

2021

COVID-19, Doctors, and the “Realities of Prison Administration” Part I: The Realities of a Subject Matter Expert

Fred Rottnek

Saint Louis University, Doisy College of Health Sciences, fred.rottnek@health.slu.edu

Follow this and additional works at: <https://scholarship.law.slu.edu/jhlp>



Part of the [Health Law and Policy Commons](#)

Recommended Citation

Fred Rottnek, *COVID-19, Doctors, and the “Realities of Prison Administration” Part I: The Realities of a Subject Matter Expert*, 14 St. Louis U. J. Health L. & Pol'y (2021).

Available at: <https://scholarship.law.slu.edu/jhlp/vol14/iss2/12>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Journal of Health Law & Policy by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**COVID-19, DOCTORS, AND THE “REALITIES OF PRISON
ADMINISTRATION” PART I: THE REALITIES OF A SUBJECT
MATTER EXPERT**

FRED ROTTNEK*

ABSTRACT

COVID-19 is still novel. As scientists continue racing to characterize the virus and its mutations, promote behavioral change, and optimize treatment and vaccination strategies, public policy makers shift their attention from one high priority population to the next. These spotlights have converged on one truism of the pandemic: COVID-19 infection, and all its sequelae, have magnified long-established social and structural inequities in U.S. institutions—including practices in jails, prisons, and detention facilities. While these facilities were recognized as early incubators of the virus, the response of the facility administrators and local leaders were at best uneven and at worst nonexistent. When lawsuits began rolling out and judges wanted to learn what was going on inside these population black boxes, they called on subject matter experts. This Article is an account of one subject matter expert’s travels, inspections, declarations, and virtual hearings during the first chaotic months of the pandemic. The author recounts his wildly diverse reception as an expert in jails and courtrooms from Detroit to East Baton Rouge. At times, expertise was recognized and honored; at other times, expertise was toyed with and dismissed. The Article concludes with suggesting that not only are U.S. court proceedings typically not a good fit for expert testimony, but courts are also not designed to recognize or promote health policy or even prohibit cruel and unusual punishment. Our elected officials in the legislative and executive branches need to honor their responsibilities for the health and well-being of all of their constituents—even those behind bars.

* Fred Rottnek, MD, MAHCM is a Professor and the Director of Community Medicine and the Program Director of the Addiction Medicine Fellowship at the Saint Louis University (SLU) School of Medicine. His clinical practices currently include addiction medicine and correctional healthcare. He teaches in the School of Medicine, the Physician Assistant Program, the Center for Interprofessional Education and Research, and the School of Law. He serves on the boards of the Saint Louis Regional Health Commission, the ARCHway Institute, and Alive and Well Communities.

I. INTRODUCTION

The correctional setting exacerbates many challenges faced by individuals in society—health disparities, institutional racism, trauma and toxic stress, food insecurity, and health conditions made worse by lack of access to care. Likewise, COVID-19 has magnified historic problems in jails, prisons, and detention facilities. Scholars have turned a bright light on historic problems in correctional facilities made worse by the novel coronavirus (COVID-19).¹ And, while few saw this pandemic coming, many who track conditions in correctional facilities were not surprised by the devastating toll it took on inmates, staff, and communities.²

I became involved in the COVID-19 crisis within correctional facilities not as a scholar, but as a physician who has practiced primary care in detention facilities for over fifteen years. As a board-certified, faculty family physician, my goal has always been to help my patients optimize their health. This goal is a world away from the typical legal standard of care within detention facilities, which often amounts to something slightly better than cruel and unusual punishment. But I also know how jails and prisons function, how health care is delivered, and what challenges exist to provide needed services in an environment where safety and security are always prioritized. As COVID-19 descended upon the United States in the spring of 2020, I served as a subject matter expert and a court-appointed inspector of jails and prisons.

I have had the advantage of learning my way around a jail—the physical structures, the sound of a door locking behind me, the rhythm of patient movement, the supremacy of safety and security, and the delicate balance of optimizing the health, while minimizing the risk, of all the stakeholders involved. When COVID-19 promised to make isolation in cruise ship living quarters look, frankly, like a vacation, compared to conditions in a jail or prison,³ I knew I was someone who could assist in assessing risk and offering solutions to maximize safety during the pandemic.

II. MY ROLE AS A SUBJECT MATTER EXPERT

My journey began with a local firm. Jack Waldron and Maureen Hanlon of ArchCity Defenders contacted me in the very early days of the pandemic in March 2020. They asked if I would work with them to lead a collaborative effort to advocate on behalf of incarcerated people during the COVID-19 pandemic. This early dive into available information started my regular habit of checking

1. See Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, THE UNIV. OF CHI. L. REV. ONLINE (Nov. 16, 2020), <https://lawreviewblog.uchicago.edu/2020/11/16/covid-dolovich/>.

2. *Id.*

3. See Robin Bravender, *'Much Worse Than a Cruise Ship': Prisoners' Lives at Risk from COVID-19*, PA. CAP. STAR (Apr. 6, 2020), <https://www.penncapital-star.com/covid-19/much-worse-than-a-cruise-ship-prisoners-lives-at-risk-from-covid-19/>.

for information and updates from the Centers for Disease Control and Prevention (CDC),⁴ the Johns Hopkins Coronavirus Resource Center (JHU),⁵ the National Commission on Correctional Health Care (NCCHC),⁶ and the National Institute of Corrections (NIC).⁷ These resources shared declarations and public letters that had already been filed during the early days of the pandemic. These included letters to judges and administrators in Harris County, Texas, and Cook County, Illinois, as well as to the Illinois Department of Corrections.

Our product was a letter of advocacy to the Missouri Supreme Court on behalf of high-risk jail and prison inmates throughout the state of Missouri. The letter had sixteen cosignatories, including primary care and public health leaders in academic and community settings.⁸ The letter complement included additional advocacy from civil rights groups, law enforcement, and houses of worship.⁹

The response from the Missouri Supreme Court was tepid.

Nevertheless, the letter was an opportunity to promote three recommendations that remained consistent throughout all my subsequent reviews and inspections: review for possible release any inmate/detainee who is at high-risk for COVID-19 infections, so that they at least have a chance to practice social distancing; maximize opportunities to practice social distancing within the facility; and follow evolving CDC guidelines regarding correctional institutions.

In early April 2020, I received a phone call from Thomas Harvey, one of the founders of ArchCity Defenders and now with the Advancement Project. Mr. Harvey was looking for an expert in correctional healthcare who could comment on plaintiffs' complaints, jail standards, and other relevant documents of the Miami-Dade Corrections and Rehabilitation Department. The Advancement

4. See generally *COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/index.html> (last visited Dec. 16, 2020).

5. See generally *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University & Medicine*, JOHNS HOPKINS UNIV. CORONAVIRUS RSCH. CTR., <https://coronavirus.jhu.edu/map.html> (last visited Dec. 16, 2020).

6. See generally *COVID-19 Coronavirus: What You Need to Know in Corrections*, NAT'L COMM'N ON CORR. HEALTH CARE, <https://www.ncchc.org/covid-resources> (last visited Dec. 16, 2020).

7. See generally *NIC's Coronavirus Information Page*, NAT'L INST. OF CORR., <https://nicic.gov/> (last visited Dec. 16, 2020).

8. See Letter from ArchCity Defenders et al. to Governor Michael Parson et al. (Mar. 13, 2020), <https://archcitydefenders.org/wp-content/uploads/2020/03/COVID-19-Response.pdf>.

9. See Letter from Mary Fox, Dir., Mo. State Pub. Def. et al., to Hon. George W. Draper, III, C.J. et al. (Mar. 26, 2020), <https://archcitydefenders.org/wp-content/uploads/2020/03/Letter-to-the-Supreme-Court-re-COVID.pdf>.

Project was filing a Petition of Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Release.¹⁰

Co-counsel in this case were lawyers with the Civil Rights Corps. Those lawyers were also working with Still She Rises, out of Tulsa, Oklahoma, and they recommended me to provide similar services for a case with the Tulsa County Jail.¹¹ So began the pattern of one counsel referring me to another to provide expert testimony on COVID-19 outbreaks involving jails and prisons, pre-trial detainees, imprisoned folks at the end of a long sentence, and surrounding communities.

At the time of this writing, I have submitted seven declarations—many with supplemental declarations—requesting that I comment and offer my opinion, based on my knowledge, professional medical experience, and expertise in correctional medicine, regarding whether the measures taken by a county jail in response to the COVID-19 outbreak have been minimally adequate to mitigate the spread of COVID-19 within the facility (See Table 1). I have also been asked to recommend any additional steps that the jails and prisons should take to ensure that they are following basic, well-accepted public health standards for the mitigation of COVID-19 in jails.

In these declarations, I have typically reviewed declarations of plaintiffs, institutional policy, procedures, communications, and strategies to address mitigation of the virus, and compared them to standards published by the CDC, the NCCHC, and the NIC.

In addition to these declarations, I have been appointed by the court to inspect five jails (See Table 2). Inspections varied greatly—not only in the physical environment, but also in the degree to which and when administrators took meaningful and sustained steps to mitigate the spread of COVID-19 within their facilities.

In the remainder of this article, I will describe my declarations, characteristics of high-risk inmates (i.e., inmates and detainees at high-risk for coronavirus infection and serious health sequelae), and recommendations for actions to mitigate spread based on CDC guidelines. Next, I will then I will turn to my inspections and my findings. I conclude with a discussion of why coronavirus could and should be a game changer in terms of incarceration practices in the United States, and how our current court structures are preventing real changes while thousands of people die every day.

10. Plaintiff's Motion for Class Certification & Inc. Memorandum of Law at 3, 12, *Swain v. Junior*, 961 F.3d. 1276 (11th Cir. 2020) (No. 1:20-cv-21457), Apr. 5, 2020, <https://advancementproject.org/wp-content/uploads/2020/04/Miami-Motion-1.pdf>.

11. *Feltz v. Bd. of Cnty. Comm'rs of Tulsa*, No. 18-CV-0298-CVE-JFJ 2020 WL 2393855, at *1, *10 (N.D. Okla. May 11, 2020).

III. DECLARATIONS

I have authored five declarations in multi-plaintiff suits at five jails in the U.S., written one declaration on behalf of a single prison inmate in Missouri Department of Corrections (DOC), and consulted on strategy on behalf of federal inmates in a Federal Bureau of Prisons facility (see Table 1 for details on these declarations).

For each declaration, I was typically sent a dozen or more declarations made by incarcerated individuals, policies and protocols of the institutions, expert witness reports, and some external documents from local health departments or testing results. In general, I was asked to review all these materials, and then, given my professional experience and judgment, provide an opinion regarding the adequacy of efforts of the institutions to mitigate the risk of COVID-19 within the institution. I compared these materials to resources publicly available through the CDC, NCCHC, and NIC.

The observations and recommendations in these declarations were remarkably similar. Social distancing was impossible due to census and/or due to physical layout of the facility. Masks were in short supply and were not readily available for exchange or replacement. They were also worn inconsistently by both inmates and correctional staff. Hygiene supplies, including soap and cleaning supplies, were limited and inadequate. If an inmate ran out of soap, the inmate had to buy more from the commissary, barter with another inmate, or do without until the next time soap was handed out. Inmates did not have adequate cleaning solutions, paper towels, or rags to clean on a regularly scheduled or as needed basis. Frequently touched surfaces were not cleaned between uses. Common areas, such as shared tables, toilets, sinks, and showers were cleaned infrequently, if at all, by institutional workers or by inmates housed on the units. Inmates reported that they generally could not get COVID-19 tests when they requested them because they were symptomatic. Rather, they were routinely told that they were fine if they didn't have a fever. Inmates were often housed with or moved in with other inmates who may have been symptomatic for COVID-19 but who had not been tested. Inmates were not educated about COVID-19; rather, they were dependent on what they could learn from TV or from relatives and friends outside the institution. Signage and educational materials were rare or non-existent. Housing practices were unclear and not understood by inmates.

An additional recommendation included the need to maintain a regularly updated list or registry of inmates who are at high risk for infection. The concept of a registry in correctional settings is not new. Accreditation agencies for health care in correctional agencies, such as the NCCHC, require such a list of patients with chronic medical conditions.¹² This list not only allows optimization of

12. Mark F. Stern, *Patient Safety*, NAT'L COMM'N ON CORR. HEALTH CARE 31 (Aug. 2016), <https://www.ncchc.org/filebin/Resources/Patient-Safety-2016.pdf>.

housing choices, but it also reminds medical staff to enroll these inmates in chronic care clinics. The purpose of chronic care clinics is regular, scheduled appointments among inmates and medical staff for care which includes interval histories and status, physical exam, laboratory checks, and updates in treatment plans.¹³

IV. ADDITIONAL ENGAGEMENT BEYOND DECLARATIONS

A. Inspections

1. Wayne County Jail

My first jail inspection was in Detroit, Michigan, in May 2020. I was selected as an expert by both the plaintiffs' and defense counsels, and I was designated as an agent of the court. Wayne County Jail (WCJ) has three divisions or buildings.¹⁴ Divisions One and Three are a few decades old.¹⁵ Part of Division Two is ninety years old.¹⁶ While efforts have been underway for years to build one new facility to replace the rundown facilities, none of these efforts have improved the inhumane conditions. As the inmates put it, "nothing works here."¹⁷

Prior to my inspection, as well as after it, local and international press reported on the horrific conditions of Division Two and the deaths of two physicians and two correctional officers due to COVID-19.¹⁸ This coverage introduced the ongoing threat of COVID-19 in jails: while inmates may be at risk of infection due to conditions and behaviors behind bars, the greater number of fatalities from the virus may be among the staff and the community the staff returns to at the end of their shifts.¹⁹

During my inspection, I found the physical conditions in Division Two, the "old jail", to be neglected, unmaintained, and filthy. There was extensive rusting, dirt, and paint chipping on the cell's bars, wall, and shower surfaces. Vents were often blocked with dirt and airborne dust. These conditions are detailed in a

13. B. JAYE ANNO, NAT'L INST. OF CORR., U.S. DEP'T OF JUST., CORRECTIONAL HEALTH CARE: GUIDELINES FOR THE MANAGEMENT OF AN ADEQUATE DELIVERY SYSTEM 165 (2001).

14. See Nicquel Terry, *Claims of 'Inhumane' Conditions Fuel Bid for New Wayne County Jail*, THE DETROIT NEWS (June 7, 2018, 11:59 PM), <https://www.detroitnews.com/story/news/local/wayne-county/2018/06/06/claims-inhumane-conditions-fuel-bid-new-wayne-county-jail/653117002/>.

15. *Id.*

16. *Id.*

17. *Id.*

18. See Natalia Megas, *Covid-19 Erupted in Detroit Jails. It Killed Two Doctors Caring for Inmates*, THE GUARDIAN (July 22, 2020), <https://www.theguardian.com/us-news/2020/jul/22/covid-19-detroit-jails-deaths>; Kelly Davis, *Coronavirus in Jails and Prisons*, THE APPEAL (July 6, 2020), <https://theappeal.org/coronavirus-in-jails-and-prisons-25/>.

19. Megas, *supra* note 18.

newspaper article that was published after my report was struck from the record, when my agreed-upon expertise was challenged after the defense counsel read the inspection report.²⁰

The unsafe conditions are compounded by general neglect of the inmates. Social distancing was not possible due to architecture and housing assignments in Divisions One and Two. Throughout all divisions, soap was not adequately supplied. Signage about COVID-19 was rare and was directed toward community education, not adapted for a correctional facility. Paper medical procedural masks were given out—at the most—every two weeks. Mask-wearing by inmates and officers during the inspection was erratic. The officers did not know how to use and wear some of the PPE—most notably the plastic coveralls. Cleaning was done by the jail trustees (incarcerated workers), and if they were not available, routine cleaning did not happen.

Medical care was contracted out to Wellpath. At the time of my visit, one of the nurses reported that they were understaffed and unable to provide chronic care service as well as new COVID-19-related care. These accounts corroborate with interviews conducted separately by the local press.²¹

Within my entire professional career, WCJ had the worst jail conditions I had experienced. Unfortunately, I was even more distressed with my next inspection at East Baton Rouge Parish Prison (EBRPP) in East Baton Rouge Parish, Louisiana.

2. East Baton Rouge Parish Prison

As in Wayne County, officials in East Baton Rouge have been touting the poor conditions at its jail²² for years as a reason to build a new complex.²³ Similarly, sections of the EBRPP were built in different decades.²⁴ These sections were connected by outside walkways circumscribed with fencing and layers of concertina wire. All areas of the jails, including the newest lines (housing units), were filthy, undermaintained, and ill-suited for human occupancy.

20. See Angie Jackson, *Report Detailing 'Severe' Disrepair at Wayne County Jail Struck from Lawsuit*, DETROIT FREE PRESS (July 3, 2020), <https://www.freep.com/story/news/local/michigan/2020/07/03/report-severe-disrepair-wayne-county-jail-struck-lawsuit/3211973001/>.

21. See Ross Jones, *'We Don't Have Enough People.' Wayne County Jail Nurses Warn of Understaffing*, WXYZ DETROIT ABC NEWS (June 15, 2020), <https://www.wxyz.com/news/local-news/investigations/we-dont-have-enough-people-wayne-county-jail-nurses-warn-of-understaffing>.

22. All jails are called prisons in Louisiana.

23. See Teresa Mathew, *More Than 40 People Have Died in the East Baton Rouge Jail. Will Voters Oust the Sheriff?*, THE APPEAL (Oct. 9, 2019), <https://theappeal.org/more-than-40-people-have-died-in-custody-of-the-east-baton-rouge-jail-will-voters-send-the-sheriff-packing/>.

24. See Lea Skene, *Officials Close Three Wings at Aging East Baton Rouge Prison Because of Safety Concerns*, THE ADVOC. (Dec. 31, 2018, 9:54 AM), https://www.theadvocate.com/baton_rouge/news/article_56230150-0315-11e9-b84f-97327cf57814.html.

The layout of the prison did not allow for social distancing in many of the newer housing units. Bunk beds were bolted to the floor in the dormitory units, and they were only a few feet apart. On some lines, bunk beds were bolted side by side. Many of the metal bunk platforms had holes in the horizontal surfaces from extensive rusting; inmates would lay down newspaper to cover the rust before they put their mattresses on the surfaces. Even on lines where inmates could have been spread out to approximate social distancing, such as the women's lines, the inmates were still clustered in bunks at one end of the room.

There were inadequate supplies of soap and hygiene supplies. If the one bar of soap provided did not last until another was distributed a week later, inmates would have to buy soap from the commissary or barter with other inmates. Cleaning supplies were inadequate and inconsistent. In several units, inmates had to clean with their own clothes or towels using their bar soap. Masks were replaced once every week or two. Signs about COVID-19 were rare. There was no information about how to protect oneself from the virus.

There were no reminders from the officers for inmates to wear masks on these lines. During my visit and subsequent phone calls, plaintiffs told me that they were only wearing masks on the date of the inspection because we were visiting. "No one wears masks on the line" was a common report. Inmates only wear masks when they are off the line in hallways or other building areas, and mask wearing by the officers is also erratic.

The physical structures were horrific. Even in the newer buildings, rust in the shared shower facilities was often over half an inch thick. Showers were mildewed and commonly contained rusty and molded surfaces. Toilets and showers were commonly broken and rarely cleaned. Since phones and other commonly touched surfaces were seldom sanitized, inmates would use their socks to hold the phones. Some of the empty lines at the time of the visit still had dirty socks on the phones. The oldest lines in the jail, A, B, and C, were built in the 1960's.²⁵ Prior to the pandemic, the administration had voluntarily closed these lines due to their state of disrepair.²⁶ Upon inspection, the physical conditions were filthy and cannot be adequately cleaned due to pervasive disrepair, irregular surfaces, rust, paint peeling and chipping, mildew, and mold. Due to the pandemic, EBRPP administration reopened these lines to use as isolation for inmates testing positive and those with signs and symptoms consistent with COVID-19.²⁷ Even inmates with a chronic illness were housed

25. See Kiran Chawla, *Tour of EBR Parish Prison Reveals 'Deplorable' Conditions*, WAFB (July 10, 2015, 12:10 PM), <https://www.wafb.com/story/28017519/tour-of-eb-r-parish-prison-reveals-deplorable-conditions/>.

26. Skene, *supra* note 24.

27. See *Civil Rights Organizations Debunk Myths of No COVID-19 Cases in East Baton Rouge Parish Prison*, ADVANCEMENT PROJECT (Aug. 19, 2020), <https://advancementproject.org/news/civil-rights-organizations-debunk-myths-of-no-covid-19-cases-in-east-baton-rouge-parish-prison/>.

on these lines, and they received even less frequent care due to this isolation. Inmates housed on these lines are at an increased risk of contracting tetanus; contact and airborne infection; and worsening of conditions due to mold, mildew, vermin, and poor ventilation. Plaintiffs typically reported that the new lines had roaches, while the old lines had rats. In both settings, inmates report having to sleep with food from commissary, otherwise it would likely become infested or stolen by vermin.

There has never been any surveillance testing done at EBRPP, despite the responsible Health Authority stating at a hearing on June 10, 2020, that they had the ability to do so.²⁸ Moreover, a common concern of the plaintiffs was the general inability to get tested when they had symptoms. Inmates with COVID-19 symptoms were often transferred to isolation lines in the old part of the jail before they were even tested. Once on these lines, inmates had even less access to basic hygiene supplies and showers, cleaning supplies, and medical attention. Some plaintiffs reported lockdown in their individual cells for days at a time. Others reported lack of soap and cleaning supplies for days at a time. Inmates sharing their isolation stories after returning back to the general population has resulted in a culture of inmate hesitancy to report any COVID-19 signs and symptoms for fear they will be locked down on the old line.

3. Worcester County Detention Center and Howard County Detention Center

The two jails I inspected that have made significant efforts to mitigate risks of spreading coronavirus were Worcester County Jail (WCDC) in Snow Hill, Maryland, and Howard County Jail (HCDC) in Jessup, Maryland.²⁹ Inspections in both cases were prompted by lawsuits on behalf of Immigration and Customs Enforcement (ICE) detainees.³⁰ U.S. District Judge, Theodore Chuang, provided a list of thirty-three, often compound, questions that we discussed during a pre-inspection hearing. The provided questions gave me guidance about the criteria and standards I should be looking for as I performed both eight-hour inspections of WCDC and HCDC. They also gave me the format of the subsequent inspection report.

These inspections were an unexpected surprise after my previous inspections of WCJ and EBRPP. From the formal and informal conversations with administrators and staff at these facilities, it was clear that they considered their institutions part of the larger community. They knew most inmates and

28. Transcript of Evidentiary Hearing on Temporary Restraining Order at 154, *Belton v. East Baton Rouge Parish Prison* (2020) (No. 20-278-BAJ). *See id.*

29. Matthew Prensky, *ICE Sued to Free Undocumented Immigrants in Maryland, Four Other States amid Coronavirus*, DELMARVA NOW (Mar. 27, 2020, 1:04 PM), <https://www.delmarvanow.com/story/news/local/maryland/2020/03/27/coronavirus-ice-sued-free-detainees-aclu-maryland-pennsylvania-california-massachusetts-washington/2917230001/>.

30. *Id.*

detainees by name, as well as many of their home situations. They knew many of their criminal records and contributing conditions to their legal problems.

My findings from these inspections generally indicate that WCDC and HCDC had taken active steps to mitigate the spread of the virus; however, there were significant gaps in services and preparedness. For screening, testing, and housing practices, both facilities had established practices consistent with CDC guidelines to screen all staff, detainees, inmates, vendors, and other visitors. Howard County Jail has reported completing four rounds of surveillance testing, and they have plans to continue surveillance testing. Worcester County Jail reported completing three rounds of surveillance testing, and they are working with their health department to create a plan moving forward.³¹ Regarding diagnostic testing, both facilities had practices in place for testing symptomatic detainees and inmates consistent with CDC guidelines.

Medical care and housing of detainees at high risk for COVID-19 appeared to be adequate for patients at high risk for COVID-19. Both facilities had housing plans that they were able to implement for quarantine of new detainees and isolation of detainees who may have had infections. These plans appear to be working well at the current populations and with the current rate of infectivity.

My overall impression of the facilities was that both jails were clean and well-maintained. Both jails had signage in place to educate staff, detainees, inmates, vendors, and other visitors about COVID-19 and their attempts to mitigate the spread of the virus. Some of these signs may have been recent additions, per detainee reports above, in anticipation of my inspection. Regardless, they were present.

While some of the cleaning and hygiene practices may have been intensified just days prior to the inspection, adequate supplies were in place. Detainees reported some inconsistency in the availability of supplies to clean and to maintain hygiene. Supplies appeared to be adequate. Soap was reported to be regularly distributed for free, including when detainees ran out. Both facilities had means of electrostatic fogging disinfection, a practice they performed on a schedule and as needed.

Efforts to mitigate the spread of the virus seemed to be working at the time of the inspection—at current census, current staffing, and current testing protocols. However, at the time of the inspection, there was a pressing need to consolidate and formalize policies and protocols from running documents and emails at both institutions as soon as possible.

31. While I did not view the actual testing results, I was able to review email strings from both institutions regarding COVID-19 practices.

4. Clayton County Jail

Prior to my visit to Clayton County Jail (CCJ) in Jonesboro, Georgia, I had written an expert declaration on July 21, 2020, after a review of plaintiffs' declarations. At that time, prior to my visit, there were few indicators that Clayton County Jail was taking action to protect detainees, staff, or visitors from COVID-19. In subsequent months, counsel for both plaintiffs and defendant worked to come to an agreement for an inspection of the facility. This inspection did not happen until October 4, 2020.

Prior to the inspection, I was able to review additional plaintiff declarations. These additional declarations included consistent observations. Social distancing was not happening, and the officers did not encourage the inmates to distance. This was pointed out repeatedly when inmates were queued to get their meal trays or queued to receive their medication, "the Pill Line." Inmates were not routinely receiving masks and replacement masks as described by documents provided by the jail. Inmates report not receiving masks until June 2020 or early July 2020, and none had received a backup mask (so they could clean their other masks) despite repeated requests. Hygiene products and practices remained inadequate. Inmates reported receiving one four-ounce bottle of liquid soap no more than once a week. They did not receive any bar soap. If they wanted more soap, they had to buy it from the commissary. Cleaning routines and cleaning supplies were irregular and often unavailable. The facility continued to be in a state of disrepair which imperils the health of inmates and staff. Contrary to defendants' statements that coronavirus testing was available for everyone who wanted a test, inmates reported that this was not the case. Medical care, access to medical care, and responses to medical requests remained inadequate.

What I was not prepared for was the overt hostility of the jail environment. The Clayton County Jail was the most opaque, least cooperative, least respectful, and most contentious inspection I experienced among the five inspections I completed during the pandemic. When we asked for materials to review prior to our visit, which were adapted from my typical request for information, we were provided a number of documents. These included signage in the facility, policies and protocols developed for the pandemic, and communications from the jail administration. The documents also included communications from CorrectHealth's Medical Director and Health Services Administrator, as well as the declaration of the defendant's expert. These materials were particularly concerning because many of them were cut-and-pasted from CDC guidelines and copied without attribution from the National Commission on Correctional Health Care (NCCHC) most recently updated Standard for Health Care Services in Jails (published in 2018). None of the documents provided demonstrated adaptation to Clayton County Jail's structure and services. In addition, we received these materials six months into the pandemic, which should have been

sufficient time for the Clayton County Jail to develop and implement meaningful policies.

5. Inspection of Clayton County Jail

Our inspection of the facility was also full of barriers and disincentives to formulating a thorough opinion. We were only allowed three hours for the physical inspection, which is usually an inadequate timeframe to properly inspect a large jail and provide a complete opinion of the services and programs requested in relation to the jail's reported mitigation of the spread of COVID-19. However, the observations I was able to make during the three-hour inspection were enough for me to form an opinion. Upon meeting both the jail's lawyer and defense team, I was informed that the inspection would be limited to the sites outlined by the counsel for the defense. Experts and plaintiffs' counsel were told that if they had a problem with that, they could take it up with the judge.

The group size resulted in delays in the inspection since limited numbers of the group could board an elevator, enter a sally port, and move through other areas of the jail. A large group of officers (an average of eight), accompanying counsel, and experts slowed the pace and the exchange of information on the tour. Plaintiffs' attorneys and experts could only ask questions to the defendants' attorneys, further hindering communication and creating an environment that was ineffective and off-putting. The two defense attorneys did not have direct knowledge of simple operational procedures. This limitation also resulted in misinformation since the attorneys did not know whom to ask, and the staff member who could answer was not always nearby. When I asked specific questions that Mr. Jackson, the defense attorney, and the officers did not know, he said he would look into it. However, I never saw him, or any other member of the inspection team, record the questions. Finally, since I could not ask any questions to correctional staff, medical staff, or inmates, I could not address the many discrepancies in declarations and reports.

Housing units included four large units with six sections each. Each section branched off the central officers' observation area. Two tiers of cells were in the back of each section, behind a common area. Common areas and dorm-style housing units were clean and uniformly organized. All inmates were confined to their cells throughout our tour. And in many sections, they banged on doors and shouted when they saw us walk in through the hallway. Male inmates were often single bunked on the lower bunk beds, although if the bunk beds had been staggered, they would have been six feet apart.³² Female inmates were often double bunked, even though there were empty cells that could have been used

32. In a unit with multiple discrete cells, single-bunked refers to housing only one person in a cell, even if the cell is a two-occupancy cell. In dormitory settings, single-bunked indicates that only one bed on a bunk bed is occupied.

to space the women apart and achieve social distancing. In several of the men's cells, inmates were housed three to a two-person cell, even though there were empty cells that could have been used to spread out the housing. In these three-person cells, the third man had to sleep on the floor, with his head or feet within a foot of the toilet. We were granted access into one of the men's sections where the faucet was stuck running and flooding on the floor of the cells. No one was in this cell. The toilets in three other cells were apparently broken and full of feces. No one was housed in these cells either.

Inmates wore masks sporadically. Throughout the tour, officers would precede our group, tap on unit windows and point to their faces. Other officers would yell "Mask up!" as we approached. In the dorm-style housing, about seventy-five to eighty percent of the inmates wore their masks. In the cell-style units, in which inmates were single, double, and triple bunked in two-person cells, very few inmates wore masks.

Cleaning supplies were on display in the dormitory housing units. I do not recall seeing any supplies in the cell-style units. As indicated in the declarations, paper towel and toilet paper rolls had the final sheet folded by the inmate in the "V" as a tribute to Sheriff Victor Hill and as a reminder to inmates of the power structure.

The only signs that were posted through the facility were the "Wait, Wear, Wash" signs. There was no signage that explicitly referred to COVID-19 and no signage that identified symptoms of COVID-19. Also, the lack of routine institutional behaviors was notable. Conditions were very controlled and contrived during the three-hour inspection. I saw only three or four areas where inmates were cleaning in common areas. I saw no one routinely cleaning sinks, toilets, showers, or their own cells. I saw only one unit where inmates were in the common dayroom—and that was in one of the dorm-style units; all other inmates were locked down, either in their cells, or told to stand facing their bunks in the dorm-style units. I saw no inmates eating or lining up for food services or medication services or pill lines—even though our tour time was between 10:00 and 13:00.

I received several more inmate declarations several weeks after the inspection that confirmed the conditions I viewed during my October 4, 2020, inspection did not represent the true state of the jail on a typical day. First, multiple detainees recount an unusual burst of cleaning, painting, and other housekeeping activities in the days immediately before our tour. The timing suggests that this was not part of an ongoing sanitation or maintenance program but was instead a one-time intervention carried out in anticipation of the inspection tour. Far more concerning were the accounts of multiple detainees that educational signs were posted, and soap was distributed, immediately before the inspection, followed by removal shortly after the inspection. Finally, multiple detainees reported suffering retaliation for attempting to communicate with us during the inspection tour. Several declarations reported that the entire

dorm was fed “nutraloaf”³³ rather than regular meals for four days beginning the day after the inspection.

Perhaps the most disturbing element of the inspection and subsequent declarations was the para-military and retaliatory culture of the institution. As a family physician, correctional health care physician, and board member of an organization promoting healing and well-being in communities disproportionately affected by chronic stress, trauma, and institutional racism, I found the expectations, practices, and signage of Clayton County Jail not only offensive, but also a means of further jeopardizing the health of stakeholders and the community at large. The cult personality and para-military style of the jail is well-known and keeps all inmates, staff, and visitors at an elevated level of stress.³⁴ This approach is clearly promoted and reinforced throughout the facility³⁵ and displayed in social media about the sheriff and his programs.³⁶ The cult of personality surrounding Victor Hill permeates the facility with “Sheriff Victor Hill” signs with raised gold letters and photographs at multiple sites through the facility, the expectation that inmates fold the tail of paper towels and toilet paper into a V shape (for Victor), and dozens of Batman drawings, stickers, and other media throughout the jails. The power dynamics are demonstrated with

33. See Steve Fennessy, “*Sheriff on Deck!*” *How Far Can Victor Hill Go?*, ATLANTA MAG. (Aug. 1, 2006), <https://www.atlantamagazine.com/great-reads/victor-hill/> (“This, I find out later, is how you make Nutraloaf: Take some powdered milk, grated potato, tomato juice, raw cabbage, ground turkey, lard, onion, dry beans, an egg and some chili powder. Shape into a loaf. Bake at 350 degrees for an hour. Serve to incorrigible inmates three times daily, with water.”).

34. See *Jail Operations Division (JOD)*, CLAYTON CNTY. SHERIFF’S OFF., <http://www.claytonsheriff.com/jail-operations-division/> (last visited Dec. 16, 2020).

35. Kate Briquet, *Batman Sheriff Shoots Woman, Walks Free*, DAILY BEAST (Apr. 14, 2017), <https://www.thedailybeast.com/batman-sheriff-shoots-woman-walks-free>.

36. See, e.g., Sheriff Victor Hill (@SheriffVHill), TWITTER (Dec. 21, 2020, 4:11 PM), <https://twitter.com/SheriffVHill/status/1341144343357304844>; Sheriff Victor Hill (@SheriffVHill), TWITTER (Dec. 31, 2020, 11:34 AM), <https://twitter.com/SheriffVHill/status/1344698567676604418>.

the Scorpion Response Team³⁷ and the requirement of inmates to face walls with hands behind their back when an officer is present³⁸

Specific activities during the inspection were unnecessary in my experience of previous inspections and were likely intended to intimidate plaintiffs' attorneys and experts. Examples of such activities included the presence of eight or more officers in the touring group, officers always being present with plaintiffs' attorneys and experts unless we verbally requested a chance to step away and confer in private, and two to three officers taking photos of everything the plaintiffs' attorneys took pictures of—and the same officers taking pictures of attorneys taking pictures. The Scorpion Response Team also marched by twice in front of the touring group.

In the general U.S. population, the percentage of people who have experienced significant trauma are overrepresented amongst those who are incarcerated.³⁹ There is established scientific literature about the negative physical health impact of chronic stress and trauma.⁴⁰ Stress also raises cortisol

37. See CLAYTON CNTY. SHERIFF'S OFF., *supra* note 34. "In 2002, the Clayton County Sheriff's Office Correctional Emergency Team (CERT) was established. This was done due to the ever changing times to deal with high risk events and violent inmate encounters. The initial team consisted of 32 members. The team has since been re-named the Scorpion Response Team (SRT) due to the forethought of our fearless leader. The Team has consisted of prior military officers, prior law enforcement/corrections officers and others with no experience. This Team turned out to be a highly motivated and dependable group of male and female Operators. Due to their diligence and hard work, they have forged a reputation of respect, task oriented and progression with a yearning for constant learning and evolution. The SRT Team has developed into a Team which has become worldly recognized for their professionalism and para-military discipline. The current Team consists of approximately 20 members and continues to have high standards of physical fitness and tactical skills to earn the honor of wearing the coveted SRT Patch and red/black uniform." *Scorpion Response Team (SRT)*, CLAYTON CNTY. SHERIFF'S OFF., <https://web.archive.org/web/20210424232225/http://www.claytonsheriff.com/SRT.html> (last visited Apr. 24, 2021).

38. See CLAYTON CNTY. SHERIFF'S OFF., <https://web.archive.org/web/20210424154413/http://www.claytonsheriff.com/index.html> (last visited Apr. 24, 2021) (showing an image of inmates facing the wall with hands behind their backs).

39. Johanna E. Elumn Madera, *The Cumulative Impact of Trauma Exposure and Recidivism After Incarceration Among Black Men* (2016) (Ph.D. dissertation, City University of New York), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=2588&context=gc_etds.

40. See Bruce S. McEwen, *Protection and Damage from Acute and Chronic Stress: Allostasis and Allostatic Overload and Relevance to the Pathophysiology of Psychiatric Disorders*, ANNALS N.Y. ACAD. SCI., July 8, 2009, at 1, 1, 2 ("Stress promotes adaptation, but prolonged stress leads over time to wear-and-tear on the body (allostatic load). Neural changes mirror the pattern seen in other body systems, that, short-term adaptation vs. long-term damage. Allostatic load leads to impaired immunity, atherosclerosis, obesity, bone demineralization, and atrophy of nerve cells in the brain.").

levels (a naturally occurring hormone) in the blood.⁴¹ The majority of inmates, staff, and medical staff are from Black and Brown communities—who already have higher rates of chronic stress and trauma than their White counterparts.⁴² They are therefore already more likely to experience negative health outcomes related to allostatic load, elevated cortisol, and other stress hormones.⁴³ A developing scientific literature is exploring chemicals, or biomarkers, most commonly associated with worse clinical outcomes in patients with COVID-19 infections, including cortisol.⁴⁴ Higher cortisol levels are associated with more deaths and worse clinical outcomes.⁴⁵ The “hands-on” and degrading management practices in Clayton County Jail exacerbate stress among all the inmates and staff, and this results in continued elevated stress responses.⁴⁶

Therefore, in my clinical opinion, the para-military management of Clayton County Jail is exacerbating risk of serious sequelae, including death, for inmates, staff, and visitors who are already at greater risk of COVID-19 infection, chronic stress, trauma, and chronic disease. This higher risk has potential to spread to the community with every shift change and with every person entering and exiting the facility.

41. Kara E. Hannibal & Mark D. Bishop, *Chronic Stress, Cortisol Dysfunction, and Pain: A Psychoneuroendocrine Rationale for Stress Management in Pain Rehabilitation*, 94 *PHYSICAL THERAPY & REHAB. J.* 1816, 1820 (2014).

42. Laura Santhanam, *Why Chronic Stress and COVID-19 Are a ‘Perfect Storm’ for the Health of Black Americans*, *PBS NEWS HOUR* (June 12, 2020, 5:19 PM), <https://www.pbs.org/newshour/health/why-chronic-stress-and-covid-19-are-a-perfect-storm-for-the-health-of-black-americans>.

43. See generally Lena J. Jäggi et al., *The Relationship Between Trauma, Arrest, and Incarceration History Among Black Americans: Findings from the National Survey of American Life*, 16 *SOC’Y MENTAL HEALTH*, 187, 201 (Nov. 2016); COREY M. LEIDENFROST & DANIEL ANTONIUS, *ASSESSING TRAUMA IN FORENSIC CONTEXTS: INCARCERATION AND TRAUMA: A CHALLENGE FOR THE MENTAL HEALTH CARE DELIVERY SYSTEM* 187 (Rafael Javier et al. eds., 2020).

44. See, e.g., Preeti Malik et al., *Biomarkers and Outcomes of COVID-19 Hospitalisations: Systematic Review and Meta-Analysis*, *BMJ EVIDENCE-BASED MED.*, Sept. 15, 2020, at 10.

45. Tricia Tan et al., *Association Between High Serum Total Cortisol Concentrations and Mortality from COVID-19*, 8 *LANCET DIABETES ENDOCRINOLOGY*, 641, 659 (June 18, 2020). Long-term effects of COVID-19 infection include the following: lung scarring and decreased lung capacity; stroke, embolism, and blood clotting disorders, which may result in permanent disabilities and amputations; heart damage, including cardiomyopathy and enlarged, ineffectively pumping hearts; and neurological deficits, psychological deficits, and mental illness. See Lori Parshley, *The Emerging Long-Term Complications of COVID-19, Explained*, *VOX*, <https://www.vox.com/2020/5/8/21251899/coronavirus-long-term-effects-symptoms> (last updated June 12, 2020, 3:31 PM).

46. Jim Dawson, *Fighting Stress in the Law Enforcement Community*, *NAT’L INST. OF JUST.* (Apr. 8, 2019), <https://nij.ojp.gov/topics/articles/fighting-stress-law-enforcement-community>.

B. Hearings

The hearing in Miami-Dade County was at the end of April 2020, when teleconferencing for hearings was very new. The judge had problems hearing counsel, the counsel had difficulty arranging for inmates to call in from the jail, and few understood how to avoid echoes when speaking. While I had called in from the conference line, my services were not needed since the judge felt that the expert reports were "quite detailed" and if she had any questions, she would call us back.

Likewise, I was logged into a virtual platform and prepared for the Wayne County Hearing, but at the last minute, the counsel for the defense persuaded the judge to strike my unflattering inspection report of the three jail facilities from the record—even though all parties had agreed to my qualifications and expertise prior to the inspection. Although I was a Certified Correctional Healthcare professional—in both the general and specific physician classifications—and have over fifteen years of experience as a medical director and lead physician of a large urban jail and juvenile detention center, the defense argued that I was not an infectious disease specialist.

My third hearing with EBRPP actually gave me an opportunity to testify. I was able to log in with everyone else on a video platform and listen to the arguments prior to my testimony. There was much discussion about legal theory and precedent. When it came time for me to testify, I stayed to my observations and application of CDC guidelines. The judge asked me a few clarifying questions about my recommendations and seemed a bit surprised when I stated that, in my clinical judgment and my review of relevant materials, there is no way, short of release, to protect a medically high-risk inmate from contracting coronavirus in a jail.

My fourth hearing was the most unusual, for a variety of reasons. First, it was my first suit involving federal lawyers, or as they introduced themselves, "the Government." Prior to my appointment from Judge Chuang to inspect the jail, I was first interviewed by the Maryland DOJ attorneys who wanted to know if I could provide an impartial and unbiased report. Among other questions, they asked me what I thought of the current administration. When I paused before starting to answer, they withdrew the questions and asked if I had any specific opinions about ICE. I replied that, as a family physician, I had real concerns about the practice of separating families at the border and the resulting trauma that arises during these actions. However, I stated that I was being asked to comment on conditions and questions that are quite different from those. I decided to take a step further at this point to honestly forecast my actions. I told them my typical recommendations for every tour I had completed already: when possible, release all medically vulnerable inmates and detainees so that they have a chance to socially distance in the community; continue to decrease census so that remaining inmates can at least approximate social distancing; and then

encourage all stakeholders to follow CDC recommendations for jails and prisons.

Apparently, this conversation was reassuring to the government lawyers, because in a subsequent conference call with both counsels and Judge Chuang, the United States District Judge for the District of Maryland, I was appointed as the inspector for the court. During the hearing following the inspections, the first forty-five minutes was a back-and-forth exchange between Judge Chuang and myself. This was the first time I had experienced a judge asking me questions based on my report in any hearing. He displayed sincere interest in the conditions inside the jail and the health risks of the inmates and staff. Only after he asked all his questions were the two opposing lawyers allowed to ask me questions.

Initially, I was expecting to participate in a fifth hearing in the second week of December 2020 for the Clayton County Jail case. However, when Judge J.P. Boulee set the specifics for the hearing, he allowed each side only three and a half hours. The plaintiffs' counsel thought my inspection report was solid enough on its own, and they would not need me to testify. However, on the day of the hearing, I was promptly contacted by the plaintiffs' counsel. The opposing counsel was trying to strike my inspection report with similar tactics used in Wayne County. I responded with information regarding acceptance of my opinions in East Baton Rouge and Maryland suits. Ultimately, my report was struck from the record.

VI. WHAT DO WE KNOW NOW ABOUT COVID-19?

As of this writing, from a public health perspective, the novel coronavirus is still that—novel. There is still much we do not know about the virus: its behavior, best strategies to prevent infection and mitigate its infectivity, and medical sequelae among those infected—particularly those who become symptomatic. This is a sometimes lethal, airborne virus that we do not know how to contain.⁴⁷ Unfortunately, there are very few lessons we can glean from the Spanish flu epidemic, since our current carceral state has little in common with incarceration practices at that time.⁴⁸ We are just now distributing the first

47. Suresh Dhaniyala & Byron Erath, *Airborne-Particle Experts Explain How to Stay Safe from New Highly Contagious Coronavirus Strain*, OREGONLIVE, <https://www.oregonlive.com/coronavirus/2021/01/airborne-particle-experts-explain-how-to-stay-safe-from-new-highly-contagious-coronavirus-strain.html> (last updated Jan. 19, 2021).

48. See *1918 Pandemic (H1N1 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> (last visited Apr. 16, 2021); Dara Lind, *One Chart That Puts Mass-Incarceration in Historical Context*, VOX (June 7, 2016), <https://www.vox.com/2015/10/11/9497161/incarceration-history> (indicating that incarceration rates were much lower in the early twentieth century).

vaccines, and the potency and duration of immunity has yet to be fully tested.⁴⁹ Until a significant portion of the world population is immunized, we have to rely on regulating human behavior through social distancing and mask wearing. However, the consistency in these behaviors remains problematic as the virus continues to be framed as a partisan issue in many parts of the United States.⁵⁰

From a medical perspective, we do know it is spread by aerosolized droplets, distinguishing this pandemic from recent public health crises—such as HIV/AIDS, MRSA, and Hepatitis C.⁵¹ Coronavirus disproportionately progresses to COVID-19 disease in older people, people with pre-existing health conditions, and Black, Brown, and Indigenous communities.⁵² These people may or may not be those incarcerated. Many inmates and correctional facility staff are included among one of these disproportionately affected categories, and after their shifts, staff often return home to similarly vulnerable families.⁵³ The long-term consequences of infection and course of disease is unknown. Survival from COVID-19 does not guarantee a life free from damage due to the virus.⁵⁴ A new term, “Long-Haulers” has arisen to describe people who are enduring months of symptoms from COVID-19 infection.⁵⁵ Long-term effects of COVID-19 infection include: lung scarring and decreased lung capacity; stroke, embolism, and blood clotting disorders, which may result in permanent disabilities and amputations; heart damage, including cardiomyopathy and

49. See *COVID-19 Vaccines and Immunity: How Long Does It Take for the Vaccines to Provide Protection?*, HEALTH MATTERS (2020), <https://healthmatters.nyp.org/covid-19-vaccines-and-immunity/>.

50. Anton Gollwitzer et al., *Partisan Differences in Physical Distancing Are Linked to Health Outcomes During the COVID-19 Pandemic*, 4 NAT. HUM. BEHAV., 1186, 1194 (Nov. 2020).

51. See *Science Brief: SARS-CoV-2 and Potential Airborne Transmission*, CTNS. FOR DISEASE CONTROL & PREVENTION (Oct. 5, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/scientific-brief-sars-cov-2.html>; WORLD HEALTH ORG., INTERNATIONAL TRAVEL AND HEALTH 56, 65 (2012); *Methicillin-Resistant Staphylococcus Aureus (MRSA)*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/mrsa/community/index.html#:~:text=MRSA%20is%20usually%20spread%20in,that%20have%20touched%20infected%20skin> (last visited Apr. 17, 2021).

52. See *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTNS. FOR DISEASE CONTROL & PREVENTION (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> [hereinafter CDC Health Equity].

53. See generally Shahlah Farzan, *Missouri Prison Staff Offered COVID Vaccine Soon, but Most Inmates Have to Wait*, ST. LOUIS PUB. RADIO (Jan. 27, 2021, 5:12 AM), <https://news.stlpublicradio.org/coronavirus/2021-01-27/missouri-prison-staff-offered-covid-vaccine-soon-but-most-inmates-have-to-wait>.

54. See Lori Parshley, *supra* note 45.

55. Catherine Whelan & Taylor Haney, *What It's Like When COVID-19 Lasts for Months*, ST. LOUIS PUB. RADIO (Aug. 10, 2020), <https://www.npr.org/2020/08/10/900710151/what-its-like-when-covid-19-lasts-for-months>.

enlarged, ineffectively pumping hearts; and neurological deficits, psychological deficits, and mental illness.⁵⁶

As the pandemic continues, the CDC has clarified that Black and Brown communities are particularly at risk for sickness and death.⁵⁷ One of the reasons for this overrepresentation of these groups is suboptimal living conditions. Disproportionately, Black and Brown individuals and their families live in more densely populated areas, experience residential segregation, live in areas without access to fresh food (food deserts), and have multi-generational households.⁵⁸ Further, these communities disproportionately are required to work outside the home in essential roles, with less paid sick leave and less access to healthcare and health insurance.⁵⁹ These same communities experience more stigma and systemic inequalities, and have sustained overrepresentation in jails and prisons due to lack of resources, lack of effective representation, and institutional racism.⁶⁰ Nationally, Black deaths from COVID-19 are nearly twice greater than expected, based on their share of the population.⁶¹ COVID-19 has magnified the disparities in health between White communities and Black and Brown communities in the United States.⁶² As a result, jails will perpetuate and accelerate the civil unrest currently gripping the country if action is not taken now.⁶³

Over the past nine months, jails and prisons have been recognized as incubators of the virus.⁶⁴ The arguments throughout this Article support this notion and highlight the availability of resources to maintain the optimal health and hygiene practices as well as physical structure of the facilities, chronic over-

56. Elizabeth Cooney, *Long After the Fire of a Covid-19 Infection, Mental and Neurological Effects Can Still Smolder*, STAT NEWS (Aug. 12, 2020), <https://www.statnews.com/2020/08/12/after-covid19-mental-neurological-effects-smolder/>. See Lori Parshley, *supra* note 45; *Long-Term Effects of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html>.

57. See *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> (last updated Mar. 12, 2021) [hereinafter COVID-19 Risks by Ethnicity].

58. CDC Health Equity, *supra* note 52.

59. *Id.*

60. See *id.*

61. See COVID-19 Risks by Ethnicity, *supra* note 57.

62. See Courtney Connley, *Racial Health Disparities Already Existed in America—The Coronavirus Just Exacerbated Them*, CNBC, <https://www.cnbc.com/2020/05/14/how-covid-19-exacerbated-americas-racial-health-disparities.html> (last updated June 3, 2020).

63. See, e.g., Heather Hollingsworth, *Inmates at St. Louis Jail Set Fires, Break Out Windows*, AP NEWS (Feb. 6, 2021), <https://apnews.com/article/st-louismedia4118b9b8424676f8a6a0361f17ac4bd7>.

64. See Madeleine Carlisle & Josiah Bates, *With Over 275,000 Infections and 1,700 Deaths, COVID-19 Has Devastated the U.S. Prison and Jail Population*, TIME (Dec. 28, 2020, 2:52 PM), <https://time.com/5924211/coronavirus-outbreaks-prisons-jails-vaccines/>.

crowding, and the behaviors of inmates, staff, and visitors. The airborne nature of coronavirus spread allows for bi-directional transmission among inmates, staff, and visitors with every admission, release, and staff shift change.⁶⁵ The patterns of deaths in Wayne County demonstrate that poor carceral practices may kill more staff than inmates.⁶⁶ Jail practices are meant in part to promote public safety, yet traditional jailing practices are resulting in additional health and safety risks during this pandemic.⁶⁷

VII. CONCLUSION: HOW DOES A SUBJECT MATTER EXPERT DEFINE CRUEL AND UNUSUAL?

The COVID-19 pandemic is a magnifier of flaws in U.S. housing, hygiene, and health practices in jails, prisons, and detention centers.⁶⁸ However, it also magnifies flaws in our legal system for addressing and challenging these practices. I have been involved in a dozen suits in half as many months. None of the plaintiffs' lawyers have found success in judicial settings, suggesting that perhaps judicial settings are not the right venues to seek necessary changes.

Our model of litigation in the United States devalues science and professional contributions of subject matter experts to optimize outcomes.⁶⁹ United States courtrooms are too often arenas of drama and conflict, and the goal of counsel is to discredit the professional and boots-on-the-ground experience of experts who can inform the judge and jury. My experience with Judge Chuang in the Maryland suit was rare, but welcome. I was treated as a valued contributor to the legal discussion. So, until our courtroom behaviors change, the courtroom

65. Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, THE PEW CHARITABLE TRUSTS (July 1, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities>. See, e.g., Jack Suntrup, *Prisons in Farmington, Vandalia Report Coronavirus Outbreaks over the Weekend*, ST. LOUIS POST-DISPATCH (Sept. 16, 2020), https://www.stltoday.com/lifestyles/health-med-fit/coronavirus/prisons-in-farmington-vandalia-report-coronavirus-outbreaks-over-the-weekend/article_59079653-709d-55d9-88b1-1ced983259d0.html; see also Naomi Thomas, *Jails Can Spread Coronavirus to Nearby Communities, Study Finds*, CNN (Aug. 4, 2020, 4:56 AM), <https://www.cnn.com/2020/08/04/health/jails-nearby-communities-coronavirus-spread-study/index.html>.

66. Peter Eisler et al., *Across U.S., COVID-19 Takes a Hidden Toll Behind Bars*, REUTERS (May 18, 2020, 11:00 AM), <https://www.reuters.com/investigates/special-report/health-coronavirus-usa-jails/>.

67. See *id.*

68. See Taylor Miller Thomas, *How U.S. Prisons Became Ground Zero for Covid-19*, POLITICO (June 25, 2020, 3:00 AM), <https://www.politico.com/news/magazine/2020/06/25/criminal-justice-prison-conditions-coronavirus-in-prisons-338022>.

69. David Baltimore et al., *Bridging the Science-Law Divide*, DAEDALUS, J. AM. ACAD. ARTS & SCIS., Fall 2018, at 181, 185. See Sheila Jasanoff, *Science, Common Sense & Judicial Power in U.S. Courts*, DAEDALUS, J. AM. ACAD. ARTS & SCIS., Fall 2018, at 15, 25.

may not be the most effective venue for the reform of corrections practices around housing, hygiene, and health.

The judicial branch has been relied on too often to change carceral conditions.⁷⁰ We have experts, we need mandatory standards. We need legislation and executive leadership. The legislative branch and the executive branch need to step up and act responsibly regarding issues of health and hygiene behind bars. The COVID-19 pandemic is showing us the spread of an infectious disease behind bars can translate to spread of the disease among corrections staff and local communities. There are several pathways to improvement.

Currently, since jails and prisons are not considered licensed health care facilities, they have no mandatory accreditation standards.⁷¹ While meeting accreditation standards does not guarantee quality services, it does set a floor. There are two primary accrediting agencies in the United States for jails and prisons, the National Commission for Correctional Health Care and the American Correctional Association.⁷² While certification by either is not a guarantee of preventing the often-accepted legal floor of cruel and unusual punishment in a given facility, it provides expectations that a baseline of policies and services exist. There are also countless non-governmental organization standards and guidelines—such as those from the United Nations and the World Health Organization.⁷³ U.S. legislation can build on these and other standards.

Moreover, many states have baseline requirements for their juvenile detention facilities.⁷⁴ Juvenile detention facilities are essentially jails and prisons for children.⁷⁵ States acknowledge the vulnerability of the facility inhabitants by setting standards. Why can we not provide similar protections for adults?

70. See generally Josiah D. Rich et al., *The Need for Higher Standards in Correctional Healthcare to Improve Public Health*, 30 J. GEN. INTERNAL MED. 503, 503 (2014).

71. *Id.*

72. *About Us*, NAT'L COMM'N ON CORR. HEALTH CARE, <https://www.ncchc.org/about> (last visited Mar. 22, 2021); *About Health Care*, AM. CORR. ASS'N, https://www.aca.org/ACA_Prod_IMIS/ACA_Member/Healthcare/About_Us/ACA_Member/Healthcare_Professional_Interest_Section/HC_About.aspx?hkey=e9d55fc8-f10b-4222-ad99-f994031d2bec (last visited Mar. 22, 2021).

73. See, e.g., U.N. Off. on Drugs & Crime, U.N. Standard Minimum Rules for the Treatment of Prisoners §§ 24–27, 29–35, https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf (last visited Apr. 22, 2021); LARS MOLLER ET AL., WORLD HEALTH ORG., HEALTH IN PRISONS, A WHO GUIDE TO THE ESSENTIALS IN PRISON HEALTH 1 (2007).

74. See, e.g., Mo. Sup. Ct. Rule 129.04 App. A.

75. Press Release, Wendy Sawyer, Prison Pol'y Initiative, Youth Confinement: The Whole Pie (Dec. 19, 2019), <https://www.prisonpolicy.org/reports/youth2019.html>.

Almost 2.3 million individuals are incarcerated or detained in the United States.⁷⁶ They are experiencing COVID-19 with the same blunt tools that teach them other life lessons. And there are also hundreds of thousands of people who staff and visit these facilities daily⁷⁷—and then return home to their communities. Standards around health, hygiene, and housing would mitigate risk of not only COVID-19, but also the next public health-threatening crisis.

I teach medical students *primum non nocere*, or “first do no harm.” I do not know the criminal justice equivalent of first do no harm. But when I see: soap and feminine hygiene products treated as a scarce commodity; mop buckets filled with filthy water; dirty and torn face masks; rust that is half-an-inch thick in patient showers; broken toilets full of feces; dozens of people screaming and banging on doors to get my attention; and Nutraloaf served as the only meal for days, I know it is time for the U.S. public and our elected officials to take the same tours I did.

I started this Article writing of the magnification of health disparities among people incarcerated in the United States. This was from an article I wrote almost ten years ago, *Why Every Medical Student Should Go to Jail*.⁷⁸ I argued to fellow faculty members, “You’ll likely find that when your students spend a little time behind bars, they’ll open their eyes to a whole new world.”⁷⁹

In the companion piece to this Article, Chad Flanders discusses how district and appeals courts analyze COVID-19 litigation involving outbreaks in prisons. He argues that district judges have had their eyes opened to the poor conditions within corrections facilities. However, the judicial system by itself is not enough to reform prison administration. Now it is time for our legislative and executive branch leaders to experience a similar epiphany as the district courts. We cannot expect one branch of government to take all the heat. Rather, all three branches of government must take responsibility to reform the way the U.S. correctional system manages basic issues of health and hygiene.

76. Press Release, Wendy Sawyer & Peter Wagner, Prison Pol’y Initiative, Mass Incarceration: The Whole Pie 2020 (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

77. *See id.* (indicating that 600,000 people enter prison gates every year); *Occupational Employment and Wage Statistics*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/oes/current/oes333012.htm#> (last visited Apr. 18, 2021) (showing that 405,780 individuals are employed as correctional officers or jailers as of May 2020).

78. Fred Rottnek, *Every Medical Student Should Go to Jail*, SOC’Y OF TCHRS. OF FAM. MED., <https://www.stfm.org/publicationsresearch/publications/educationcolumns/2011/july/> (last visited Mar. 22, 2021).

79. *Id.*

FIGURE 1. CHARACTERISTICS OF HIGH-RISK INMATES AND DETAINEES

CHARACTERISTICS OF HIGH-RISK INMATES AND DETAINEES
<p>Jails and prisons typically house detainees with chronic conditions that were not well-controlled prior to incarceration.⁸⁰ According to the CDC, many such chronic conditions make people particularly susceptible to serious COVID-19. The CDC has published the following list of diagnoses that make a detainee high-risk for COVID-19 infection⁸¹:</p> <p>People of any age with the following conditions are at increased risk of severe illness from COVID-19:</p> <ul style="list-style-type: none"> • Cancer; • Chronic kidney disease; • Chronic obstructive pulmonary disease (“COPD”); • Immunocompromised state (weakened immune system) from solid organ transplant; • Obesity (body mass index [“BMI”] of 30 or higher); • Serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies; • Sickle cell disease; or • Type 2 diabetes mellitus. <p>Based on current knowledge, people with the following conditions might be at an increased risk for severe illness from COVID-19:</p> <ul style="list-style-type: none"> • Asthma (moderate-to-severe); • Cerebrovascular disease (affects blood vessels and blood supply to the brain); • Cystic fibrosis; • Hypertension or high blood pressure; • Immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines; • Neurologic conditions, such as dementia; • Liver disease; • Pregnancy; • Pulmonary fibrosis (having damaged or scarred lung tissues); • Smoking; • Thalassemia (a type of blood disorder); or • Type 1 diabetes mellitus. <p>Additionally, individuals aged 55 or older, even if they are not diagnosed or receiving treatment for one of the aforementioned conditions, are at an increased risk of serious illness or death from COVID-19 and are properly classified as high-risk.⁸²</p>

80. AMY SMITH, *HEALTH AND INCARCERATION 7* (Nat’l Acad. Press, 2013).

81. *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated Mar. 15, 2021).

82. See Daniel Downs, *Data Analyzes COVID-19 Impact on Jail Populations*, CORRECTIONS1 (June 25, 2020), <https://www.corrections1.com/coronavirus-covid-19/articles/data-analyzes-covid-19-impact-on-jail-populations-jCpL0XVyNoJEHCZD?MvBriefArticleId=10532>.

TABLE 1. DECLARATIONS

JAIL	COURT	PLAINTIFFS' ATTORNEY/FIRM	DATE OF INVOLVEMENT	ENGAGEMENT BEYOND DECLARATION	STATUS
Miami-Dade County, Metro-West	US District Court for the Southern District of Florida, Miami Division	Advancement Project, CRC	April 2020	Scheduled for a conference call emergency hearing on 4/27/20. But technology fail on conference call	11 th Court of Appeals vacated the Preliminary Injunction (PI) from the district court ⁸³
Tulsa County	US District Court for the Northern District of Oklahoma	Still She Rises; CRC	April 2020		Plaintiff's motion for a PI was denied without prejudice, and plaintiff's motion for a TRO is moot. ⁸⁴
Prince George County	US District Court for the District of Maryland, Eastern Division	CRC; Wilmer Hale	April 2020	Supplemental declaration; assisted in developing discovery list and interrogatories	District court did not grant a PI. ⁸⁵

83. Swain v. Junior, 961 F.3d 1276, 1294 (11th Cir. 2020).

84. Feltz v. Bd. of Cnty. Comm'rs of Cnty. of Tulsa, 18-CV-0298-CVE-JFJ, 2020 WL 2393855, at *17 (N.D. Okla. May 11, 2020).

85. Seth v. McDonough, 461 F. Supp. 3d 242, 265 (D. Md. 2020).

JAIL	COURT	PLAINTIFFS' ATTORNEY/FIRM	DATE OF INVOLVEMENT	ENGAGEMENT BEYOND DECLARATION	STATUS
East Baton Rouge Parish Prison (Jail) ⁸⁶	US District Court, Middle District of Louisiana	Advancement Project; CCR Justice	May 2020 through February 2021	Two supplemental declarations and inspection	Case dismissed with prejudice.
Terminal Island Prison	US District Court, Central District of California, Western Division	Prison Law Center	June 2020	No declaration; shared resources and other unsealed work product	No further action ⁸⁷
Missouri Department of Corrections - Women's Eastern Reception, Diagnostic and Correctional Center (Vandalia) Prison ⁸⁸		Phillips Black	May and June 2020		The client was given the earliest possible release date.

86. Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief, *Belton v. Gautreaux*, No. 3:20-cv-000278-BAJ-SDJ (May 26, 2020).

87. See *Wilson v. Ponce*, 465 F. Supp.3d 1037, 1050 (C.D. Cal. 2020) (showing that the plaintiffs' request for TRO was denied).

88. Marissanne Lewis-Thompson, *'We Wasn't Supposed to Die': One Missouri Prison's COVID Outbreak Raises Concerns*, ST. LOUIS PUB. RADIO (Sept. 11, 2020, 3:29 PM), <https://news.stlpublicradio.org/2020-09-11/covid-prison-conditions>.

JAIL	COURT	PLAINTIFFS’ ATTORNEY/ FIRM	DATE OF INVOLVEMENT	ENGAGEMENT BEYOND DECLARATION	STATUS
Clayton County (Atlanta), Georgia ⁸⁹	US District Court for the Northern District of Georgia, Atlanta Division	ACLU (National); Southern Center for Human Rights ⁹⁰	June 2020 through December 2020	Inspection on 10/4/2020	Motion for PI was denied.

89. Class Action Complaint and Petition for Writ of Habeas Corpus, *Jones v. Hill*, No. 1:20-cv-02791 (July 1, 2020).

90. Lauren Gill, *Prisoners Inside Georgia’s Clayton County Jail Describe Desperate Efforts to Avoid COVID-19*, THE APPEAL (Aug. 7, 2020), <https://theappeal.org/prisoners-inside-georgias-clayton-county-jail-describe-desperate-efforts-to-avoid-covid-19/>; Leon Stafford, *Civil Rights Groups: Clayton County Jail Must Address COVID-19 Cases*, ATLANTA J.-CONST. (July 28, 2020), <https://www.ajc.com/news/atlanta-news/civil-rights-group-pushing-clayton-county-jail-to-address-alleged-covid-19-cases/UWBX5CMSC5ACTEZYUZLMSP74WQ/>.

TABLE 2. INSPECTIONS, AS AN AGENT OF THE COURT

JAIL	COURT	COUNSEL	DATE OF INVOLVEMENT	ENGAGEMENT BEYOND INSPECTION	STATUS
Wayne County (Detroit), Michigan ⁹¹	Third Judicial Court of Michigan	Lawyers representing Wayne County and the contracted health care provider; Advancement Project; Allison Kriger	May 2020; Inspection on 5/6/20	My report was struck from the record. ⁹²	Ongoing
East Baton Rouge Parish Prison (Jail) ⁹³	US District Court, Middle District of Louisiana	Lawyers representing the parish and Jail and the contracted health care provider; Advance Project; CCR Justice	May 2020 through February 2021; Inspection on 6/5/2020	Declaration and two supplementals; TRO Hearing on 6/10/2020; Continued interviews of plaintiffs following inspection for final inspection report	Case dismissed with prejudice.

91. Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief, *Russell v. Wayne County of Michigan*, No. 2:20-cv-11094-MAG-EAS (E.D. Mich. May 4, 2020).

92. Angie Jackson, *Report Detailing ‘Severe’ Disrepair at Wayne County Jail Struck from Lawsuit*, DETROIT FREE PRESS (July 3, 2020, 9:06 AM), <https://www.freep.com/story/news/local/michigan/2020/07/03/report-severe-disrepair-wayne-county-jail-struck-lawsuit/3211973001/>; Kelly Davis, *Coronavirus in Jails and Prisons*, THE APPEAL (July 6, 2020), <https://theappeal.org/coronavirus-in-jails-and-prisons-25/>.

93. Petition for Writ of Habeas Corpus, *supra* note 86.

JAIL	COURT	COUNSEL	DATE OF INVOLVEMENT	ENGAGEMENT BEYOND INSPECTION	STATUS
Worcester County, Maryland, and Howard County, Maryland (ICE Detainees)	US District Court, District of Maryland	US Department of Justice; and lawyer representing the jails the warden/ director, and CorrectHealth; National Immigration Project of the National Lawyers Guild and USAMD ⁹⁴	July 2020-September 2020; Inspections on 7/31/20 and 8/1/20	Case Management Conference, 7/17/2020; Motion hearing on 9/2/2020	A Maryland federal judge has certified a class of medically vulnerable immigrants held in detention facilities who claim that the coronavirus pandemic has created “unconstitutional conditions of confinement,” but denied the class expedited bail hearings ⁹⁵
Clayton County (Atlanta), Georgia ⁹⁶	US District Court for the Northern District of Georgia, Atlanta Division	Lawyers for Clayton County; ACLU (National); Southern Center for Human Rights ⁹⁷	June 2020 through December 2020 Inspection on 10/4/2020	Declaration	Motion for PI was denied.

94. Melissa Angell, *ICE Detainees Get Cert., Denied Early Bail in COVID-19 Fight*, LAW360 (Sept. 21, 2020, 11:15 PM), <https://www.law360.com/classaction/articles/1311820/ice-detainees-get-cert-denied-early-bail-in-covid-19-fight>.

95. *Coreas v. Bounds*, 451 F. Supp. 3d 407, 430 (D. Md. 2020).

96. Class Action Complaint, *supra* note 89.

97. *Stafford*, *supra* note 90.

