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Death by Virus: Why the Prison Litigation Reform Act Should Be Suspended

James Allen Smith, a retired teacher, was serving only a six-month sentence when he was killed by COVID-19 in a Texas prison. Although releasing inmates is key to avoiding COVID-19 outbreaks, the governor of Texas has rejected early-release. Nicolas Andres Sanchez, 28, died of COVID-19 at the same prison, while serving three years for failing to report his location to his probation officer. Without early-release, and without measures to prevent the spread of COVID-19, serving time in prison has become a death sentence; one that inmates cannot appeal or challenge.

The COVID-19 pandemic is an unprecedented disaster that is rapidly moving through the prison system. COVID-19 cases have been soaring in federal and state prisons alike, at much higher rates than the public. Ample resources have been allocated to prisons to deal with the crisis, but to no avail. The prison system refuses to adapt and aggressively implement measures to save lives. Even so, little attention has been paid to the crisis, as inmates are an unsympathetic demographic to the public. The only way for inmates to be heard is through the court system, where they encounter roadblocks that cannot be overcome.

This is largely due to the Prison Litigation Reform Act of 1996. Court cases brought by inmates have plummeted, because the act makes it incredibly difficult to successfully bring a case.¹ The Prison Litigation Reform Act also restricts the courts' ability to change or reform prison policy.² This is especially pertinent now, as quick reforms are needed, but the court often does not have the authority to order significant change.

Congress must pass an emergency bill suspending the Prison Litigation Reform Act until the pandemic is over. This may seem extreme, and perhaps unrealistic to many. Criminal justice reform advocates and experts in prison policy have laid out plans for quicker and less dramatic changes, that could have easily been implemented in the months since the pandemic began.³ However, the prison system has been unwilling to adapt, even after being given over 100 million dollars of aid under the CARES Act and the directive to utilize the early release powers that Congress and Attorney General Barr have given.⁴ The directives thus far have read as timid suggestions. With thousands of lives on the line, this will not be enough.

At San Quentin State Prison, researchers had offered free testing for several months, as well as guidelines to slow the spread of COVID-19.⁵ These guidelines were ignored, even when

¹ Meredith Booker, 20 Years is Enough: Time to Repeal the Prison Litigation Reform Act, Prison Policy Initiative (May 5, 2016), https://www.prisonpolicy.org/blog/2016/05/05/20years_plra/.

² *Ibid.*

³ Peter Wagner & Emily Widra, No Need to Wait for Pandemics: The Public Health Case for Criminal Justice Reform, Prison Policy Initiative (March 6, 2020), <https://www.prisonpolicy.org/blog/2020/03/06/pandemic/>.

⁴ How Will the CARES Act Impact Prisons and Jails?, Prison Fellowship, (2020),

<https://www.prisonfellowship.org/2020/04/how-will-the-cares-act-impact-prisons-and-jails/>.

⁵ Amy Maxmen, California's San Quentin Prison Declined Free Coronavirus Tests and Urgent Advice-Now It has a Massive Outbreak, Nature (July 7, 2020), <https://www.nature.com/articles/d41586-020-02042-9>.

lawsuits were brought to have the governor mandate the prison.⁶ The court denied the order, and the prison continued to ignore the guidelines, now resulting in more than one-third of inmates testing positive for COVID-19.⁷ Morality is moot in the prison system; the pandemic has illustrated the disposability of inmate lives. Suspending the Prison Litigation Reform Act is not a first step; it is a last-ditch effort to save the lives of inmates. Countless reasonable guidelines have been given to prisons, and have been updated as the pandemic progresses, and still the prison system refuses to adapt.

The time for “reasonable” measures was in March, at the beginning of the pandemic. As of July 10, 2020, there have been 57,019 inmates who have tested positive for COVID-19, and 651 deaths.⁸ Federal prisons report the highest number at 98 deaths.⁹ These are conservative numbers, as the number of positive cases depends on the number of inmates being tested.¹⁰ The Federal Bureau of Prisons, along with fifteen other prison systems, will not release data on how many inmates have been tested.¹¹

Advocates have attempted to recommend reasonable solutions. But the prison system, as well as the government, is not motivated to help inmates or institute changes. The prison industrial system was built to imprison as many people as possible, and to release inmates early simply goes against their nature. Compromise has been attempted and has failed, and tens of thousands of lives are on the line. Suspending the Prison Litigation Reform Act may have been extreme for “regular” times, in which even simple political issues caused government shutdowns, filibustering, and stalemates. But push has finally come to shove, and what used to be considered extreme is now necessary.

Furthermore, the current administration does not prioritize the wellbeing of the inmates. The Justice Department has asked Congress to pass a bill allowing people to be detained indefinitely during times of emergency, and for judges to be able to order the suspension of criminal proceedings.¹² Although unlikely to be passed, the Department of Justice is pushing for a restriction of rights and more government power during a crisis.¹³ This is an extremely disturbing request, as the Justice Department is attempting to capitalize on the current pandemic to not only compromise the rights of Americans, but to further increase their risk of contracting COVID-19 due to indefinite detainment. In contrast, suspending the Prison Litigation Reform

⁶ Amy Maxmen, California’s San Quentin Prison Declined Free Coronavirus Tests and Urgent Advice-Now It has a Massive Outbreak, Nature (July 7, 2020), <https://www.nature.com/articles/d41586-020-02042-9>.

⁷ *Ibid.*

⁸ The Marshall Project, A State-by-State Look at Coronavirus in Prisons, The Marshall Project (July 10, 2020), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons#prisoner-cases>.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Betsy Swan, DOJ Seeks New Emergency Powers Amid Coronavirus Pandemic, Politico (March 21, 2020), <https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023>.

¹³ *Ibid.*

Act does not call any constitutional rights into question. It does not affect the government's powers either; it merely reopens the channels that inmates have used to take cases to court.

Negligence and Abuse at the Hands of the Government

The Prison Litigation Reform Act makes it near impossible for inmates to seek legal recourse, which is especially detrimental during the COVID-19 pandemic. The bill was created to prevent unnecessary lawsuits from inmates.¹⁴ It did so successfully, while also decreasing access to remedies for any and all inmates.¹⁵ The Prison Litigation Reform Act states that in order to bring a case to court, "exhaustion of administrative remedies is required."¹⁶ Cases brought by inmates are often thrown out for failure to meet this requirement, which is complicated and often requires strict deadlines.¹⁷

Multiple COVID-related lawsuits have already faced this obstacle. In *Gunn v. Edwards*, the plaintiffs argued that since COVID-19 is an imminent risk, expecting the plaintiffs to wait until all administrative remedies have been exhausted is unreasonable and life threatening. Although true, the court ruled that there was no legal support for this argument, as the Prison Litigation Reform Act does not discuss any exceptions to the requirements.¹⁸ Unless the Prison Litigation Reform Act is temporarily suspended due to the COVID-19 pandemic, inmates will not be able to circumvent the exhaustion requirement, which greatly delays the legal process. The Prison Litigation Reform Act has restrained inmates from being able to bring valid complaints, and leaves them without a remedy whilst outbreaks spread through the prison system.

Suspension of this act does seem like an extreme measure, but the consequences of continuing the current handling of the prison system has a much higher cost. Inmates are contracting COVID-19 at extremely high rates, and have attempted complaints and lawsuits. Many are unable to access their public defenders or counselors, due to limited phone time and the cancelling of all in-person activities.¹⁹ Without a mechanism to be heard, people are forced to resort to more extreme tactics such as hunger strikes, like on Rikers Island in March.²⁰ This is a slippery slope, particularly as frustration grows throughout the United States over the government's inaction during the pandemic. Suppressing the complaints of inmates and sitting by while they contract COVID-19 is a ticking time bomb, one the government cannot afford to deal with when pandemic-related issues are exploding everywhere.

¹⁴ *Ibid.*

¹⁵ Margo Schlanger, Trends in Prison Litigation as the PLRA Enters Adulthood, 5 UCI L.J. 153, 162 (2015).

¹⁶ Prison Litigation Reform Act of 1995, S.866, 104th Cong. (1995).

¹⁷ Margo Schlanger, Trends in Prison Litigation as the PLRA Enters Adulthood, 5 UCI L.J. 153, 162 (2015).

¹⁸ *Ibid.*

¹⁹ Alleen Brown, Inside Rikers: An Account of the Virus-Stricken Jail From a Man Who Managed to Get Out, The Intercept (April 21, 2020), <https://theintercept.com/2020/04/21/coronavirus-rikers-island-jail-nyc/>.

²⁰ *Ibid.*

Torture as a Means to Protect

Though the prison system has generally ignored the recommendations of prison experts, who have encouraged early-release, many prisons have instead resorted to solitary confinement as a means to quarantine inmates. Solitary confinement, particularly for extended periods of time, can cause severe emotional and mental trauma. However, the Prison Litigation Reform Act prohibits lawsuits regarding mental or emotional harm.²¹ At least 146,000 inmates have been put in isolation to slow the spread of COVID-19.²² This is disturbing, not only because inmates have done no harm to cause such harsh treatment, but also because solitary confinement for more than fifteen days has been defined as torture by the United Nations.²³ Currently, inmates are being put in solitary confinement for much longer periods of time, through no fault of their own. In a prison in Otisville, inmates were in solitary confinement for over a month.²⁴ They are put back in solitary confinement anytime another inmate tests positive for COVID-19.²⁵ Their lives depend on something completely out of their control, and though prisons may argue they are protecting inmates from the physical threat of COVID-19, they are at the same time, deliberately subjecting them to irreparable mental harm. Solitary confinement is proven to cause many detrimental effects to inmates, such as depression, panic attacks, paranoia, and even hallucinations.²⁶ It is a legalized form of torture, being recklessly used in prisons across the country, but once again, because of the Prison Litigation Reform Act, inmates cannot bring suit. It is just another punishment thrust upon them, for which they have no control over.

No Justice for the Average Inmate

Imagine facing unspeakable abuses in prison: no medical care while dying of COVID-19, alone and afraid; sharing close quarters with someone who is COVID-positive, but unable to secure early release; physical abuse by guards, with no public defender to contact. Litigation is, at this point, the only hope inmates have. But not only is the process of getting there difficult, so is the price. The Prison Litigation Reform Act requires that inmates pay their own court fees as

²¹ Meredith Booker, 20 Years is Enough: Time to Repeal the Prison Litigation Reform Act, Prison Policy Initiative (May 5, 2016), https://www.prisonpolicy.org/blog/2016/05/05/20years_plra/.

²² Jean Casella & Katie Quandt, Prisons' Use of Solitary Confinement Explodes with the COVID-19 Pandemic, While Advocates Push for Alternatives, Solitary Watch (April 10, 2020), <https://solitarywatch.org/2020/04/10/prisons-use-of-solitary-confinement-explodes-with-the-covid-19-pandemic-while-advocates-push-for-alternatives/>.

²³ Walter Pavlo, Bureau of Prisons Using Solitary Confinement As a Means to Curb Covid-19 Contagion, Forbes (July 16, 2020), <https://www.forbes.com/sites/walterpavlo/2020/07/16/bureau-of-prisons-using-solitary-confinement-as-a-means-to-curb-covid-19-contagion/#5190cb93193a>.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Sadie Dingfelder, Psychologist Testifies on the Risks of Solitary Confinement, American Psychological Association, 10 (October 2012), <https://www.apa.org/monitor/2012/10/solitary>.

well as their representation.²⁷ Most inmates cannot afford to bring cases to court, and most attorneys will not take prison-related cases.²⁸ Attorneys have no incentive to take prison cases, particularly in times of nationwide economic hardship, because the Prison Litigation Reform Act severely limits how much of the attorney's litigation costs the court will pay for, even when the inmate wins.²⁹ This is particularly detrimental during the pandemic, as inmates need legal representation to advocate for them, and are left with little to no guidance. Not only must they figure out the complicated bureaucratic process of exhausting all administrative remedies, but also how to bring their cases to court, as well as afford the process. In 2012, only 5% of inmates that made it to court were represented by attorneys.³⁰ With the Prison Litigation Reform Act in place, the amount of obstacles inmates face effectively shut them out of the courtroom, with only around ten inmates per one thousand filing in court.³¹ With around 57,000 inmates testing positive for COVID-19, inmates have little hope for representation or relief from the abuses they face.³²

Need for Accountability

The negligence and inaction of the Federal Bureau of Prisons highlights the need for accountability in the prison system more than ever before. The prison system has little motivation to adapt quickly and prioritize inmates, particularly when consequences are few and rare. By suspending the Prison Litigation Reform Act, the means to hold prisons accountable would become much more accessible, particularly through lawsuits addressing the prison system's gross negligence.

The Federal Bureau of Prisons did not handle the pandemic in an efficient nor timely manner. The first COVID-19 case in the United States was reported on January 20, 2020.³³ It was not until March 6, 2020, that the Bureau of Prisons even began to assess each prison's PPE inventory.³⁴ By this point, the disease was widespread, and PPE was essential to slowing it down. In places like Texas, prison officials had already been asking for N-95 masks as well as other protective gear to prepare for disaster like this.³⁵ Although a state spokesman said that 100,000 N-95 masks have gone out to prisons, correctional officers say they have not been

²⁷ Prison Litigation Reform Act of 1995, S.866, 104th Cong. (1995).

²⁸ Meredith Booker, 20 Years is Enough: Time to Repeal the Prison Litigation Reform Act, Prison Policy Initiative (May 5, 2016), https://www.prisonpolicy.org/blog/2016/05/05/20years_plra/.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Margo Schlanger, Trends in Prison Litigation as the PLRA Enters Adulthood, 5 UCI L.J. 153, 159 (2015).

³² The Marshall Project, A State-by-State Look at Coronavirus in Prisons, The Marshall Project (July 10, 2020), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons#prisoner-cases>.

³³ Mike Baker, When Did the Coronavirus Arrive in the US?, New York Times (May 15, 2020), <https://www.nytimes.com/2020/05/15/us/coronavirus-first-case-snohomish-antibodies.html>.

³⁴ Federal Bureau of Prisons, A BOP COVID-19 Overview, Federal Bureau of Prisons, https://www.bop.gov/coronavirus/overview.jsp#bop_emergency_response.

³⁵ *Ibid.*

permitted to use the protective equipment.³⁶ Prison officials have reported having to use cloth masks, even though they are interacting with large numbers of COVID-infected inmates, who also do not have access to masks.³⁷ The prison's actions indicate that they designate PPE only for the people they believe matter, like high ranking prison officials, but not inmates or prison guards. Inmates themselves are making masks and hand sanitizer because no one else is going to protect them. The Federal Bureau of Prisons knew the pandemic was coming, and also knew how easily prisons could be impacted. They had the chance to stock up on supplies and help prevent outbreaks from occurring, but instead chose to wait until the damage was already done.

Some may argue that these are outliers, and that most prisons have dealt with the pandemic comprehensively. Not according to the Prison Policy Initiative, which graded each state's response to the pandemic based on factors such as reduction of prison population, adequate testing and personal protective equipment supply, and availability of data.³⁸ Every single state was given a failing grade, with the highest being a D minus.³⁹ Although prisons knew this threat was emerging, they took little to no action to prevent the spread until widespread outbreaks hit. By this time, with the overpopulation of prisons, it was ultimately catastrophic. This complete disregard for the health of inmates is illustrated perfectly in the San Quentin State Prison outbreak, where a reported one-third of inmates have COVID-19 after the prison declined free COVID-19 testing.⁴⁰ At Lompoc Federal Prison, nearly seventy percent of prisoners tested positive for COVID-19.⁴¹

No coincidence nor bad luck caused these devastating outbreaks. It was the negligence of the Federal Bureau of Prisons and prison industry that caused this. Inmates have attested to horrible conditions, as well as negligence by the prison staff.⁴² In a correctional facility in Indiana, many inmates have reported that despite the prison's statement, infected inmates repeatedly sought medical attention to no avail.⁴³ One inmate was sick for a week and a half, and needed to be transported using a wheelchair.⁴⁴ The staff told him he just needed water and rest, and after repeating that he could not breathe, he was finally put on oxygen.⁴⁵ He died five hours

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Emily Widra & Dylan Hayre, Failing Grades: States' Responses to COVID-19 in Jails & Prisons, Prison Policy Initiative (June 25, 2020), https://www.prisonpolicy.org/reports/failing_grades.html.

³⁹ *Ibid.*

⁴⁰ Amy Maxmen, California's San Quentin Prison Declined Free Coronavirus Tests and Urgent Advice-Now It has a Massive Outbreak, Nature (July 7, 2020), <https://www.nature.com/articles/d41586-020-02042-9>.

⁴¹ CBS SF Bay Area, Nearly 70 Percent of Inmates at Central Coast Federal Prison Test Positive for COVID-19, CBS (May 9, 2020), <https://sanfrancisco.cbslocal.com/2020/05/09/coronavirus-lompoc-outbreak-prisons-covid-santa-barbara/>.

⁴² Jake Harper, As COVID-19 Cuts Deadly Path Through Indiana Prisons, Inmates Say Symptoms Ignored, NPR (May 26, 2020), <https://www.npr.org/sections/health-shots/2020/05/26/861223677/as-covid-19-cuts-deadly-path-through-indiana-prisons-inmates-say-symptoms-ignore>

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

later.⁴⁶ His suffering could have been prevented, but he was not heard, and he never will be. No prison will be held accountable for his death, and no inmates will be able to prevent the same fate for themselves. This is not an uncommon story, but there has been no accountability for the staff nor the prisons themselves. The Prison Litigation Reform Act assured that.

Some attorneys and inmates have attempted to take COVID-related prison suits to court.⁴⁷ In Washington D.C., inmates have filed a class action lawsuit alleging that the prisons did not provide free hand soap and only allowed staff to use hand sanitizer.⁴⁸ Whether these cases will be heard in a court of law remains to be seen, however, multiple COVID-related cases have already been decided in favor of the government due to the Prison Litigation Reform Act. In *Money v. Pritzker*, *Swain v. Junior*, and multiple other recent cases regarding prison conditions, the defendant prisons invoked the jurisdiction defense that the plaintiffs had not exhausted the administrative remedies.⁴⁹ The courts ruled they did not have the authority to order the plaintiffs' release, nor did the plaintiffs fulfill the requirements of the Prison Litigation Reform Act.⁵⁰ During the pandemic, the Prison Litigation Reform Act ensures that the majority of inmates have no avenue for legal recourse for these preventable situations. In order to ensure fair and equal rulings, the bill must be suspended.

Americans entrust a jury of their peers to decide their fate in the courtroom, and in turn, their peers entrust the custody of inmates to the government. The government has betrayed that trust and yet will face no consequences because inmates are such a vulnerable and marginalized population. Without suspending the Prison Litigation Reform Act and allowing inmates a right to recourse, no one will be held responsible for the gross ineptitude that led to 86,639 COVID-19 cases in the prison system (as of August 4).⁵¹

Reparations for the Racism of Early Release

Advocating for the suspension of the Prison Litigation Reform Act, prior to the summer of 2020, may have been seen as political suicide. Defending and advocating for the rights of inmates does not come with many supporters, as inmates are not a particularly sympathetic demographic. However, the tide of politics is controlled by the public, and right now, there has been a tsunami of support for racial reparations to government institutions. George Floyd's death has sparked one of the largest movements in the history of the United States, and has changed the

⁴⁶ *Ibid.*

⁴⁷ Luke Barr, Federal Prisons Facing Shortages of Resources Amid Coronavirus Outbreak, ABC News (April 1, 2020), <https://abcnews.go.com/Health/federal-prisons-facing-shortages-resources-amid-coronavirus-outbreak/story?id=69920966>.

⁴⁸ Minyvonne Burke, Inmates in Washington, D.C., Sue Over Coronavirus Fears, Claim Staff Not Taking Precautions, NBC News (April 1, 2020), <https://www.nbcnews.com/news/us-news/inmates-washington-d-c-sue-over-coronavirus-fears-claim-staff-n1174386>.

⁴⁹ *Hallinan v. Scarantino*, U.S. Dist. LEXIS 103409 (2020).

⁵⁰ *Ibid.*

⁵¹ The Marshall Project, A State-by-State Look at Coronavirus in Prisons, The Marshall Project (July 10, 2020), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons#prisoner-cases>.

public's view on the Black Lives Matter movement almost overnight. Radical racial remedies were not accepted in the past; the strategy was slow and steady progress. This summer, the message was clear: the public has reached its boiling point. Since June 2020, use-of-force guidelines have been updated, police budgets have been cut, things that have been the status quo for decades are being critiqued and reformed. There is clear momentum, and as eyes turn to the prison system, also referred to as "the New Jim Crow,"⁵² many are ready for radical change. Suspending the Prison Litigation Reform Act would clear a path for real reform that has been a long time coming.

Mass incarceration and the overpopulation of prisons already disproportionately affects people of color, and the prison system's COVID-19 response continues this trend. Suspension of the Prison Litigation Reform Act would allow inmates of color to correct some of the biases of the government's pandemic response. Currently, one of the methods of handling the prison outbreaks has been early release, in order to depopulate the overcrowded prisons.⁵³ For state prisoners, early release has extremely narrow criteria.⁵⁴ To be eligible, prisoners must have less than a year remaining on their sentence and must not have been convicted of a Class 1 felony or sex offense.⁵⁵ Furthermore, inmates must show they have a home to go back to, have a good time earning level, and be determined as medium or low risk using the COMPAS algorithm.⁵⁶

The issue with this criteria is twofold. By requiring inmates to have a home or a plan for a stable place to live, inmates who are of a higher socioeconomic class are at an advantage. The COVID-19 pandemic is life-threatening, and those who cannot meet these requirements will not be released. For those who do not have a stable background or people on the outside they can rely on, this could be the difference between life or death. People of color in prison, in particular Black men, are more likely to be of a lower socioeconomic class than their white counterparts, thus disproportionately affecting the number that are able to be released.⁵⁷

The main issue, however, is the COMPAS algorithm. The algorithm uses a questionnaire filled out by the inmate to determine whether they are low-risk, medium-risk, or at high-risk of recidivism.⁵⁸ The COMPAS algorithm asks questions about who the inmate was raised by, whether he grew up in a single parent household, whether his parents have been incarcerated or had drug or alcohol issues, and whether his friends have been in gangs, used drugs, or been

⁵² June Christian, [A Conversation with Michelle Alexander](https://www.tolerance.org/magazine/fall-2014/a-conversation-with-michelle-alexander), Teaching Tolerance (2014), <https://www.tolerance.org/magazine/fall-2014/a-conversation-with-michelle-alexander>.

⁵³ Prison Policy Initiative, [Responses to the COVID-19 Pandemic](https://www.prisonpolicy.org/virus/virusresponse.html), Prison Policy Initiative (July 14, 2020), <https://www.prisonpolicy.org/virus/virusresponse.html>.

⁵⁴ <https://vadoc.virginia.gov/media/1506/vadoc-covid19-early-release-plan.pdf>

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Eli Day, [The Race Gap in US Prisons is Glaring, and Poverty is Making it Worse](https://www.motherjones.com/crime-justice/2018/02/the-race-gap-in-u-s-prisons-is-glaring-and-poverty-is-making-it-worse/), Mother Jones (February 2, 2018), <https://www.motherjones.com/crime-justice/2018/02/the-race-gap-in-u-s-prisons-is-glaring-and-poverty-is-making-it-worse/>

⁵⁸ Jeff Larson & Surya Mattu, et. al., [How We Analyzed the COMPAS Recidivism Algorithm](https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm#:~:text=The%20COMPAS%20violent%20recidivism%20score,years%20after%20they%20were%20scored), ProPublica (May 23, 2016), <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm#:~:text=The%20COMPAS%20violent%20recidivism%20score,years%20after%20they%20were%20scored>

incarcerated.⁵⁹ It also uses questions such as how often the inmate has moved, whether he has a stable family life to go back to, education, past work, and criminal attitudes.⁶⁰

Although the company that created the algorithm does not reveal how these answers are all weighed to create the score, they all have a part in determining the recidivism risk level.⁶¹ A number of these questions depend on socioeconomic status as well as the community the inmate grew up in.⁶² Communities of color, particularly Black communities, are overpoliced and underfunded. Education, past work experience, incarceration of friends and family, all are hugely reliant on zip code and skin color. By using these factors to help determine recidivism rates, the algorithm may be “colorblind” on its face, but it disproportionately affects the Black community. This is illustrated in a ProPublica study, where researchers found that the algorithm is more likely to incorrectly classify a black inmate as higher risk than a white inmate.⁶³ COMPAS scored black inmates who did not recidivate as nearly twice as likely to be higher risk than their white counterparts.⁶⁴

For federal prisons, the First Step Act is used to determine early release. The First Step Act was passed in 2018,⁶⁵ in order to help curb mass incarceration and depopulate the prison system.⁶⁶ However, before April 2, 2020, only 144 inmates nationwide were released due to the First Step Act.⁶⁷ The PATTERN algorithm, which is used to determine the recidivism risk of the inmate, is similar to the COMPAS algorithm in that it is “colorblind” on its face, but produces discrepancies between races.⁶⁸ The algorithm has not been independently reviewed nor fully

⁵⁹ Julia Angwin, Risk Assessment, ProPublica (May 23, 2016),

<https://www.documentcloud.org/documents/2702103-Sample-Risk-Assessment-COMPAS-CORE.html>.

⁶⁰ *Ibid.*

⁶¹ Jeff Larson, Surya Mattu, Lauren Kirchner, Julia Angwin, How We Analyzed the COMPAS Recidivism Algorithm,

ProPublica (May 23, 2016), <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm#:~:text=The%20COMPAS%20violent%20recidivism%20score,years%20after%20they%20were%20scored>

⁶² Julia Angwin, Risk Assessment, ProPublica (May 23, 2016),

<https://www.documentcloud.org/documents/2702103-Sample-Risk-Assessment-COMPAS-CORE.html>.

⁶³ Jeff Larson, Surya Mattu, Lauren Kirchner, Julia Angwin, How We Analyzed the COMPAS Recidivism Algorithm,

ProPublica (May 23, 2016), <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm#:~:text=The%20COMPAS%20violent%20recidivism%20score,years%20after%20they%20were%20scored>

⁶⁴ *Ibid.*

⁶⁵ Joseph Neff & Keri Blakinger, Few Federal Prisoners Released Under COVID-19 Emergency Policies (April 25, 2020), <https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies>.

⁶⁶ Office of the Attorney General, U.S. DOJ, The First Step Act of 2018 (July 19, 2019),

https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf

⁶⁷ Joseph Neff & Keri Blakinger, Few Federal Prisoners Released Under COVID-19 Emergency Policies (April 25, 2020), <https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies>.

⁶⁸ Eli Hager, How Bill Barr’s COVID-19 Prisoner Release Plan Could Favor White People (March 28, 2020),

<https://www.themarshallproject.org/2020/03/28/how-bill-barr-s-covid-19-prisoner-release-plan-could-favor-white-people>.

tested, but is used to determine the futures of inmates during the pandemic.⁶⁹ The PATTERN algorithm uses certain factors such as age of first crime and education to determine recidivism risk scores for prisoners.⁷⁰ Because of the over policing of Black and brown communities, Black men are more likely to be arrested at younger ages, although committing similar rates of crime to whites.⁷¹

Both algorithms have been statistically proven to be biased against people of color, and thus deny people of color equal protection under the law. People of color are less likely to qualify for early release to escape the dangers of COVID-19 in the prison system. Although the data shows these disparities, inmates of color have no way of changing how their release is determined. Because of the Prison Litigation Reform Act, civil rights lawsuits are difficult to file and difficult to find representation for. With the pandemic sweeping through the prison system, for those who are older or have pre-existing conditions, early release is their only chance. Without the suspension of the Prison Litigation Reform Act, inmates of color have little chance for change and little chance of getting out of COVID-19 hotspots.

A World Without the Prison Litigation Reform Act

Suspension of the Prison Litigation Reform Act could allow courts the ability to make necessary reforms quickly, as well as give policymakers insight into how prison litigation could look if the act was repealed. As the issues of mass incarceration and systemic racism move to the forefront, the prison system is being scrutinized heavily. Acts such as the Prison Litigation Reform Act have been criticized by many, with even the American Bar Association calling for reform.⁷² The American Bar Association recommended that the physical harm requirement be repealed, as well as the filing fee requirements.⁷³ It also recommended that the inmates be given a longer period of time to exhaust the administrative requirements, rather than the limited and subjective amount of time they currently have.⁷⁴ With all the adjustments that would have to be made to the bill, and time being of the essence, suspending the act until the pandemic ends would be the most effective solution.

The Prison Litigation Reform Act was not reviewed in-depth by Congress, instead it was inserted and approved as part of a larger bill.⁷⁵ This is particularly concerning when considering the detrimental effects of this bill, and how little forethought was put into the potential

⁶⁹ *Ibid.*

⁷⁰ <https://apps.urban.org/features/risk-assessment/>

⁷¹ Betsy Pearl, *Ending the War on Drugs: By the Numbers* (June 27, 2018), <https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers/>.

⁷² David Reutter, *ABA Recommends Congress Repeal Portions of the PLRA*, Prison Legal News, <https://www.prisonlegalnews.org/news/2007/may/15/aba-recommends-congress-repeal-portions-of-plra/>.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

consequences, which are being illustrated currently. Although the creators of the bill advocated for it as a way to tackle frivolous lawsuits, before the act was even passed, inmate lawsuits were already decreasing.⁷⁶ At its highest, there were still only around thirty lawsuits per 1,000 inmates.⁷⁷ Some may argue that despite the detrimental effects, suspending the Prison Litigation Reform Act is still too extreme a measure, particularly when the consequences of doing so have not been properly vetted. However, the act itself was passed without thorough inspection into the consequences for countless inmates. Suspending the act has the potential to save hundreds, to possibly thousands, of lives.

By suspending this act temporarily, policymakers will be able to see how effectively the courts could be used when inmates are allowed to be heard, and how much faster change could occur. In many cases being brought to court currently, judges have criticized the Federal Bureau of Prisons for their sluggish and delayed response to a rapidly deteriorating situation.⁷⁸ Bureaucracy has caused a slowdown in many institutions' responses to the COVID-19 pandemic, and lives have been lost because of it. By suspending this act, the channels to the courts would finally be unblocked and inmates would have a path to recourse and reform.

Allowing inmates a right to recourse can also help directly tackle issues of mass incarceration that the COVID-19 pandemic has exacerbated. Overcrowded prisons were already an issue, as was the aftermath of the War on Drugs.⁷⁹ By allowing the inmates the right to come to court, and the courts to order early releases, distancing, and more resources to be invested into prisons, many reforms that prisons already needed can finally occur. Prison reform, although a bipartisan talking point, has been stalled. The First Step Act, passed in 2018, was supposed to address this issue and depopulate the prison system.⁸⁰ However, prior to the COVID-19 pandemic, only 144 inmates nationwide were released.⁸¹ Legislation itself has not been able to make an impactful difference, but allowing inmates to sue for relief finally push real change. During the pandemic, politicians on both sides of the aisle, along with Attorney General Barr, and prison reform advocates have all pushed early-release as the quickest solution to the crisis in the prison system. However, the prison ultimately has the control to release however many inmates they want to, and have chosen to do so slowly and inefficiently. By taking these cases to court, inmates could obtain early release that they should have been entitled to much earlier. Suspending the Prison Litigation Reform Act would be an effective first step to unclog the gears and move towards real, lasting prison reform.

⁷⁶ Margo Schlanger, Trends in Prison Litigation as the PLRA Enters Adulthood, 5 UCI L.J. 153, 162 (2015).

⁷⁷ *Ibid.*

⁷⁸ Josh Gerstein, Judge Rips Feds Over Prison Quarantine Policies, Politico (April 20, 2020),

<https://www.politico.com/news/2020/04/20/judge-quarantine-prison-196656>.

⁷⁹ Andrea Caumont, Chart of the Week: The Problem of Prison Overcrowding, Pew Research Center (August 2, 2013), <https://www.pewresearch.org/fact-tank/2013/08/02/chart-of-the-week-the-problem-of-prison-overcrowding/>.

⁸⁰ Joseph Neff & Keri Blakinger, Few Federal Prisoners Released Under COVID-19 Emergency Policies (April 25, 2020), <https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies>.

⁸¹ *Ibid.*

This may feel like an impossibly unrealistic task, but in 2019, no one would have thought the United States would be rocked by a pandemic that has brought both the economy and major institutions to their knees. Measures that would previously be considered extreme or unrealistic are already being enacted. President Trump has already suspended entry of “Immigrants Who Present a Risk to the United States Labor Market” in response to the COVID-19 pandemic.⁸² This is a huge blow to immigrants and businesses alike, and will have a significant effect on the future of the economy. Some might argue that suspending the Prison Litigation Reform Act is different and more complicated, as it would require an increase in litigation when the court is already backlogged. However, an increase in cases will put pressure on the court system to enact widespread change, which in turn puts pressure on the prison system, as they are at the root of the issue. Countless less complicated reforms have already been advocated for, but the prison system has no incentive to listen unless they are being directly ordered by the court or the legislature. Suspending the Prison Litigation Reform Act would give the courts that tool.

In 2006, the federal government was able to suspend one of Americans’ core rights by declaring it necessary for public safety in a time of crisis. In 2020, suspending the Prison Litigation Reform Act is essential for public safety in the prison crisis. Extreme situations call for extreme measures, such as Congress has already been passing. For the Prison Litigation Reform Act to be suspended, Congress would have to act. In times of unanticipated emergency, such 9/11 and the War on Terror, the government has passed legislation that has suspended federal law. In 2006, citing public safety and a threat to the Constitution, President Bush suspended habeas corpus rights for those considered “enemy combatants.”⁸³ Habeas corpus rights are a cornerstone of American democracy, and yet the Congress wrote a bill that allowed its suspension in a time of crisis.⁸⁴ Although controversial, it was not seen as unrealistic because it was with the purpose of tackling terrorism and preventing another 9/11. This pandemic is a time of unanticipated emergency like never before, with a body count over fifty times higher than 9/11. Suspending the Prison Litigation Reform Act does not compromise the rights of Americans like the suspension of habeas corpus. It allows Americans due process in a court of law, and the hope for remedies after the abuses they have faced in the prison system.

Now is the time for breaking the usual norms and taking extreme actions. In the field of healthcare, some federal telehealth laws have been waived due to the pandemic.⁸⁵ The CARE package that Congress passed was one of the largest aid packages ever passed by Congress, in a record amount of time. In times of crisis, radical change is critical to save lives and adapt to

⁸² Donald J. Trump, Proclamation Suspending Entry of Aliens Who Present a Risk to the Labor Market Following the Coronavirus Outbreak, White House (June 22, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-aliens-present-risk-u-s-labor-market-following-coronavirus-outbreak/>.

⁸³ Robert Longley, Why Bush and Lincoln Both Suspended Habeas Corpus, ThoughtCo. (January 16, 2020), <https://www.thoughtco.com/bush-lincoln-both-suspended-habeas-corpus-3321847#:~:text=On%20Oct.%2017%2C%202006%2C,the%20Global%20War%20on%20Terror.>

⁸⁴ *Ibid.*

⁸⁵ FPM Editors, Three Federal Telehealth Rules That No Longer Apply During the Pandemic, FPM (March 23, 2020), https://www.aafp.org/journals/fpm/blogs/inpractice/entry/telehealth_rules_waived.html.

unprecedented situations. Normal does not exist anymore, and deviating from the status quo is what allows progress to be made.

Temporary suspension of the Prison Litigation Reform Act must be included in the next pandemic-related relief bill. Most Congressmen would have no motive to enact such a controversial bill in normal times, however, along with the pandemic, this summer has been a reckoning for racial relations in America. The public is closely scrutinizing the policy decisions of politicians more than ever before, particularly in issues that affect people of color, such as mass incarceration. Current events and context must be taken into account when thinking about the suspension of the Prison Litigation Reform Act. With the pandemic, a controversial administration, and the Black Lives Matter movement, 2020 has become a perfect storm; an environment fit for more radical policy changes, particularly because the norm has not been working. As America's institutions crumble, this is the time to take extreme chances, not only to save lives, but to build up a stronger, more just system for all.

Although the pandemic is exacerbating the abuses many inmates face, it is the Prison Litigation Reform Act that ensures the abuses continue. The Prison Litigation Reform Act must be suspended until the COVID-19 pandemic is over. Suspension of the act would allow inmates a method of recourse, would help tackle racial biases in COVID-related reforms, and could serve as a trial run for repealing the act altogether. In times of great uncertainty, quick adaptations such as these are needed to free people of bureaucratic restraints, particularly when they endanger lives. It can also be a time of opportunity to enact lasting changes. By temporarily suspending the Prison Litigation Reform Act until the pandemic is over, the government has a chance at saving lives and instituting real reform that has been a long time coming.