challenging — if not impossible — for facilities to adequately provide necessary medical care, safe living conditions, and other essential services.²⁰

At the end of 2019 — just before the initial global outbreak of COVID-19 — the United States incarcerated roughly 2.1 million people; 1.43 million of whom were under the jurisdiction of federal and state prisons.²¹ During this time, twenty-two state prisons operated at a ninety percent to ninety-nine percent capacity, while ten state prison systems and the entirety of the federal system's Bureau of Prisons (BOP) operated at a capacity of 100 percent or more.²² As a result, when the pandemic hit and the virus entered the overcrowded carceral system, COVID-19 cases among incarcerated persons surged and the virus thrived.²³

B. *The Eighth Amendment Enshrines the Human Right to be Free from Cruel & Unusual Punishment.*

Overcrowded and under-resourced, carceral facilities expose incarcerated persons to COVID-19 and the subsequent risks of severe illness and death at a rate that amounts to cruel and unusual punishment as set forth under the Constitution. Such a rate of exposure to the risk of serious illness and death also violates international human rights law standards.

The Eighth Amendment guarantees an incarcerated person's right to be free from cruel and unusual

²⁰ *Id.*

²¹ John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/>.

²² Ryan Spohn, *State Prison Overcrowding and Capacity Data*, UNIV. NEBRASKA (May 3, 2020), <https://www.unomaha.edu/college-of-public-affairs-and-community-service/governing/stories/state-prison-overcrowding-and-capacity-data.php>; E. Ann Carson, *Prisoners in 2019*, BUREAU OF JUST. STAT. (Oct. 2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf>.

²³ Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, PRISON POL'Y INITIATIVE (Dec. 2020), <https://www.prisonpolicy.org/reports/covidspread.html>.

punishment.²⁴ While what qualifies as “cruel and unusual punishment” is subject to immense legal debate, the Supreme Court has held that “a prison official’s ‘deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment.’”²⁵ In the context of medical health emergencies specifically, the Supreme Court has held that to deny, delay, or intentionally interfere with medical treatment, or fail to follow accepted medical standards and protocols, is to act with deliberate indifference in violation of the Eighth Amendment.²⁶

Further, international law recognizes the right of *any person* to be free from cruel and unusual punishment as a human right.²⁷ The United States is a party to and bound by the International Covenant on Civil and Political Rights (ICCPR) and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Universal Declaration of Human Rights (UDHR) is considered binding as customary international law.²⁸ Both Article 5 of the UDHR and Article 7 of the ICCPR provide that “*no one* shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²⁹ Article 16 of the CAT also seeks to prevent cruel, inhuman, or degrading treatment or punishment, regardless of whether such actions would be

24 U.S. CONST. amend. VIII.

25 *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

26 *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *see also Hernandez v. Cnty. of Monterey*, 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015) (finding that known noncompliance with generally accepted guidelines for inmate health strongly indicates deliberate indifference to a substantial risk of serious harm).

27 International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966 999 U.N.T.S. 171, art. 7 [hereinafter ICCPR] (emphasis added).

28 *Ratification Status for the United States*, UNITED NATIONS, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en (last visited Dec. 17, 2022) (ratifying the ICCPR on June 8, 1992, ratifying the CAT on October 21, 1994); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National & International Law*, 25 GA. J. INT’L & COMP. L. 287, 304-07 (1996) (explaining the U.S. recognizes the UDHR as customary international law).

29 Universal Declaration of Human Rights, Dec. 8, 1948 G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) (emphasis added); ICCPR, art. 7 (emphasis added).

considered torture as defined by the Convention.³⁰ Similarly, numerous individual nations around the world recognize a person’s right to be free from cruel and unusual punishment.³¹

III. LEGAL ANALYSIS

The United States’ reliance on mass incarceration and acceptance of overcrowded carceral systems — particularly during peak periods of the pandemic — implicates constitutional and human rights violations because it has created and sustained life-threatening conditions that amount to cruel and unusual punishment. Specifically, overcrowding in carceral facilities leads to COVID-19 exposure rates over five times that of the general population and mortality rates over three times that of the general population.³²

The U.S. carceral system undoubtedly acted with deliberate indifference to the health and safety of incarcerated persons by failing to adequately respond to high rates of COVID-19 within its systems — a patent violation of the Eighth Amendment. In 1974, the Supreme Court held in *Estelle v. Gamble* that a prison official’s deliberate indifference to the serious medical needs of an incarcerated person amounts to cruel and unusual punishment.³³ To prove deliberate indifference, the Court stated that claimants must prove two elements: 1) that the medical needs of imprisoned persons were objectively and sufficiently serious and 2) that the carceral facility officials knew about and ignored “an excessive risk to [one’s]

30 Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113.

31 Carrie Leonetti, *Comparative Cruelty: A Comparative Analysis of the Eighth Amendment to the United States Constitution & Section Nine of the New Zealand Bill of Rights Act*, 47 HASTINGS CONST. L. Q. 533, 538 (2020).

32 Brendan Saloner, et al., *COVID-19 Cases & Deaths in Federal and State Prisons*, JAMA NETWORK (July 8, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2768249>; Emily Widra, *With Over 2,700 Deaths Behind Bars & Slow Vaccine Acceptance, Prisons & Jails Must Continue to Decarcerate*, PRISON POL’Y INITIATIVE (June 23, 2021), https://www.prisonpolicy.org/blog/2021/06/23/june2021_population/.

33 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

health or safety.”³⁴ Nearly two decades later, the Supreme Court held in *Farmer v. Brennan* that a prison official’s deliberate indifference to a substantial risk of serious harm to an inmate also violates the Eighth Amendment if the official was subjectively aware of the risk at issue.³⁵ Today, *Estelle* and *Farmer* remain two of the seminal cases regarding healthcare protections for incarcerated persons.³⁶

Under the first prong of *Estelle*’s “deliberate indifference” test, there can be no doubt that the COVID-19 virus is objectively and sufficiently serious. For the past two years, the severity of the pandemic has fundamentally altered how people across the globe conduct their daily lives. The severity of the virus, especially during peak periods of the pandemic, was particularly acute for incarcerated people, as evidenced by the rates of contraction, transmission, and death that were far above the rates among non-incarcerated persons.³⁷ Overcrowded facilities simply could not accommodate social distancing guidelines, and alarming shortages of personal protective equipment (PPE) and testing services allowed the virus to overwhelm carceral facilities.³⁸

The standard outlined in *Farmer* and the second prong of *Estelle*’s “deliberate indifference” test is readily satisfied.³⁹ Like the rest of the world, carceral facility officials were aware of the excessive risk COVID-19 posed to one’s health and safety.⁴⁰ Since the onset of the pandemic, the Center for Disease Control (CDC) and the BOP recognized that incarcerated people were uniquely vulnerable

34 See generally *Your Right to Adequate Medical Care Chapter 23*, in A JAILHOUSE LAWYER’S MANUAL 707 (Colum. Hum. Rts. L. Rev. eds., 12th ed. 2020), <http://jlm.law.columbia.edu/files/2017/05/35.-Ch.-23.pdf> (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

35 *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

36 Greg Dober, *Beyond Estelle: Medical Rights for Incarcerated Patients*, PRISON LEGAL NEWS (Nov. 4, 2019), <https://www.prisonlegalnews.org/news/2019/nov/4/beyond-estelle-medical-rights-incarcerated-patients/>.

37 Saloner, et al., *supra* note 32; Widra, *supra* note 32.

38 COVID-19’s Impact on People in Prisons, *supra* note 9.

39 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

40 *Your Right to Adequate Medical Care*, *supra* note 34, at 707.

to COVID-19.⁴¹ Accordingly, the CDC and BOP established broad guidelines to respond to the heightened risk of illness and death that detained persons were subject to.⁴² Despite the establishment of such directives, prison and jail officials largely ignored the excessive risk the virus posed to the health and safety of incarcerated people; behavior that is evidenced by the fact that most state carceral facilities and the federal BOP failed to meaningfully implement even the most straightforward mitigation measures.⁴³

IV. LOOKING FORWARD

A. Recommendations

While the courts have yet to recognize the grave and nearly universal mismanagement of COVID-19 within U.S. carceral systems as an Eighth Amendment violation, the law is clear that such an argument can readily be made. Notably, the lack of accessible data regarding facility non-compliance with CDC and BOP recommendations makes it difficult for plaintiffs to show that carceral facility officials ignore excessive risks to their health and safety. Since such non-compliance data will likely never be available in full, human rights activists and constitutional rights advocates need to continue to demand a showing of successful virus mitigation measures within jails and prisons. Significant measures include decarceration to limit the number of people confined within these high-risk facilities and the regular implementation of sanitation measures such as frequent cleaning and disinfecting initiatives and the distribution of proper

41 *Director’s COVID Messages*, FED. BUREAU OF PRISONS (March 17, 2020), <https://www.bop.gov/foia/docs/DirectorsCOVIDMessages.pdf>.

42 *Federal Bureau of Prisons COVID-19 Action Plan*, FED. BUREAU OF PRISONS (March 13, 2020, 3:09 PM), https://www.bop.gov/resources/news/20200313_covid-19.jsp.

43 Tiana Herring & Maanas Sharma, *States of Emergency: The Failure of Prison System Responses to COVID-19*, PRISON POL’Y INITIATIVE (Sep. 1, 2021), https://www.prisonpolicy.org/reports/states_of_emergency.html (indicating that such measures include a showing of effort to limit the number of people in prisons, reduce infection and death rates behind bars, vaccinate incarcerated persons and staff, and address basic health including mental health needs through easy policy changes).

PPE. Finally, jails and prisons need to make vaccines and boosters readily available to incarcerated persons and be transparent about their vaccination rates among staff.

B. Conclusion

In the United States, a growing group of second-class citizens, locked away and forgotten, are denied fundamental human rights, including the right to be free from cruel and unusual punishment in the pandemic era. However, even before the pandemic, this country's narrow, punishment-driven response to crime created an over-reliance on mass incarceration which subjects incarcerated persons to extreme mistreatment in general. While compliance with COVID-19 mitigation measures will likely improve the health, safety, and general living conditions of incarcerated persons during the pandemic, much more is needed to truly secure the human rights of incarcerated persons and those who commit crimes. To start, the United States must recognize the humanity of incarcerated persons and embrace that such individuals are worthy of dignified living conditions. Moreover, society must reimagine the role of the criminal legal system as one that emphasizes rehabilitation and reintegration over punishment and incarceration.