

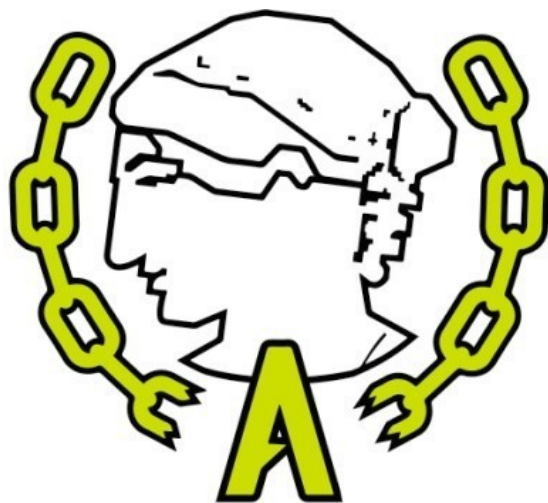
# ANTIGONE

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**Have prisons learnt from Covid-19?  
How the world has reacted to the pandemic  
behind bars**



ANTIGONE



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## N. 1/2020 HAVE PRISONS LEARNT FROM COVID-19? HOW THE WORLD HAS REACTED TO THE PANDEMIC BEHIND BARS

edited by Susanna Marietti and Alessio Scandurra

### TABLE OF CONTENTS

<i>Preface</i> , Susanna Marietti, Alessio Scandurra	7
<b>PART ONE - A PRISON WORLD OVERVIEW</b> <b>with the contribution of the European Prison Observatory and the American Civil Liberties Union</b>	<b>15</b>
BELGIUM - <i>So far, so good? Health and prisons in Belgium during Covid-19 pandemic</i> , Elena Gorgitano, Adriano Martufi	17
BRAZIL - <i>Covid-19 and prisons in Brazil: conditions and challenges</i> , Bruno Rotta Almeida, Elaine Pimentel, Patrick Cacicedo	27
BULGARIA - <i>Covid-19 and the prison system in Bulgaria</i> , Krassimir Kanev	34
FRANCE - <i>The pandemic crisis and opportunities for lasting change in French prisons</i> , Cécile Marcel	40
GERMANY - <i>Covid-19 shows substantial problems in the German prison system</i> , Melanie Schorsch, Christine Graebisch	47
GREECE - <i>Isolation for protection. Facing the Covid-19 pandemic in Greek prisons</i> , Ioanna Drossou, Nikolaos Koulouris, Theodora Pantelidou, Sophia Spyrea	55
HUNGARY - <i>Much ado about nothing. Banning visitation did not prevent the virus spreading into Hungarian penitentiaries</i> , Zsófia Moldova	62
ISRAEL - <i>A matter of absence: the Ministry of Health and Covid-19 in Israel's prisons</i> , Anat Litvin, Dana Moss	68
ITALY - <i>Coronavirus and Italian prisons: a success story?</i> , Federica Brioschi	75
PORTUGAL - <i>The management of Covid-19 in Portuguese prisons</i> , Vera Silva	85
SIERRA LEONE - <i>Covid-19 responses to mitigate the impact of the virus in Sierra Leone's prisons: an overview</i> , Lydia W. Kembabazi, Isabella Cordua	91

SPAIN - <i>Coronavirus management in Spanish and Catalan prisons</i> , Alejandro Forero Cuéllar	99
UNITED KINGDOM - <i>Covid-19 in prisons: the view from England and Wales</i> , Matt Ford	106
UNITED STATES OF AMERICA - <i>United States' failure to respond to the Covid-19 crisis in prisons and jails</i> , Udi Ofer	116
<b>PART TWO - THE PANDEMIC AND PRISON: REFLECTIONS AND INSIGHTS</b>	<b>126</b>
<i>The Covid-19 pandemic: the urgency to rethink the use of pre-trial detention</i> , Laure Baudrihayé-Gérard	128
<i>The Covid-19 pandemic highlights the urgent need to decriminalise petty offences in Sierra Leone and beyond</i> , Isabella Cordua, Joseph Bangura	139
<i>Pandemic and democracy: for a global constitutionalism</i> , Luigi Ferrajoli	151
<i>Assessing strategies to prevent and control Covid-19 in prisons in the initial emergency phase of the pandemic</i> , Matt Ford	160
<i>How the pandemic has aggravated the gendered impacts of drug policies on women who use drugs and incarcerated women for drug offences in Mexico</i> , Corina Giacomello	171
<i>The social revolution of fraternity against the virus of identitarian ideology</i> , Patrizio Gonnella	190
<i>Policy responses to Covid19 in prison. Testing the (in)action of European institutions during the pandemic</i> , Adriano Martufi	198
<i>Health and prison</i> , Aldo Morrone	212
<i>University and prison. A complex but unavoidable (more than ever in time of Covid-19) institutional and cultural interweaving</i> , Iñaki Rivera Beiras	225
<i>Prisons, health and drug control in the time of Covid-19</i> , Gen Sander	242
<i>In the United States, the Coronavirus devastated prisons and jails, exposing the violence and indifference of the country's mass incarceration system</i> , Alice Speri	257
<b>AUTHORS</b>	<b>272</b>





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# UNITED STATES OF AMERICA - United States' failure to respond to the Covid-19 crisis in prisons and jails<sup>1</sup>

*Udi Ofer<sup>2</sup>*

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The United States incarcerates more people, both per capita and by volume, than any other nation in the world. On any given day, there are 2.3 million people incarcerated in 3,134 local jails, 1,833 state prisons, 218 immigration detention facilities, and 110 federal prisons. In comparison, the United Kingdom has one-fifth the prison incarceration rate of the United States, while Canada has one-sixth and Germany one-tenth (Prison policy initiative, 2018).

This American exceptionalism cannot be explained by victimization rates as the United States ranks about the same as countries in Western Europe<sup>3</sup>. Rather, it is explained by a cultural and political backlash that began in the United States in the 1960's in reaction to civil rights protests and growing calls for racial justice, and which led to the implementation of a harmful tough-on-crime approach to public safety that has had a devastating impact on people of color in the United States<sup>4</sup>.

As a result, during a span of 50 years, states and the federal government began to pass

laws and institute practices that criminalized more behaviors and increased dramatically jail and prison sentences. Once out of prison, people now face nearly 50,000 legal restrictions as they try to reintegrate back into society, including restrictions on voting rights and other basic human rights. And as mass incarceration grew, many social services programs faced cuts or remained stagnant, resulting in prisons and jails becoming the primary institution to house people with medical, mental health and substance abuse needs.

The incarcerated population today in the United States suffers from extreme racial and ethnic disparities due to racist policies and practices. A Black boy born today has a 1-in-3 chance of being incarcerated, compared to a 1-in-17 chance for a white boy<sup>5</sup>. Combined Black and Latino people represent about 30 percent of the United States population yet 60 percent of the nation's people in prison. A majority of people in prison have drug, alcohol or mental health needs (United States Department of justice, 2006), and 40 percent

suffer from at least one chronic health condition (The center for prisoner health and human rights, 2020). Due to extreme sentences, there are nearly 200,000 people age 55 and older who are incarcerated in the United States (M. McKillop, F. McGaffey, 2015). And while mass incarceration impacts many more men by sheer volume and rate, incarceration rates have increased more rapidly for women than for men since the early 1970s, particularly incarceration rates of Black women.

It's in the above context that the Covid-19 pandemic hit and ravaged the United States and the nation's decentralized and bloated system of thousands of jails, prisons and detention centers. As of September 1, 2020, jails and prisons accounted for 90 of the 100 largest clusters of Covid-19 in the United States.

The fact that Covid-19 has spread dramatically in prisons and jails was anticipated by public health experts and human rights activists. Even before the first reported case of Covid-19 in a prison or jail, human rights organizations warned about the virus spreading through the thousands of detention facilities, which lack social distancing and proper hygiene, and which house vulnerable individuals particularly susceptible to the virus. Experts explained that reducing prison and jail populations will bring down infection rates and prevent Covid-19 from spreading into the broader community.

On March 18, the American civil liberties union (Aclu) sent letters (Aclu, 2020b) to the federal Bureau of prisons (J. Coleman, 2020) and to governors (Aclu of Colorado, 2020), prosecutors, police and other criminal legal system stakeholders in states

across the country warning of the impending disaster (H. Fowler, 2020). Public health experts also sent letters (L. Riley, 2020), as well as many state-based human rights organizations<sup>6</sup>. The letters warned about the spread of Covid-19 and called for changes in incarceration practices, including the safe release of vulnerable populations. Advocates demanded that people in prison who fit the Centers for disease control and prevention's (Cdc) criteria for people most vulnerable to Covid-19 be released, as well as the release of people who are nearing the end of their sentences.

Advocates also demanded that police and prosecutors use their discretion to dramatically reduce the number of people entering jails in the first place. In the United States, police make 10.3 million arrests a year, and according to the FBI, 95 percent of these arrests do not involve a violent offense and 80 percent of all arrests are for misdemeanors. Once arrested, individuals who cannot afford cash bail are trapped in the jail system while awaiting trial, sometimes weeks, months or even years. On any given day, there are about 500,000 people in pretrial detention in the United States, the majority of whom are incarcerated for the sole reason of inability to afford cash bail.

Human rights organizations, like the Leadership conference on civil and human rights and many more, lobbied the White house and Congress to take action, but we focused in particular on governors for pressure campaigns, pleading with them to issue executive orders to reduce prison and jail populations (Aclu, 2020a). Governors have enormous authority over incarcerated individuals, including the ability to direct their state corrections and



parole and probation boards to reduce prison populations, use their power of clemency to commute sentences, and also pressure local municipal and county stakeholders, such as police, sheriffs and prosecutors, to change their arrest and charging practices to reduce prison and jail populations (U. Ofer, 2020). Given the decentralized nature of the criminal legal system in the United States, and that 90 percent of the 2.3 million people who are incarcerated are under state or local jurisdictions, pressuring governors was the most direct way to help people.

As the advocacy efforts were gaining steam, with many grassroots organizations leading efforts in their local communities, reported cases of Covid-19 began to pour in. On March 20<sup>th</sup>, the first reported cases appeared in Georgia (Georgia Department of Corrections, 2020) and Massachusetts (The Enterprise, 2020), exactly two months following the first reported case of Covid-19 in the United States. Six days later, the first known Covid-19 death of a person in prison came to light, when Anthony Cheek died in Lee state prison in Georgia. He was 49-years-old and 18 years into a 20-year sentence (J. Sharpe, 2020).

Two days later, Patrick Jones became the first person in federal prison to die from Covid-19 (K. Johnson Kevi, 2020). Mr. Jones' experience with the criminal legal system is very much the story of the United States' mass incarceration crisis. He was arrested in 2007 for possessing a crack pipe, and later convicted for selling drugs after a search of his apartment found 32 grams of crack cocaine. He was sentenced to an astounding 27 years in prison because of the racist disparities in sentencing between crack and powder cocaine, a prior burglary record from the

age of 17, and because he was living within 1,000 feet of a junior college. These types of sentencing enhancements have led to extreme sentences in the United States, as well as extreme racial disparities in who's incarcerated.

Worrying that policymakers were failing to take adequate steps, the Aclu and other advocacy organizations began to increase our work as the weeks progressed. On March 30, the Aclu released a poll finding that 63 percent of registered voters supported releasing people from jails and prisons to help stop the spread of Covid-19, and 72 percent support clemency for elderly incarcerated individuals (Aclu, 2020c). The Justice collaborative also released a similar poll in March (The justice collaborative, 2020). On April 9<sup>th</sup>, the Aclu took the unusual step of launching television ads in numerous states to increase the pressure on governors to act (Aclu, 2020d). This is an extraordinary and expensive measure to take, but we did it to emphasize the severity of the situation and pressure governors to take extreme measures to save lives.

Also in April, the Aclu along with epidemiologists from the University of Tennessee, Washington state university and the University of Pennsylvania released a model estimating that the number of deaths from Covid-19 would increase by 100,000 more than White house estimates should states fail to reduce their jail populations (B. Hutchinson, 2020)<sup>7</sup>. There are nearly 11 million admissions a year into jails, as well as hundreds of thousands of employees in prisons and jails. Each admission and employee serve as a vector point for the spread of Covid-19 inside and outside of

jails and prisons. The model showed how tens of thousands of people could be saved if police stopped making arrests for anything other than the five percent of crimes that are defined as the most serious by the FBI, and by releasing people incarcerated in jail who have not been convicted of a crime and can safely await trial at home.

The ACLU also increased its advocacy with international human rights bodies, and on April 17, numerous human rights organizations submitted recommendations to the United Nations on Covid-19, detailing the risks faced by people in custody in the United States (ACLU, et. al., 2020). A broader letter was sent on April 29 by 69 human rights organizations urging the President of the United Nations Human Rights Commission to ensure that the rights of vulnerable communities are included in the Human Rights Council resolution on the implications of the Covid-19 crisis (The Advocates for Human Rights, Africa Solidarity Centre Ireland, Awnp, AfDiDi, Avf, Acat, ACLU, et. al., 2020).

While Covid-19 spread in prisons and jails, facilities began to subject people to solitary confinement. In June, Unlock the Box released a report finding that there had been a 500 percent increase in the use of solitary confinement in response to the outbreak of the Covid-19 pandemic – a trend that put the lives of countless incarcerated people, corrections officers and community members at risk. The report noted in extensive detail the analysis of medical experts on the risks associated with federal and state jails and prisons utilizing punitive solitary confinement instead of targeted depopulation efforts and medical isolation

to contain the spread of the virus (Unlock the Box, 2020).

Also in June, the ACLU and Prison Policy Initiative released report cards for every state grading their response to the Covid-19 crisis in prisons and jails. The report cards graded states on four factors: (1) whether the state provides testing and personal protective equipment (PPE) to correctional staff and the incarcerated population; (2) whether the state reduced jail and prison populations in response to the spread of the pandemic; (3) whether the governor issued an executive order — or the department of corrections issued a directive — accelerating the release from state prisons of medically vulnerable individuals and/or those near the end of their sentence; and (4) whether the state published regularly updated, publicly available data on Covid-19 in the state prison system. The report cards concluded that all states failed to implement a cohesive, system-wide response. The grades ranged from a D- to an F, as state responses ranged from disorganized or ineffective at best, to callously nonexistent at worst.

Advocates also filed hundreds of lawsuits to challenge conditions and demand releases, with at least three of these lawsuits reaching the United States Supreme Court (B. Bentley II, 2020). The ACLU alone has filed 77 legal actions in prisons and jails and 58 in immigration detention facilities<sup>8</sup>. Even corrections officers have filed lawsuits to protect them from Covid-19 (NBC 5 Dallas-Forth Worth, 2020). Claims have been filed under the Eighth Amendment's prohibition against cruel and unusual punishment and under the Due Process Clause of 14<sup>th</sup> Amendment to the United States Constitution, as well

as under the Americans with disabilities act and other anti-discrimination statutes.

Many of these cases have been unsuccessful, even in securing basic rights, as judges have failed to question executive actions. For example, the United States Court of appeals for the eleventh circuit ruled that jails cannot be forced to give people in prison soaps and masks, even in a jail that had hundreds of people test positive for Covid-19 (D. M. Reutter, 2020). And the United States Supreme court has overturned two lower court decisions that sided with plaintiffs, one that requested better cleaning in a Texas geriatric facility, and the other that required better health and safety procedures in a California jail.

Due to the efforts of advocates, six months into the pandemic, tens of thousands of people have been released. The Aclu tracks the results of our advocacy, and we estimate that 48,695 people have been released due to our advocacy along with partner organizations. UCLA School of Law's Covid-19 behind bars data project has estimated more than 100,000 releases from prisons and jails<sup>2</sup>. Most of the releases have been from jails, and both the releases from jails and prisons have been largely the result of non-litigation advocacy, as courts have been reluctant to intervene and question executive actions.

But this is nowhere close to enough. As of September 4th, there are 150,195 confirmed cases of Covid-19 in prisons and jails, and 1,036 deaths from the virus. Cases continue to peak in prisons and jails, particularly as states begin to finally engage in mass testing of people in prison and it becomes clear that the virus had been circulating among people without

symptoms in much greater numbers (C. Aspinwall, J. Neff, 2020). Some states are seeing dramatic increases, such as in Missouri, where confirmed cases increased more than 50 percent during August (St. Louis post-dispatch, 2020).

The work continues as lives are still at serious risk. Human rights advocates across the United States, representing organizations large and small, continue to push for actions by local, state and federal government, including for decarceration provisions in what is expected to be another stimulus package passed by Congress. But the presidential race in the United States is stealing attention away from the crisis overall, and in particular the dire situation in jails and prisons. Unfortunately, both political parties in the United States have continued to fail in their responses, and people in prisons and jails, as well as surrounding communities, are paying the price.

## Notes

<sup>1</sup> September 10, 2020.

<sup>2</sup> **Udi Ofer:** is the Deputy national political Director of the American Civil Liberties Union (ACLU) and Director of the ACLU's Justice division. He is also a visiting lecturer at Princeton University's School of Public and International Affairs. Mr. Ofer has been a civil rights lawyer and advocate for close to 20 years.

<sup>3</sup> United nations Interregional crime and justice research institute, International crime victims survey, available at [http://www.unicri.it/services/library\\_documentation/publications/icvs/](http://www.unicri.it/services/library_documentation/publications/icvs/)

<sup>4</sup> Presidential campaigns have played a key role in the rise of mass incarceration. During the 1964 presidential election, United States Senator Barry Goldwater ran an unabashed law-and-order campaign, deploying race-based appeals to a white electorate opposed to racial justice and slamming the civil rights movement as violent and un-American. During the 1968 election, candidate Richard Nixon won by going after southern white Democrats who opposed the civil rights movement and were willing to defect from the Democratic party. Law-and-order politics gained even more traction under President Ronald Reagan, who not only ran on the platform but also launched an aggressive War on drugs that pumped hundreds of millions of dollars into law enforcement. His media offensive perpetuated racist images of a crack-cocaine epidemic plaguing American cities and Black communities. Reagan's successor, President George H. W. Bush, boosted this racist message even further when he ran the infamous Willie Horton campaign ad. By the late 1980s,

Democratic politicians also began to adopt the tough-on-crime rhetoric, and it was new Democrat Bill Clinton who seized this strategy, running for president in 1992 vowing that he would never permit any Republican to be perceived as tougher on crime. Once elected, President Clinton championed the 1994 Crime Bill, which continues to lead to extreme sentences and exacerbate racial disparities in incarceration.

<sup>5</sup> Sentencing project, Trends in U.S. corrections, available at <https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf>

<sup>6</sup> Urgent action needed to protect individuals in Connecticut's prisons and jails from Coronavirus-19 pandemic, Letter to Governor Lamont, March 26, 2020, available at <https://drive.google.com/file/d/1E41348ai4el1e2toWctVgoHRWLo6i2-m/view>

<sup>7</sup> At the time of the report, April 2020, the government estimated nearly 100,000 deaths from Covid-19. At of September 10, 2020, the United States has had 190,714 deaths from Covid-19.

<sup>8</sup> List of cases on file with author. You may contact the author at [uofer@aclu.org](mailto:uofer@aclu.org).

<sup>9</sup> Ucla School of Law Covid-19 behind bars data project, available at [https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA\\_HkPVTk/edit#gid=845601985](https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA_HkPVTk/edit#gid=845601985)

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