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(Un)Masking the Truth - The Cruel and Unusual Punishment of Prisoners Amidst the COVID-19 Pandemic

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(UN)MASKING THE TRUTH - THE CRUEL AND UNUSUAL PUNISHMENT OF PRISONERS AMIDST THE COVID-19 PANDEMIC

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I. INTRODUCTION

Andrea Circle Bear was a thirty-year-old mother, serving twenty-six months in prison for drug charges.[1] Bear was also one of at least 2,515 inmates who died from the Coronavirus in a correctional facility by April 9, 2021, as a result of the Bureau of Prisons not taking necessary steps to reduce risk inside the prisons.[2] In fact, Sharon Dolovich, the director of the COVID-19 Behind Bars Data Project, claims that Bear's death, and the other 2,514 deaths did not need to happen; these deaths were a result of the Bureau of Prison's "total

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[1] Clare Hymes, *Federal Prisons Reach Grim Milestone: 100 Inmate Deaths from Coronavirus,* CBS NEWS (July 28, 2020, 8:13 AM), https://www.cbsnews.com/news/coronavirus-100-federal-prison-inmates-covid-deaths.

[2] *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT), https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons, (last visited Apr. 15, 6:00 PM) (The Marshall Project is a nonpartisan, nonprofit news organization that has worked in collaboration with news outlets including the Times, the Washington Post, and the Atlantic, to continuously educate audiences on live statistics within the criminal justice system.)

unwillingness" to take steps to ensure a safe inhabitable environment.[3]

The first purported case of the Coronavirus entering the United States, in the state of Washington, quickly resulted in panic and disarray.[4] While the number of cases climbed rapidly among people in the United States, with over twenty-nine million testing positive for the Coronavirus infection from March 1, 2020 to April 9, 2021, a significant number of incarcerated inmates have contracted the Coronavirus as well.[5] By April 9, 2021, at least 392,565 inmates in prisons in the United States tested positive for the illness.[6] According to the Commissioner of Corrections' estimates, fifty percent of the inmates under the care and control of prisons are either over sixty years of age or have an underlying medical condition that puts them at a heightened risk for a severe case of COVID-19.[7]

Amid the COVID-19 pandemic, various lawsuits claiming violations of prisoners' Eighth Amendment rights were filed against prisons as incarcerated individuals continue to contract the virus at alarming rates.[8]

This Note has seven sections. Section II examines the history of airborne illnesses in prisons. Section III assesses inmates' constitutional rights and what is considered "cruel and unusual punishment" under the Eighth Amendment. Section IV of this Note discusses current prison regulations in place to protect inmates from contracting diseases and the medical treatment prisoners receive. Section V provides an analysis of whether those regulations have been complied with following the Coronavirus outbreak, including a case study of lawsuits filed by inmates against prisons since the start of the pandemic and argues that the medical treatment and prevention regulations have not been met. In Section VI, this Note proposes a solution to the issue and suggests the Supreme Court change the

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[3] Hymes, *supra* note 1.

[4] *First Travel-related Case of 2019 Novel Coronavirus Detected in United* States, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 21, 2020), https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html.

[5] *Pneumonia and Influenza Mortality- A Weekly Surveillance Summary of U.S. COVID-19 Activity*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 9, 2021), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html.

[6] *A State-by-State Look at Coronavirus in Prisons, supra* note 2.

[7] Foster v. Comm'r of Corr., 146 N.E.3d 372, 380 (Mass. 2020).

[8] *See* Stroughten v. Brann, 122 N.Y.S.3d 866 (N.Y. Sup. Ct. 2020).

standard for cruel and unusual punishment in the prison system. This Note argues that prisons are failing to meet health regulations, which constitutes a violation of cruel and unusual punishment under the Eighth Amendment, because the treatment and care of inmates, amidst this global pandemic has demonstrated a deliberate indifference to the lives of prisoners.

II. BACKGROUND ON ILLNESSES WITHIN PRISONS AND ITS EFFECT ON INMATES

The high rate of communicable disease, mental illness, and chronic disease within incarcerated populations dates back, long before the spread of the Coronavirus, to the 1970s.[9] Many cases of infectious diseases, such as sexually transmitted infections, HIV, and hepatitis have escalated in the criminal justice system.[10] When inmates complain of symptoms of these illnesses, it takes multiple complaints for them to even have the chance to speak with a doctor.[11] Perhaps prison guards are skeptical that inmates are faking illnesses to attempt escapes or avoid prison work shifts; regardless, the indifferent attitude towards inmates' complaints is dangerous to the inmates who are actually suffering.[12]

One reason the spread of infectious diseases is so prominent in prisons is because prisons are populated with poor and marginalized groups.[13] For that same reason, inmates tend to bring infectious diseases with them into the prisons.[14] Additionally, "substandard prison conditions" also intensify the risk of disease spreading once the illness enters the prison facility.[15] Some of the most detrimental

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[9] Ank E. Nijhawan, *Infectious Diseases and the Criminal Justice System: A Public Health Perspective*, 352 AM. J. MED. SCI. 399, 399-407 (Oct. 1, 2016) (discussing the dramatic increase in incarceration rates that started around the 1970s).
[10] *Id.*
[11] Alan Greenblatt, *America Has a Health-Care Crisis – in Prisons*, GOVERNING THE FUTURE OF STATES & LOCALITIES (Aug. 2019), https://www.governing.com/archive/gov-prison-health-care.html.
[12] *Id.*
[13] Gen Sander, *Preventing Infectious Diseases in Prisons: A Public Health and Human Rights Imperative*, PENAL REFORM INT'L (Oct. 23, 2015), https://www.penalreform.org/blog/preventing-infectious-diseases-in-prisons-a-public-health.
[14] *Id.*
[15] *Id.*

conditions prison systems face are overcrowding, poor sanitary conditions, and the lack of personal hygiene supplies.[16]

In the early 1970s, the American Medical Association finally acknowledged the issue of inadequate health services in jails.[17] It was not until 1976 when the American Medical Association Jail Program developed the first standards for health services in prisons, and even then, those services were only tested in sixteen jails.[18] It took another twenty years for there to be at least a published set of standards for prisons to follow.[19] In 1999, the National Commission on Correctional Health Care ("NCCHC") published its own standards and guidelines for delivering health services in prisons.[20]

Over the last thirty years, the threat of litigation by inmates against prisons forced correctional institutions to provide, at the very least, a minimum standard of healthcare for prisoners.[21] In response to this threat, accreditation bodies, such as the NCCHC, provided minimum standards to prison-based health systems.[22] However, these minimum standards are not mandatory.[23] Instead, prison health systems can voluntarily choose to follow these minimum guidelines set up by accreditation bodies.[24] In 2020, in the midst of the Coronavirus pandemic, the NCCHC released surveys, online certification testing, and review courses for prisons across the country to complete.[25] Soon after the NCCHC scheduled surveys, it postponed them and suggested that prisons reschedule surveys only if they had concerns about their own facilities.[26] In turn, this allowed prisons continue with their mediocre safety practices.

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[16] *Id.*
[17] *NCCHC Historical Time Line*, NAT'L COMM'N ON CORR. HEALTH CARE, https://www.ncchc.org/time-line (last visited Feb. 5, 2021).
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Nijhawan*, supra* note 9.
[22] Josiah D. Rich et al., *The Need for Higher Standards in Correctional Healthcare to Improve Public Health,* U.S. NAT'L LIBR. OF MED. NAT'L INST. OF HEALTH (Dec. 19, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4371015.
[23] *Id.*
[24] *Id.*
[25] *NCCHC Historical Time Line*, *supra* note 17.
[26] *NCCHC Accreditation*, NAT'L COMM'N ON CORR. HEALTH CARE, https://www.ncchc.org/ncchc-accreditation (last visited Feb. 5, 2021).

III. THE CONSTITUTIONAL PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT

As the rate of Coronavirus cases continues to climb,[27] more lawsuits are being filed by inmates against correctional facilities for not providing adequate medical treatment.[28] Most of these suits raise a claim of cruel and unusual punishment, a violation of an Eighth Amendment right guaranteed under the United States Constitution.[29]

The U.S. Constitution's Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[30] The standard for determining what constitutes an Eighth Amendment violation is "deliberate indifference" to a person's basic human needs.[31] This section continues with a discussion of four essential Supreme Court decisions that further define what constitutes "cruel and unusual punishment."[32]

A. The *Estelle* Decision

The United States Supreme Court first applied the Eighth Amendment to prison conditions in 1976 when it heard the case of *Estelle v. Gamble*.[33] The Court held in *Estelle*[34] that:

> deliberate indifference to a prisoner's serious medical needs constitutes the "unnecessary and wanton infliction of pain," proscribed by the Eighth Amendment. 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 delay-

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[27] *A State-by-State Look at Coronavirus in Prisons, supra* note 2.
[28] *See* Estelle v. Gamble, 429 U.S. 97 (1976); Rhodes v. Chapman, 452 U.S. 337 (1981); Wilson v. Seiter, 501 U.S. 294 (1991); Farmer v. Brennan, 511 U.S. 825 (1994).
[29] U.S. CONST. amend. VIII.
[30] *Id.*
[31] *Gamble*, 429 U.S. 97, 105 (1976).
[32] *See Estelle*, 429 U.S. 97 (1976); *see also Rhodes*, 452 U.S. 337 (1981); *Wilson*, 501 U.S. 294 (1991); *Farmer*, 511 U.S. 825 (1994).
[33] 429 U.S. 97 (1976).
[34] *Id.* at 105.

> ing access to medical care or intentionally interfering with the treatment once prescribed.[35]

Furthermore, in order to state a cognizable claim of medical mistreatment under the Eighth Amendment, a prisoner must "allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[36]

In *Estelle,* respondent, J.W. Gamble, was an inmate of the Texas Department of Corrections who was injured while performing a prison work assignment.[37] He instituted a civil rights action under 42 U.S.C. § 1983 complaining about the inadequate treatment he received following his injury.[38] Among others, Gamble named Dr. Ralph Gray, the medical director of the Department of Corrections and chief medical officer of the prison hospital, in the suit.[39] After being checked in to the unit hospital, Gamble was told he had a hernia and a lower back strain.[40] He was prescribed pain relievers and muscle relaxants and was then sent back to his cell.[41] For the following three weeks, Gamble still felt terrible back pain but was nevertheless forced to begin working again.[42] Due to his lingering injuries, Gamble refused to work.[43] This refusal eventually led to Gamble being called before the prison disciplinary committee which placed Gamble in solitary confinement, without even looking into his medical complaints.[44] While in solitary confinement, Gamble requested to see a doctor for chest pains, "blank outs,"[45] and pain in his left arm,

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[35] *Id.* at 104. (footnotes omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).
[36] *Id.* at 106.
[37] *Id.* at 98-99 ("According to the complaint, Gamble was injured . . . when a bale of cotton fell on him while he was unloading a truck. He continued to work, but after four hours he became stiff and was granted a pass to the unit hospital, where he was checked for a hernia and sent back to his cell.").
[38] *Id.* at 98.
[39] *Id.* at 99.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 100.
[43] *Id.*
[44] *Id.* at 101.
[45] *Blank out something,* CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/blank-out-something (last visited Mar. 11, 2021) (To "blank out" means to forget something. The opinion does not provide examples of "blank outs" that Gamble experienced.).

but his guards refused to call for a doctor for three days.[46] Gamble then filed a lawsuit, claiming that the petitioners had subjected him to cruel and unusual punishment in violation of the Eighth Amendment.[47]

On writ of certiorari, the Supreme Court concluded that deliberate indifference to prisoners' serious medical needs constitutes "unnecessary and wanton infliction of pain."[48] The Court held that despite refusing to call a doctor and treat Gamble when he complained of having pains, the prison doctors were not indifferent to the Gamble's needs and prison guards' did not intentionally deny or delay access to medical care.[49] The Court also noted that such a determination does not mean that wanton infliction of unnecessary pain included all accidents resulting in refusal of a prisoner's medical treatment.[50]

B. The *Rhodes* Decision

The United States Supreme Court added onto its analysis of what constitutes "unnecessary and wanton infliction of pain" five years after *Estelle* when it held in *Rhodes v. Chapman*[51] that "double celling,"[52] which is the policy of assigning two prisoners to the same cell, does not satisfy the high standard set forth in *Estelle* of "unnecessary and wanton infliction of pain" and therefore does not violate the Eighth Amendment.[53] The Court further held that the Constitution "does not mandate comfortable prisons," and only those deprivations denying "the minimal civilized measure of life's necessities"

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[46] *Estelle*, 429 U.S. at 101. Gamble continued to experience pain his left arm, chest, and back three days following his initial doctor consultation. *Id.* When he requested to see a doctor again, the guards refused with no reasoning. Gamble asked again the next day and the guards refused again with no reasoning. *Id.* Finally, on February 9, after asked a third time to see a doctor, the prison guards allowed Gamble to see the doctor Gamble saw previously. *Id.*

[47] *Id.*

[48] *Id.* at 103. (quoting Gregg v. Georgia, 428 U.S. 153 at 173 (1976)).

[49] *Id.* at 104.

[50] *Id.* at 105.

[51] 452 U.S. 337 (1981).

[52] *Id.* at 340; *see also Supreme Court Holds Double Celling Not Unconstitutionally Cruel and Unusual*, PRISON LEGAL NEWS (May 15, 2007), https://www.prisonlegalnews.org/news/2007/may/15/supreme-court-holds-double-celling-not-unconstitutionally-cruel-and-unusual.

[53] *Rhodes*, 452 U.S. at 346.

are sufficiently grave to form the basis of an Eighth Amendment violation.[54]

Respondents, Kelly Chapman and Richard Jaworski, were inmates at the Southern Ohio Correctional Facility, a maximum-security state prison.[55] Respondents, who were being housed together in single cells, brought this action on behalf of all inmates who were similarly situated.[56] Chapman and Jaworski asserted that "double celling" at this prison was a violation of their Eighth Amendment rights, as the double celling confined them too closely, which further exacerbated the existing issue of overcrowding at the prison.[57] Each prison cell measured approximately sixty-three square feet.[58] Within this sixty-three square foot area, each cell had a "two-tiered bunk bed measuring thirty-six by eighty inches, a cabinet-type night stand, a wall-mounted sink with hot and cold running water, and a toilet that the inmate can flush from inside the cell."[59] Each cell also "ha[d] a heating and air circulation vent near the ceiling."[60] The district court recommended that each individual in a correctional institution should have at least fifty to fifty-five square feet of living quarters, which was consistent with the American Correctional Association Manual of Standards for Adult Correctional Institutions.[61] The Supreme Court disregarded the fact that the Ohio Correctional Facility was forcing inmates to double-cell, and even more disturbingly, spend most of their time in their cells with their inmates, going so far as stating "[t]hese general considerations fall far short in themselves of proving cruel and unusual punishment."[62]

Though overcrowding and cramped living conditions in prisons are pressing problems, the critical issue revolves around the lack of resources allocated to prisons.[63] The Court in *Rhodes* pointed out

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[54] *Id.* at 349.
[55] *Id.* at 339.
[56] *Id.*
[57] *Id.* at 339-40.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 341.
[61] *Id.* at 343; *see also* MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS, AM. CORR. ASSN., Standard No. 4142, p. 27 (1977); A HANDBOOK ON JAIL ARCHITECTURE, NAT'L SHERRIFS' ASSN., p. 63 (1975); MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS, NAT'L COUNS. ON CRIME AND DELINQ., p. 4, 10 (1972).
[62] *Rhodes*, 452 U.S. at 348.
[63] *Id.* at 357 (Brennan, J., concurring).

that the average direct expenditure at adult institutions in 1977 was $5,451 per inmate.[64] The average cost of constructing space for an additional prisoner is estimated to be between $25,000 and $50,000.[65] The funding for prisons tends to be considerably below what would be needed to conform with basic constitutional standards.[66] Furthermore, since 1975, "[t]he number of inmates in federal and state correctional facilities has risen 42% percent."[67]

The Court's decision in *Rhodes* turned on whether the deprivation was sufficiently serious to constitute an Eighth Amendment prison violation claim.[68] Ultimately, the Court held that the conditions of confinement at this prison did not constitute cruel and unusual punishment.[69] Even though the extent that such conditions were restrictive, and even harsh, they were also part of the penalty that criminal offenders pay for their offenses against society.[70]

C. The *Wilson* Decision

The United States Supreme Court in *Wilson v. Seiter*[71] applied *Estelle's* "deliberate indifference standard" and held that a prisoner claiming an Eighth Amendment violation must, at a minimum, allege "deliberate indifference" to his or her medical needs.[72] The Court further held that "[w]hether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*."[73]

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[64] *Id.* (quoting Procunier v. Martinez, 416 U.S. 396, 404 (1974)).
[65] *Id.*
[66] *Id.*
[67] *Id.* (citing Krajick, *The Boom Resumes*, 7 Corr. Mag. 16-17 (Apr. 1981); 3 National Institute of Law Enforcement and Criminal Justice, The National Manpower Survey of the Criminal Justice System 13-14 (1978)). Some causes of the rising number of prison inmates include an increasing population, higher crime rates, stiffer sentencing provisions, and more restrictive parole practices. *Id.*
[68] *Rhodes*, 452 U.S. at 348.
[69] *Id.* at 352.
[70] *Id.* at 347.
[71] 501 U.S. 294 (1991).
[72] *Id.* at 297 (citing Estelle v. Gamble, 429 U.S. 97, 106 (1976)).
[73] *Id.* at 303 (quoting *Estelle*, 429 U.S. 97, 105 (1976)).

In *Wilson*, Petitioner, Pearly L. Wilson, was an inmate at the Hocking Correctional Facility in Nelsonville, Ohio.[74] Wilson alleged that the conditions of his confinement constituted cruel and unusual punishment.[75] Specifically, his complaint alleged issues of "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and improper housing with mentally and physically ill inmates."[76]

The Court found it necessary to look to the state of mind of the prison officials to see if there was an Eighth Amendment violation.[77] In order for there to be a violation, the officials' "offending conduct must be wanton."[78] However wantonness does not have a fixed meaning; instead, wantonness is determined based on the different kinds of conduct that the Eighth Amendment was created to combat.[79]

The wantonness of a prison official's conduct depends on the facts of a particular situation.[80] Whether something can be characterized as "wanton" depends upon the constraints facing the official.[81] During a prison disturbance, their "actions are necessarily taken in haste, [and] under pressure."[82] The actions taken during a prison disturbance should balance the safety "of prison staff or other inmates."[83] Moreover, based on the *Whitley* standard, a prison is liable for their officials' actions if they acted "maliciously and sadistically for the very purpose of causing harm."[84] Mere negligence does not satisfy *Estelle's* "deliberate indifference" standard.[85]

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[74] *Id.* at 296.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 302.
[78] *Id.*
[79] *Id.* ("[The] offending conduct must be wanton . . . however, that in this context wantonness does not have a fixed meaning but must be determined with 'due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.'" (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986))).
[80] *Id.*
[81] *Id.* at 303.
[82] *Id.* at 302.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 305.

The Court further analyzed how to determine the intent of prison officials.[86] An intent requirement is generally "either implicit in the word 'punishment' or it is not."[87] If the pain inflicted by the prison official is not formally given out as a punishment, consistent with statutory law or the sentencing judge's orders, some "mental element" must be attributed to the inflicting officer.[88] The Court did not explicitly say what is required to meet this "mental element" or whether the mental element requirement is synonymous with intent; however, longer durations of cruel prison conditions may make it easier to establish knowledge and, therefore, some form of intent.[89]

D. The *Farmer* Decision

In *Farmer v. Brennan*,[90] the Supreme Court further defined the phrase "deliberate indifference."[91] The petitioner, Dee Farmer, sued federal prison officials asserting a violation of the Eighth Amendment through the prison's "deliberate indifference to the petitioner's safety."[92] Dee Farmer was serving a prison sentence for credit card fraud.[93] Farmer identified as a transexual female.[94] Prior to being incarcerated, she sought medical treatment, including hormonal therapy and surgery, to obtain a permanent sex change.[95] While in prison, Farmer was housed with male inmates and at times was also kept in segregation, kept separate from all other inmates.[96] She was allegedly beaten and raped by fellow inmates in her own cell.[97] Farmer reported the incident to prison officials, and several days later she was returned to the same prison cell.[98] The Bureau of Prisons' medical personnel believed her sexual identification was a

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[86] *Id.* at 300.
[87] *Id.* at 301.
[88] *Id.* at 300.
[89] *Id.* (citing Canton v. Harris, 489 U.S. 378, 390). Simply because a long duration of a cruel prison condition may make it easier to establish intent, the requirement of intent should not therefore evaporate. *Id.*
[90] 511 U.S. 825 (1994).
[91] *Id.* at 825.
[92] *Id.* at 829.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 830.
[97] *Id.*
[98] *Id.*

"rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex" and ignored her request to be separated from these inmates.[99] Farmer filed a suit in federal district court, seeking damages and an injunction barring future confinement in any penitentiary, and alleged that the respondents acted with "deliberate indifference" to Farmer's safety in violation of her Eighth Amendment rights.[100]

The Court held that the Constitution does not permit inhumane prisons, and moreover, that "the treatment prisoners receive in prison and the conditions under which they are confined are both subject to scrutiny under the Eighth Amendment."[101] The Court further explained that a prison official is not responsible for an Eighth Amendment violation unless two elements are met.[102] First, the official must know of and disregard the health or safety dangers to the inmate.[103] Second, the official must be both aware of facts "from which an inference could be drawn" based on the dangers presented to the inmate as well as draw that inference.[104] Even though the Supreme Court acknowledged that inmates were treated inhumanely, the Court still held that the prison officials could not be liable under the Eighth Amendment for acting with "deliberate indifference" to Farmer's safety because the intent requirement was not satisfied.[105]

E. The Supreme Court's Standard in a Nutshell

Under the *Estelle* standard, a prisoner must provide evidence of actions or omissions that are deliberately indifferent to serious medical requirements for a medical mistreatment claim under the Eighth Amendment.[106] It does not matter whether prison officials are indifferent in their response to prisoners' needs; simply put, deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain."[107] The Court followed this precedent in *Wilson* where it narrowed the definition of "cruel

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[99] *Id.* at 829.
[100] *Id.* at 828.
[101] *Id.* at 832 (quoting Helling v. McKinney, 509 U.S. 25, 31 (1993)).
[102] *Id.* at 837.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] Estelle v. Gamble, 429 U.S. 97, 106 (1976).
[107] *Id.* at 103.

and unusual" punishment regarding prisoner treatment as "wanton" depending upon the constraints facing the prison official.[108] The Court made it more difficult here to satisfy the standard of cruel and unusual punishment, by suggesting that in order for a prison guard and the prison itself to be treating inmates unconstitutionally, the behavior must meet the high threshold standard of "malicious" and "sadistic."[109]

The district court in *Rhodes* emphasized that forcing inmates to be housed in such drastically close quarters was dangerous, especially since prisoners spend a large amount of time in their cells.[110] Though the district court found these conditions at the prison facility to constitute cruel and unusual punishment, the Supreme Court disagreed, finding these conditions were insufficient to meet an Eighth Amendment violation.[111] The *Wilson* decision likewise held that longer durations of cruel prison conditions are more likely to serve as evidence of intent to punish.[112] However, the Court in *Rhodes* should have found that cruel and unusual punishment was present. Amidst the Coronavirus pandemic, inmates now spend an average of three hours each day out of their prison cells.[113] This means that inmates are confined to their cells for about twenty-one hours per day.[114]

Each of the Supreme Court cases discussed in Sections III(A)-(D) came before the onset of the Coronavirus pandemic. Courts are now attempting to apply the same standard they used in earlier cases, the "deliberate indifference standard," to the novel issues presented by the COVID-19 pandemic. This is problematic because the issues presented by the pandemic evidently show a need for more care for inmates' health. For example, the *Rhodes* decision, stating that "double celling" does not constitute deliberate indifference, would be addressed differently during a pandemic.[115] If the Supreme Court were presented with such an issue during the COVID-19 pandemic, forcing inmates to be housed in such close quarters would likely con-

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[108] Wilson v. Seiter, 501 U.S. 294, 300 (1991).
[109] *Id.*
[110] *Rhodes*, 452 U.S. at 341.
[111] *Id.* at 352.
[112] *Wilson*, 501 U.S. at 300.
[113] *Time out of Cell Increases to 3 Hours Per Day,* INSIDETIME: THE NAT'L NEWSPAPER FOR PRISONERS & DETAINEES (Dec. 11, 2020), https://insidetime.org/time-out-of-cell-increases-to-three-hours-per-day.
[114] *Id.*
[115] Rhodes v. Chapman, 452 U.S. 337, 340 (1981).

stitute cruel and unusual punishment. Even under the narrow standard the Court has set, "double celling" would arguably be "malicious" and "sadistic," because it would (1) prevent prisoners from following social distancing guidelines and (2) significantly increase the risk of spreading disease.[116]

IV. CURRENT REGULATIONS IN PLACE IN PRISONS

A. Standards Before COVID-19

The NCCHC provides the framework to ensure that confinement facilities have systems, policies, and procedures in place to produce "the best outcomes in the most cost-efficient" way.[117] The NCCHC is a national organization that was created to improve the quality of health care in prisons and other confinement facilities.[118] It also runs a voluntary accreditation program for confinement facilities.[119] These guidelines were developed by healthcare practitioners as well as experts in law and corrections.[120] They generally reference the Centers for Disease Control and Prevention ("CDC") guidelines regarding how to operate with various diseases including sexually transmitted diseases, asthma, diabetes, and tuberculosis.[121] In March of 2020, this framework included a section dedicated to COVID-19 guidelines for correctional facilities.[122] However, since this is just a suggested guideline for prisons to follow, essential decisions about the allocation of resources are made at a systemic level.[123] This is problematic because it not only relieves stress on adhering to federal policies, it also allows prisons to follow less stringent standards than they should.[124]

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[116] *Id.*
[117] *Federal Clinical Guidelines,* NAT'L COMM'N ON CORR. HEALTH CARE, https://www.ncchc.org/standards (last visited Jan. 15, 2021).
[118] *About Us,* NAT'L COMM'N ON CORR. HEALTH CARE, https://www.ncchc.org/about (last visited Jan. 15, 2021).
[119] *Id.*
[120] *NCCHC Historical Time Line*, *supra* note 17.
[121] *Id.*
[122] *Id.*
[123] Rich et al., *supra* note 22.
[124] *Guidance for Correctional & Detention Facilities*, CTR. FOR DISEASE CONTROL & PREVENTION (July 22, 2020), https://www.ncchc.org/COVID-Resources.

Correctional facilities currently restrict access to soap and paper towels and prohibit alcohol-based hand sanitizer and many disinfectants.[125] Social distancing options within correctional and detention settings are also limited due to crowded living conditions.[126]

B. Additional Standards as a Result of COVID-19

The CDC released guidelines for correctional and detention facilities in three sections: Operational Preparedness, Prevention, and Management of COVID-19.[127] The "Management" section is intended to help facilities clinically manage those with confirmed and suspected COVID-19 inside the facility and prevent further transmission of the virus.[128] According to this protocol, individuals suspected of having COVID-19 inside a correctional facility, including incarcerated persons, staff, and visitors who recently came inside, are to be placed under medical isolation.[129] Anyone suspected to have the virus or confirmed to have the virus should be quarantined and given necessary medical care.[130]

C. Impact of Valentine v. Collier

The Court of Appeals for the Fifth Circuit held in *Valentine v. Collier*[131] that prison officials were required to immediately implement more drastic preventative measures, beyond what was suggested by the CDC guidelines.[132] The plaintiffs were two inmates at the Texas Department of Criminal Justice Wallace Pack Unit, a prison specifically for the elderly and the infirm.[133] They filed a class action lawsuit on behalf of other inmates at the prison, alleging that the Texas Department of Criminal Justice violated their Eighth Amendment rights.[134] The district court granted a preliminary injunction to

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[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] 956 F.3d 797 (5th Cir. 2020).
[132] *Id.* at 803.
[133] *Id.*at 799.
[134] *Id.*

implement more health and safety measures for the inmates finding it likely that the plaintiffs could prove such a violation.[135]

The district court determined that it was crucial for the Texas Department of Criminal Justice to follow various guidelines to protect their inmates who were already at a higher risk of contracting the Coronavirus.[136] For example, the correctional facility was ordered to provide plaintiffs and the other class members with unrestricted access to: hand soap and disposable hand towels, hand sanitizer containing at least 60% alcohol, tissues, additional toilet paper above the normal allotment, cleaning supplies, masks, and education on the COVID-19 pandemic.[137]

The district court acknowledged that the measures ordered in the preliminary injunction "largely overlap with [Texas Department of Criminal Justice's] COVID-19 policy and requirements and recommendations."[138] However, the district court found it was urgent to promote compliance with the Texas Department of Criminal Justice's policy recommendations to allow unrestricted access to soap, paper towels, hand sanitizers, and other hygiene supplies, as well as the CDC's regulations.[139] Additionally, the district court noted that compliance with these guidelines alone could still be considered constitutionally insufficient.[140]

Alternatively, the appellate court found that the plaintiffs lacked evidence of defendants' subjective deliberate indifference to the risk of inmates contracting Coronavirus.[141] The Fifth Circuit held that mere disagreement with the prison's medical decisions were insufficient to establish deliberate indifference.[142] Ultimately, the circuit court ignored the district court's urge to require the correctional facility to implement more drastic guidelines in order to minimize the spread of the virus.[143]

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[135] *Id.*
[136] *Id.*
[137] *Id.* at 800.
[138] *Id.* at 801.
[139] *Id.*
[140] *Id.*
[141] *Id.* at 802.
[142] *Id.*
[143] *Id.* at 801.

D. Lack of Prevention Standards and Guidelines

The government released large numbers of inmates who were more susceptible to COVID-19 into the public, as an initial response to the rise in Coronavirus cases within prisons.[144] Non-inmates believe this mass release is a public safety concern.[145] For example, Judge Brendan J. Sheehan, the administrative and presiding judge of the Cuyahoga County Common Pleas Court, responded to concerns from the public that releasing inmates may introduce more violence and increase crime rates.[146] Judge Sheehan explained that it is crucial to "protect the public, [but] also to protect the safety of the inmate."[147] He further assured that only inmates accused of nonviolent crimes would be eligible for release.[148]

Beyond releasing inmates who are more vulnerable to the virus because of health deficits, there has not been a substantial effort to prevent the virus from spreading in correctional facilities. There is still much to do to make prisons safe for inmates to live in.[149] Instead of making proactive changes, prisons are only attempting to respond once inmates contract the virus; from the beginning, minimal measures were taken to prevent the virus from spreading.[150] In most prisons, prisoners cannot just choose to visit an emergency room; they, instead, have to go to the prison guards with this request, which is often times a huge obstacle.[151] Moreover, a vast majority of prisons do not have hospitals within the prison facility.[152] Also, the "ratio of clinical staff to prisoners is extremely low," which results in less care for inmates than non-inmates.[153] The lack of appropriate clinical care is amplified during the pandemic because prisoners can

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[144] *Responses to the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE (Mar. 26, 2021), https://www.prisonpolicy.org/virus/virusresponse.html.
[145] Timothy Williams, '*Jails are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, N.Y. TIMES (May 20, 2020), https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Responses to the COVID-19 Pandemic*, *supra* note 144.
[150] *Id.*
[151] Talha Burki, *Prisons Are "In No Way Equipped" to Deal with COVID-19*, 385 THE LANCET – WORLD REP., no. 10234, at 1411-12 (May 2, 2020).
[152] *Id.*
[153] *Id.*

only be treated for COVID-19 by transfers to "external medical care."[154]

According to the Federal Bureau of Prison's Modified Operations, in addition to screening and testing inmates, temperature checks and COVID-19 screenings are regularly conducted for staff, contractors, and other visitors to correctional institutions.[155] The Federal Bureau of Prisons also claims to be incorporating every CDC-recommended precaution into new visiting procedures.[156] The Bureau explained that it implemented social distancing guidelines by limiting inmates' movements.[157] Such measures are promising in theory, however they are not being enforced.

V. HAVE CORRECTIONAL FACILITIES COMPLIED WITH EXISTING COVID-19 PREVENTION STANDARDS?

As previously discussed,[158] the Fifth Circuit Court of Appeals held in *Valentine* that, while there was no Eighth Amendment violation, the prison needed to be more stringent in its standards in order to comply with CDC guidelines.[159] Furthermore, many lower courts held that correctional facilities have not complied with regulations that prevent COVID-19 from spreading within the prison walls.[160] This section will specifically examine state courts in New York because of the abundant litigation that has ensued within the state since the onset of the pandemic. In fact, New York was severely hit at the onset of the pandemic, quickly becoming known as the epicenter of the Coronavirus.[161]

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[154] *Id.*

[155] *BOP Modified Operation,* FED. BUREAU OF PRISONS (Oct. 8, 2020) https://www.bop.gov/coronavirus/covid19_status.jsp.

[156] *Id.*

[157] *Id.*

[158] *See supra* Section IV(C).

[159] *See* Valentine v. Collier*,* 956 F.3d 797, 801 (5th Cir. 2020).

[160] *See generally Ex rel.* Gregor v. Reynolds*,* 124 N.Y.S.3d 118 (N.Y. Supp. Ct. 2020).

[161] Eric Levenson, *Why New York is the Epicenter of the American Coronavirus Outbreak,* CNN (Mar. 26, 2020, 4:49 PM), https://www.cnn.com/2020/03/26/us/new-york-coronavirus-explainer/index.html. (It is important to take note that the state of New York follows a different hierarchical court system, where the trial courts are known as the "Supreme Courts," and fall below New York Court of Appeals, which is the highest court in the state.).

As of December 21, 2020, prisons were operating at 75% or more capacity, while the Federal Bureau of Prisons continues to operate at 100% capacity.[162] Even before the pandemic, prison overcrowding was a serious problem, which has been correlated with increased lack of adequate health care.[163] As discussed in Section IV(D),[164] one response to the issue of overcrowding was the idea of releasing inmates.[165] However, even as prison populations slowly decreased in response to the pandemic, prisons have insufficient space to allow for adequate social distancing.[166] This is a result of prisons not being designed to handle an international pandemic, which was a problem already evident before Coronavirus entered the prison system, based on the high rates of several other infectious diseases existing in prisons.[167]

A. Federal Court

i. Marlowe v. Leblanc

The District Court for the Middle District of Louisiana concluded in *Marlowe v. Leblanc*[168] that the Rayburn Correctional Center ("RCC") was not following its own policy statements aimed at preventing the spread of Coronavirus.[169] Plaintiff, a prisoner detained at the defendant's correctional institution, filed suit initially in 2018.[170] In his complaint, the prisoner alleged that officers exhibited deliberate indifference towards Plaintiff's medical needs by providing a constitutionally deficient meal service.[171] These meals resulted in the plaintiff allegedly developing diabetes, and subsequently, prison officials failed to adequately treat his illness.[172] After a telephonic

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[162] Emily Widra, *Just How Overcrowded Were Prisons Before the Pandemic, and At This Time of Social Distancing, How Overcrowded Are They Now?* PRISON POL'Y INITIATIVE (Dec. 21, 2020), https://www.prisonpolicy.org/blog/2020/12/21/overcrowding.
[163] *Id.*
[164] *See supra* Section IV(D).
[165] *Responses to the COVID-19 Pandemic, supra* note 144.
[166] Widra, *supra* note 165.
[167] *Responses to the COVID-19 Pandemic, supra* note 144.
[168] 810 Fed. Appx. 302, 304 (5th Cir. 2020) (per curiam).
[169] *Id.* at 304.
[170] *Id.*
[171] *Id.*
[172] *Id.* at 303.

evidentiary hearing in April of 2020, the correctional facility submitted a memorandum updating the court about the procedures it was taking to contain the spread of COVID-19.[173] Plaintiff responded to these procedures and suggested that, in lieu of temporary release, a request he was previously denied, the court could order the prison to create conditions that would better allow for proper social distancing in order to protect him.[174]

The district court held that,

> despite taking some steps to deter the spread of the virus, [the Rayburn Correctional Center] had not effectively implemented the Department of Correction policies that require staff members and orderlies to wear masks and other personal protective equipment to protect the prison population, including the Plaintiff.[175]

The court further determined that RCC "failed to meaningfully implement social-distancing procedures and other measures aimed at thwarting the spread of the [C]oronavirus." Unfortunately, the Fifth Circuit disagreed with the District Court and granted the motion to stay the preliminary injunction which required the prison to comply with their own internal policies and implement social distancing and hygiene practices.[176]

ii. George v. Diaz

The United States District Court for the Northern District of California, reviewed a prisoner's civil rights action, alleging cruel and unusual punishment in *George v. Diaz*[177] in December of 2020. This prisoner, Joseph Anthony George, sued the Secretary of the California Department of Corrections and Rehabilitation, claiming that COVID-19 had become widespread in the California prison system as a result of inmate transfers not being stopped after the virus had already entered the prisons.[178] George, along with other inmates at

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[173] *Id.*
[174] *Id.*
[175] *Id.* at 304.
[176] *Id.* at 305.
[177] No. 20-cv-03244-SI, 2020 U.S. Dist. LEXIS 153581 (N.D. Cal. Aug. 24, 2020).
[178] *Id.* at *2.

Pelican Bay Correctional Facility, argued that all the COVID-19 hotspots were being concealed from inmates.[179] At the time this complaint had been filed, at least 25 inmates and staff members had died from the virus at Pelican Bay prison alone.[180]

George suffered from heart disease and other serious medical conditions.[181] He reportedly made a request to be given a face mask for himself, as well as requested that others in the prison wear masks.[182] The court referred to the same standard set forth in *Farmer*, discussed earlier in Section III (D), stating that in order to establish an Eighth Amendment claim, a prisoner must show "an objectively, sufficiently serious, deprivation, and [that] the official was, subjectively deliberately indifferent to the inmate's health or safety."[183]

However, the court simply took judicial notice as to the standards and "plans" to address COVID-19 in the prison, rather than addressing and questioning whether the prison was even following such standards.[184] Moreover, because George failed to meet the standard of deliberate indifference by the specific defendants named, Diaz, the Secretary of the correctional facility, Clark Kelso, the Director of Medical Services in California, Bill Woods, the Chief Medical Officer at Pelican Bay, and Xavier Becerra, the California Attorney General, his claim was dismissed.[185] Such a standard, as solely looking at the plan a prison claims it intends to follow, rather than analyzing and addressing whether it has even abided by the plan is proof that most courts have little regard for the wellbeing of inmates.[186]

iii. Young v. Ledet

The United States District Court for the Eastern District of Louisiana also heard a case regarding the treatment of inmates in one of its prisons, and yet again dismissed the inmates' claims, but this

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[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.* at *7 (citing Farmer v. Brennan, 511 U.S. 825, 834 (1994)).
[184] *Id.* at *8.
[185] *Id.* at *2.
[186] *Id.* at 9-11.

time as being "frivolous."[187] Forty-one inmates filed suit against defendant Warden Rhonda Ledet.[188] The complaint alleged that the defendant along with other named prison officials failed to implement policies, provide personal protection equipment, and clean and sanitize the jail to help prevent the spread of COVID-19.[189] More specifically, they claimed that inmates were not provided cleaning chemicals, paper towels, disinfectant, hand sanitizer, or masks and that the jail officials did not "regularly monitor inmates' temperatures and test for the virus."[190]

The court responded to these complaints, stating that "[a] true jail condition case starts with the assumption that the State intended to cause the pretrial detainee's alleged constitutional deprivation."[191] However, the court explained that the plaintiffs did not meet their burden of proof because the existence of diseases and infections cannot imply unconstitutional confinement conditions, further acknowledging the "densely populated residence" are already subject to such outbreaks.[192] This court made an even stricter ruling than other courts, holding that an inmate challenging jail conditions must demonstrate "a pervasive pattern of serious deficiencies in providing for basic human needs; any lesser showing cannot prove punishment in violation of the detainee's Due Process rights."[193]

One key issue in this case was the naming of Gordon Dove, president of the correctional facility, as one of the defendants.[194] The court held that the inmates failed to prove the president of the correctional facility played a direct role in the conditions of the prison, nevertheless acknowledging the poor conditions and the president's role in financing, physical maintenance, and appointing or contracting with health care providers to tend to the medical needs of the inmates.[195] The court's decision here is troubling. By naming plaintiffs' claims

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[187] No. 20-2165 SECTION "J"(2), 2021 U.S. Dist. LEXIS 39485 at *56 (E.D. La. Jan. 15, 2021).
[188] *Id.* at *3.
[189] *Id.* at *4.
[190] *Id.* at *4-5.
[191] *Id.* at *35.
[192] *Id.* at *37.
[193] *Id.*
[194] *Id.* at *38.
[195] *Id.* at *39.

"frivolous,"[196] the court diminished the importance of the health needs of inmates and set a dangerous precedent moving forward.[197]

B. New York State Courts Find There are Not Enough Prevention Standards

i. Gregor v. Reynolds

The New York Supreme Court of Essex County held in *Gregor v. Reynolds*[198] that there was a failure to take adequate steps to ensure inmates' reasonable safety; moreover, that failure to take adequate protective measures was a violation of these inmates' due process rights.[199] Plaintiffs, two inmates at the Essex County Jail, alleged that the design and operation of the facility prevented inmates from "engaging in social distancing and maintaining adequate levels of preventative hygiene."[200] Inmates typically decided whether to engage in social distancing so they could not control the actions and movements of other people in the jail.[201]

By not requiring all individuals within the jail, including inmates and staff, to socially distance, the facility did not lower the risk of infection.[202] The court found that the most important measures to minimize risks to prisoners was not taken.[203] Social distancing is among the best practices recommended by the CDC to reduce the risk of spreading the virus.[204] Mitigating the risk of infection was not impossible however; the court determined that crowded jails have taken measures such as "staggering meal and recreation times to limit the number of inmates present" at one time and more strictly require inmates to socially distance.[205]

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[196] *Id.*
[197] *Id.*
[198] 67 Misc. 3d 662 (N.Y. Sup. Ct. 2020).
[199] *Id.* at 670.
[200] *Id.* at 664.
[201] *Id.*
[202] *Id.* at 667.
[203] *Id.*
[204] *Id.*
[205] *Id.*

ii. Stoughton v. Brann

The Supreme Court of New York County held in *Stoughton v. Brann*[206] that COVID-19 created life-threatening conditions that endangered detainees' reasonable sense of safety and that the officials at the Rikers Island Prison failed to take reasonable care to mitigate risks posed by the pandemic.[207]

This court stated that "the health of prison inmates is the business of governments [that] incarcerate them,"[208] and "it has long been settled that the United States Constitution requires the government to provide effective medical care for inmates".[209] Petitioners, thirty-two inmates at the Rikers Island prison, demanded release on due process grounds with concerns regarding the COVID-19 pandemic.[210] The New York Supreme Court determined that, based on the conditions at Rikers Island, the inmates' right to due process was violated and the prisoners should be afforded a remedy.[211] Some of the conditions the court pointed to in making that determination included the facility being crowded, the use of communal dining rooms, the method of serving food to inmates, and the conditions of where inmates resided.[212] With respect to where inmates were being housed, they resided in barracks-style dormitories, where they shared sinks, showers, and toilets.[213] Even more noteworthy, the spaces were so cramped that inmates were physically unable to stay far enough from their fellow prisoners to be safe from the risk of contagion, regardless of prison officials "advising" inmates to socially distance.[214] These conditions produced spikes in the virus; at the time the court released its opinion, 231 prisoners and 223 staff members at Rikers Island prison had tested positive for the virus.[215]

The court here conceded that no American prison, including Rikers Island, is equipped to deal with a health crisis of this severi-

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[206] 122 N.Y.S.3d 866 (N.Y. Sup. Ct. 2020).
[207] *Id.* at 872.
[208] *Id.* at 868.
[209] *Id.* at 869.
[210] *Id.* at 868.
[211] *Id.* at 872.
[212] *Id.* at 870.
[213] *Id.*
[214] *Id.*
[215] *Id.* at 871.

ty.[216] Even though Rikers has medical facilities, it is not a hospital; moreover, even fully equipped hospitals face challenges during this pandemic.[217] However, due process requires that prison officials take reasonable measures to protect inmates and mitigate COVID-19 risks; it does not, and should not, excuse prison officials, who mean well but have no effective way to protect inmates from potentially fatal pandemics.[218] The escalating numbers of infected inmates, as well as the inevitable truth that eighteen prisoners had to be released for the sake of health, showed what Rikers had done was not effective.[219]

VI. WHAT IS THE SOLUTION?

The current "standards" in place for prisons regarding protecting the health of inmates amidst the Coronavirus pandemic is, if anything, an idle reactive effort. These standards and guidelines set by the NCCHC are not even mandatory and only serve as mere suggestions for prisons to implement within their prison walls.[220]

Courts today rely on the holding in *Estelle v. Gamble*, a case decided in 1976, to determine whether inmate treatment during the Coronavirus pandemic amounts to cruel and unusual punishment.[221] The "deliberate indifference" rule that came out of that decision was not designed for an extraordinary situation such as the Coronavirus pandemic because the courts and prison systems never accounted for a world-wide pandemic. The Supreme Court set a very high bar by deciding the standard would be "deliberate indifference," and the imposition of that high of a standard is exactly what has allowed prison facilities to continue acting in such a reactive manner. The Supreme Court followed that initial decision in *Estelle* with its decision in *Rhodes*, where it even acknowledged that the standard was harsh, but

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[216] *Id.* at 872.
[217] *Id.* at 872.
[218] *Id.*
[219] *Id.*
[220] Josiah D. Rich et al., *The Need for Higher Standards in Correctional Healthcare to Improve Public Health,* U.S. NAT'L LIBR. OF MED. NAT'L INST. OF HEALTH (Dec. 19, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4371015.
[221] Milad Haghani & Michiel C. J. Bliemer, *Covid-19 Pandemic and the Unprecedented Mobilisation of Scholarly Efforts Prompted by a Health Crisis: Scientometric Comparisons Across SARS, MERS and 2019-nCoV Literature,* US NAT'L LIBR. OF MED. NAT'L INST. OF HEALTH, (Sep. 21, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7505229.

nevertheless allowed the prison some leeway simply because inmates are criminal offenders who must pay for their offenses against society.[222] Is this to say criminal offenders have less of a right to adequate health care? In its attempt to give a more distinct meaning to the "deliberate indifference" standard, the Supreme Court narrowed the standard in both *Wilson* and *Farmer*, by including the requirement that prison officials "intend" to cause harm to the inmates.[223]

The standard must be changed in light of the COVID-19 pandemic and should remain even after the pandemic ceases to exist. In order for the NCCHC to implement stricter guidelines, the Court must revise the standard to encompass not only *intent* of prison officials to commit harm, but also the *inattentiveness* of prison officials to prisoner's health needs. Once the Court sets an example by issuing a new standard for prisons to meet, the NCCHC should set guidelines and measures for prisons to proactively handle infectious diseases within their walls. Prisons would be more inclined to follow stricter standards and pay attention to inmates' concerns to avoid potential litigation.

One way courts should attempt to revisit the standard for neglect is to look at the standards in place for neglect in a school setting.[224] In the context of neglect in a school, "[n]eglect involves the caregiver's inattention to the basic needs of a child, such as food, clothing, shelter, medical care, and supervision."[225] Educators take on this role of "caregiver" by becoming responsible for the livelihood of their students throughout the school day.[226] Just like a school's duty to its students is to educate, while caring for their wellbeing, correctional facility's duty to inmates is to rehabilitate and deter further criminal acts, while maintaining a safe environment.[227]

It is crucial for prisons to care for the health needs of their inmates. Not only do inmates have a due process right to adequate healthcare, correctional healthcare systems have a significant impact

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[222] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).
[223] Wilson v. Seiter, 501 U.S. 294, 300 (1991).
[224] Cynthia Crosson-Tower, THE ROLE OF EDUCATORS IN PREVENTING AND RESPONDING TO CHILD ABUSE AND NEGLECT, CHILD ABUSE AND NEGLECT USER MANUAL SERIES, (2003) https://www.childwelfare.gov/pubPDFs/educator.pdf.
[225] *Id.* at 16.
[226] *Id.*
[227] *Id.*

on non-inmate individuals and the community at large.[228] According to a study by the Prison Policy Initiative, "mass incarceration contributed to more than a half million cases inside and outside correctional facilities over the summer of 2020."[229] Locking up millions of inmates in overcrowded and unsanitary conditions is harmful not only for those locked up, but for people outside prisons as well.[230] A better healthcare system within the walls of prisons can produce lasting health benefits for inmates, former inmates, and everyone outside the prison walls.[231]

VII. CONCLUSION

There is no simple solution to avoid a health crisis like the Coronavirus pandemic. However, a lack of social distancing, unsanitary conditions, and overcrowding can be controlled with a broader standard of what constitutes cruel and unusual punishment in prisons. Although the court system serves as the body of interpreting the Constitution and applying the law to facts, it is inevitable that its decisions serve as goals for people to attain. Specifically, bodies who set even voluntary guidelines, like the NCCHC and prisons themselves, will be more inclined to pay attention to the health needs of inmates' and set standards themselves to avoid the spread of infectious diseases. As the number of complaints of cruel and unusual punishment against prison officials continues to climb amidst the Coronavirus pandemic, it is crucial that the courts begin to open their eyes and broaden the impossible to meet standard, so as to protect the right inmates have to health care and safety. No person should fear for his or her life each day as a result of the carelessness to basic human needs.

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[228] Josiah D. Rich et al., *The Need for Higher Standards in Correctional Healthcare to Improve Public Health,* U.S. NAT'L LIBR. OF MED. NAT'L INST. OF HEALTH (Dec. 19, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4371015.
[229] Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread,* PRISON POL'Y (Dec. 2020), https://www.prisonpolicy.org/reports/covidspread.html.
[230] *Id.*
[231] *Id.*