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**HUMAN RIGHTS UNDER STRAIN: AN UNPRECEDENTED CRISIS BRINGS
COVID-19 LAWSUITS INSIDE CORRECTIONAL FACILITIES**

Lilyan Wong*

On January 21, 2020, the first case of a new Coronavirus¹ was confirmed in the United States.² Shortly after, the Trump Administration declared the Coronavirus outbreak to be a public health emergency, making it the first quarantine order issued by the federal government in over fifty years.³ On February 11, 2020, the World Health Organization (“WHO”)⁴ announced the formal name for the Coronavirus – COVID-19.⁵ Although the Center for Disease Control and Prevention (“CDC”) emphasized the importance of social distancing, face masks, and other measures to control the transmission of the virus between communities,⁶ the disease continued to spread like wildfire within the United States. The White House COVID-19 Task Force continues to cause unease throughout the nation as their daily briefings include issues such as: the problems of a possible vaccine⁷ and the transmission in detention centers, including jails, prisons, and immigration detention facilities.⁸ Outbreaks of the virus continue to plague these high-population environments.

In the wake of the global coronavirus pandemic, congested and unsanitary conditions in jails and prisons leave incarcerated individuals vulnerable during this unprecedented crisis. These detention centers are epicenters for infectious diseases and possible COVID-19 cases. The environments make basic measures of personal protection nearly impossible. They are sites of concentrated outbreaks because of the higher background prevalence of infection, the unavoidable close contact in overcrowded and unsanitary facilities, limited supplies, and poor access to

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¹ *Coronavirus*, WORLD HEALTH ORGANIZATION, https://www.who.int/health-topics/coronavirus#tab=tab_1 (last visited June 18, 2021) (detailing the overview, prevention, and symptoms of the infectious disease).

² Grace Hauck et al., *Five Months in: A timeline of how COVID-19 has unfolded in the US*, USA TODAY NEWS (June 23, 2020), <https://www.usatoday.com/in-depth/news/nation/2020/04/21/coronavirus-updates-how-covid-19-unfolded-u-s-timeline/2990956001/>.

³ *Id.*

⁴ *About WHO*, WORLD HEALTH ORGANIZATION, <https://www.who.int/about> (last visited June 18, 2021) (detailing who is part of this organization, their work, how they are governed, etc.).

⁵ Nick Schwellenbach, *The First 100 Days of the U.S. Government’s COVID-19 Response*, POGO (May 6, 2020), <https://www.pogo.org/analysis/2020/05/the-first-100-days-of-the-u-s-governments-covid-19-response/> (discussing the federal government’s response during a substantial period covering critical phases of the coronavirus outbreak in the United States).

⁶ *GUIDANCE FOR UNVACCINATED PEOPLE: How to Protect Yourself & Others*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited June 11, 2021) (discussing precautionary measures to prevent further exposure of the virus).

⁷ See Laura Spinney, *When will a coronavirus vaccine be ready?*, THE GUARDIAN (Apr. 6, 2020), <https://www.theguardian.com/world/2020/apr/06/when-will-coronavirus-vaccine-be-ready>.

⁸ Joseph J. Amon, *COVID-19 and Detention: Respecting Human Rights*, HEALTH AND HUMAN RIGHTS JOURNAL (Mar. 23, 2020), <https://www.hhrjournal.org/2020/03/covid-19-and-detention-respecting-human-rights/>.

healthcare services.⁹ Incarcerated individuals have a constitutional right to healthcare services that mirror community standards.¹⁰ Social distancing has been recognized as a fundamental strategy to prevent the transmission of COVID-19; however, individuals in these institutions cannot achieve such measures effectively.¹¹ Not only are the detainees at high risk, but the staff that works inside these correction centers are vulnerable to the transmission of COVID-19 and have the potential to link the virus to the community.¹² With shared necessary utilities such as showers, toilets, sinks, and even food services, there is no effortless way to stop the spread from reaching the inside of those walls.¹³ Inside jails and prisons, more than 398,000 individuals have tested positive, and at least 2,701 inmates and correctional officers have unfortunately died due to COVID-19.¹⁴

To mitigate the effects of possible outbreaks, it is detrimental to include jails and prisons in the overall public health response during and after the pandemic. Beyond a protective plan, to achieve proper social distancing and reduce those at high risk, these detention centers must incorporate immediate actions - some of which include adequate and frequent testing, access to proper preventive supplies, improved sanitation, and more. Running water, working toilets, and basic medical care constitute the bare minimum of support necessary to guarantee that incarcerated individuals remain healthy inside prison walls.¹⁵ The coronavirus pandemic is a public health crisis unlike any experienced in decades.¹⁶ Failure to mount a suitable response to COVID-19 outbreaks throughout jails and prisons has the potential to impede the health and safety of incarcerated Americans, the correctional workforce, and the community surrounding these facilities.¹⁷ This issue has shined light upon the inherent injustices of our criminal legal system, including the unconscionable number of people held in jails and prisons in inhumane conditions. By utilizing the legal system to obtain relief, incarcerated individuals and employees are subject to explore potential avenues for a solution to their position during these times.¹⁸ Federal, state, and local governments must enforce protective protocols and follow guidance to reduce the population inside these facilities for the safety of the incarcerated individuals and the public at large.

This note will discuss the following: (1) explore a brief background of COVID-19 in the United States; (2) consider the extraordinary challenges for prisoners and staff in the context of

⁹ Amon, *supra* note 8.

¹⁰ See Daniel S. Murphy, *Health Care in the Federal Bureau of Prisons: Fact or Fiction*, 3 CALIFORNIA JOURNAL OF HEALTH PROMOTION (2005).

¹¹ CDC, *supra* note 6.

¹² Lauren-Brooke Eisen & Jennifer Weiss-Wolf, *No Soap. Broken Sinks. We Will All Pay For Coronavirus Ravaging Prisons*, BRENNAN CENTER FOR JUSTICE (Mar. 26, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/no-soap-broken-sinks-we-will-all-pay-coronavirus-ravaging-prisons>.

¹³ See *id.*

¹⁴ *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last visited June 11, 2021) (discussing the most updated data of people infected and killed by COVID-19 nationwide and in each prison system).

¹⁵ Lauren-Brooke Eisen & Jennifer Weiss-Wolf, *supra* note 12.

¹⁶ Hauck et al., *supra* note 2.

¹⁷ See Oluwadamilola T. Oladeru et al., *A call to protect patients, correctional staff and healthcare professionals in jails and prisons during the COVID-19 pandemic*, 8 HEALTH & JUSTICE (2020).

¹⁸ See Sara D. Schotland, *A plea to apply principles of quarantine ethics to prisoners and immigration detainees during the COVID-19 crisis*, 1 JOURNAL OF LAW AND THE BIOSCIENCES (2020).

the current crisis; (3) explore the government's response to COVID-19 inside jails and prisons; and (4) suggest long-term solutions to strengthen infection control and prevention measures during and after COVID-19. Ultimately, this note will advocate for those affected by incarceration during the rapid spread of COVID-19 and prioritize the health and safety of the public at large.

I. Background of COVID-19 in the United States.

The devastating impact of the coronavirus has been catastrophic in the United States and all around the globe, affecting the lives of millions of people. The fatal consequences of this pandemic are due to the Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2), the novel pathogen that causes the coronavirus disease 2019 (COVID-19).¹⁹ The virus emerged in Wuhan, China, in December 2019.²⁰ Since the first confirmed case in the United States, the virus rapidly continued to grow and soon surged past China and Italy, becoming the planet's most infected nation in March 2020.²¹ COVID-19 spreads through droplets released into the air when an infected person coughs or sneezes.²² Some COVID-19 symptoms include: cough, fever, chills, shortness of breath, difficulty breathing, muscle or body aches, sore throat, and a loss of taste or smell.²³ In rare cases, individuals may have severe respiratory problems, kidney failure, or ultimately death.²⁴ As of March 10, 2021, 527,726 deaths have been associated with COVID-19 in the United States.²⁵ The CDC has urged the public to follow current guidelines in order to protect themselves and those around them from transmitting the virus, because COVID-19 can spread easily in the community.²⁶ Community spread is the "spread of an illness for which the source of infection is unknown."²⁷ Furthermore, the senior director of infection prevention at Johns Hopkins Medicine, Lisa Lockerd Maragakis, explored such guidelines: avoid close contact with others; practice good hygiene; and take precautions if living with or caring for someone who is sick.²⁸

Not only in the United States, but across the world, governments declared states of emergency and urged citizens to isolate and quarantine to prevent exposure to people who have or

¹⁹ Lauren M. Sauer, *What is Coronavirus?*, JOHNS HOPKINS MEDICINE (Oct. 12, 2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus> (discussing critical information about COVID-19 such as how it started and how to protect the public from the spread).

²⁰ Schwellenbach, *supra* note 5.

²¹ *Id.*

²² Sauer, *supra* note 19.

²³ *Id.*

²⁴ *Id.*

²⁵ *The Unequal Toll of the COVID-19 Pandemic*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/past-reports/03122021.html> (last visited Mar. 12, 2021) (COVID-19 data showing reported cases, percentage of tests, vaccinations, hospital admissions, and deaths in the United States).

²⁶ CDC, *supra* note 6.

²⁷ *CDC Confirms Possible Instance of Community Spread of COVID-19 in U.S.*, CDC, <https://www.cdc.gov/media/releases/2020/s0226-Covid-19-spread.html> (Feb. 26, 2020).

²⁸ Lisa L. Maragakis, *How Can I Protect Myself (and Others) from the New Coronavirus and COVID-19?*, JOHNS HOPKINS MEDICINE (July 31, 2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/how-can-i-protect-myself-from-coronavirus>.

may have the contagious disease.²⁹ Ideally, the goal in fighting a pandemic is to completely halt the spread, but slowing it down is pivotal. To flatten out the curve, the public was advised, and sometimes required, to self-isolate since actual quarantine reduced the number of cases active at a given time.³⁰ Aside from social distancing, avoiding eating and drinking in bars and restaurants, and unnecessary travel, the Trump administration limited gatherings to fewer than ten people.³¹ In May 2020, schools, bars, restaurants, and entertainment venues remained closed until a majority of states began moving forward with phased-in approaches, with restrictions to minimize the risk of spreading the virus.³² Throughout June 2020, a number of states saw a sudden spike in cases.³³ Although the number of deaths have decreased drastically since the peak in the spring, in October 2020 the average number of deaths was 700 per day - which in comparison is far more than seen in early July of 2020.³⁴ According to a New York Times database, as of July 22, 2021, about a year later, more than 34,310,126 people in the United States have been infected with COVID-19, and at least 610,027 have died from the virus.³⁵ Despite the increase in cases, states throughout the United States have lifted stay-at-home orders, reopened businesses, and worked to reduce the severity of social distancing measures.³⁶ Lifting social distancing measures prematurely as cases remain high could potentially have devastating consequences.³⁷

II. Jails and Prisons In The Time of COVID-19.

The United States leads the world in both COVID-19 infections and mass incarceration.³⁸ This pandemic has proven to be rapidly developing, with little attention given to prisoners and correctional staff who share environments known to amplify the outbreak. Many state and federal

²⁹ See Sean Fleming, *Europe surpasses 100,000 confirmed coronavirus deaths – how did we get here?*, WORLD ECONOMIC FORUM (Apr. 24, 2020), <https://www.weforum.org/agenda/2020/04/coronavirus-deaths-europe/>.

³⁰ Siobhan Roberts, *Flattening the Coronavirus Curve*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/article/flatten-curve-coronavirus.html> (discussing why slowing the spread of coronavirus with protective measures is critical to flattening the curve that keeps society going).

³¹ *Federal government responses to the coronavirus (COVID-19) pandemic, 2020-2021*, BALLOTPEDIA, [https://ballotpedia.org/Federal_government_responses_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2021](https://ballotpedia.org/Federal_government_responses_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021) (last updated July 21, 2020) (exploring a timeline with comprehensive coverage of how federal, state, and local governments have responded throughout the coronavirus pandemic in the United States).

³² See BALLOTPEDIA, *supra* note 31.

³³ Adrianna Rodriguez, *Why are states seeing a sudden increase in coronavirus cases? Experts have more than one answer*, USA TODAY (June 11, 2020), <https://www.usatoday.com/story/news/health/2020/06/11/coronavirus-experts-explain-why-covid-19-cases-spike-these-states/5333309002/> (discussing how sudden increases in coronavirus cases might be the consequence of lifting state lockdown restrictions; in June 2020 many states experienced a spike in cases, including: Arizona, Alaska, Arkansas, California, Florida, Kentucky, New Mexico, North Carolina, Mississippi, Oregon, South Carolina, Tennessee, Texas, and Utah, as well as Puerto Rico).

³⁴ *Id.*

³⁵ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters> (last visited July 22, 2021).

³⁶ Hannah Miller, *Reopening America: A state-by-state breakdown of the status of coronavirus restrictions*, CNBC, <https://www.cnbc.com/2020/04/30/coronavirus-states-lifting-stay-at-home-orders-reopening-businesses.html> (last updated July 9, 2020) (discussing how different states are enforcing reopening plans).

³⁷ *America Is Reopening. But Have We Flattened the Curve?*, JOHNS HOPKINS MEDICINE (Oct. 12, 2020), <https://coronavirus.jhu.edu/data/new-cases-50-states>.

³⁸ See *Why Decarceration Is Vital For Public Health Amid COVID-19*, PARTNERS IN HEALTH (Jan. 26, 2021), <https://www.pih.org/article/why-decarceration-vital-public-health-amid-covid-19>.

prisons have more occupants than they are designed to hold.³⁹ The United States holds approximately 2.3 million people incarcerated in the criminal justice system.⁴⁰ The results of research conducted by the JAMA Network⁴¹ shows that COVID-19 is tearing through Federal Bureau of Prisons (“BOP”) facilities.⁴² Moreover, case rates for incarcerated people are more than five times higher than the nation’s overall rate.⁴³ Jails and prisons are highly vulnerable to the global COVID-19 pandemic due to overcrowding, poor ventilation, and tight environments that increase the transmission of the virus.⁴⁴ Placed in such conditions, a great percentage of prisoners qualify as “high risk” for COVID-19 due to their age and pre-existing health conditions, combining the risk for mass spreading and severe symptoms.⁴⁵ Studies have shown that prisoners have a high prevalence of chronic diseases and mental health illnesses, as well as an increasingly aging population with hypertension and diabetes.⁴⁶ Even during normal circumstances, prisons concentrate individuals who are susceptible to infection and at higher risks of complications. Now, COVID-19 has increased mortality in older people and those with chronic diseases and immunosuppression.⁴⁷ Inadequate investment in prison health combined with massive overcrowding has the potential to delay diagnosis and treatment.⁴⁸

States must recognize COVID-19 as a substantial health risk to prisoners and have an obligation to ensure proper medical care at least equivalent to that available to the general population.⁴⁹ The deprivation of basic health and hygiene to anyone who is in the custody of the government is a disturbing violation of human dignity at any time. The United Nations Committee on Economic, Social and Cultural Rights reported that “States are under the obligation to *respect* the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services.”⁵⁰ Adequate testing and screening in jails and prisons is critical to fighting the virus, as contact tracing facilitates a means of alleviating the spread in closed institutions.⁵¹ However, there is a lack of availability of COVID-19 tests and an uncertainty of

³⁹ Emily Widra, *Since you asked: Just how overcrowded were prisons before the pandemic, and at this time of social distancing, how overcrowded are they now?*, PPI (Dec. 21, 2020), <https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/>.

⁴⁰ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PPI (Mar. 24, 2020), <https://rb.gy/pcqag8> (discussing the broader harm of mass incarceration within the criminal justice system).

⁴¹ *About JAMA*, JAMA NETWORK (July 2020), <https://jamanetwork.com/journals/jama/pages/for-authors> (discussing information of the editors and objectives of JAMA, an international-peer reviewed general medical journal).

⁴² See Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, JAMA NETWORK (July 8, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2768249>.

⁴³ *Id.*

⁴⁴ Elizabeth Barnert et al., *Prisons: Amplifiers of the COVID-19 Pandemic Hiding in Plain Sight*, 110 AJPH, 964 (2020).

⁴⁵ *See id.*

⁴⁶ See Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AJPH (2009).

⁴⁷ Stuart A. Kinner et al., Comment, *Prisons and custodial settings are part of a comprehensive response to COVID-19*, 5 THE LANCET PUB. HEALTH, e188 (2020).

⁴⁸ *Id.*

⁴⁹ Amon, *supra* note 8.

⁵⁰ UN Economic and Social Council, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, CESCR (Aug. 11, 2000), <https://www.refworld.org/docid/4538838d0.html>.

⁵¹ Brie Williams et al., *Correctional Facilities In The Shadow Of COVID-19: Unique Challenges And Proposed Solutions*, HEALTH AFFAIRS (Mar. 26, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200324.784502/full/>.

whether jurisdictions are accounting for such a demanding need for proper screening and testing in their correctional facilities.⁵² Additionally, jails and prisons have access to extremely limited emergency medical equipment needed to combat the virus.⁵³ A lack of available tests and a lack of medical supplies is a recipe for a disproportionately high COVID-19 mortality rate.

These correctional environments impose additional risks as stories have emerged of prisoners producing personal protective equipment while they themselves are barred from possessing it.⁵⁴ Some institutions are strictly controlling essential items like soap, cleaning supplies, hand sanitizer, and bedding materials.⁵⁵ Prisoners are not being provided the bare minimum of supplies to fight against COVID-19 due to overcrowded facilities or simply a lack of resources.⁵⁶ The provision of soap to the inmate population varies widely among facilities, and many prisoners often lack adequate access to soap unless purchased through commissary.⁵⁷ Further, prisoners who are provided the opportunity to work generally earn pennies on the dollar, making basic necessities cost-prohibitive.⁵⁸ These basic essentials in preventing the spread of COVID-19 are becoming a luxury rather than a commonplace requirement. Facing such a deadly pandemic, desperate attempts of incarcerated individuals to protect themselves are commonplace. A countless number of release motions were raised by individuals with underlying health concerns who fear serious health consequences if infected with COVID-19.⁵⁹ These were accompanied by numerous claims regarding detention facilities lacking adequate medical services and supplies exacerbating the spread of the virus.⁶⁰

Alarmed by the failure to implement adequate procedures consistent with CDC guidelines, four inmates in custody at the Metropolitan Detention Center filed a class action petition seeking habeas relief due to their underlying medical conditions.⁶¹ Plaintiffs argued that their Fifth and Eighth Amendment rights were violated due to incarceration despite their increased vulnerability to COVID-19.⁶² To vindicate their constitutional rights, prisoners may bring suits challenging the conditions of their confinement.⁶³ Government officials must comply with the Constitution; otherwise, the government's failure to provide basic human needs for those in custody may cause Fifth Amendment violations.⁶⁴ The government's response to COVID-19 in jails must adhere to

⁵² Williams et al., *supra* note 51.

⁵³ *Id.*

⁵⁴ Andre G. Montoya-Barthelemy et al., *COVID-19 and the Correctional Environment: The American Prison as a Focal Point for Public Health*, 58(6) AM. J. PREV. MED., 888, 889 (2020).

⁵⁵ *Id.* at 888.

⁵⁶ *See id.*

⁵⁷ Conor Friedersdorf, *Can't We at Least Give Prisoners Soap?*, THE ATLANTIC (Apr. 1, 2020), www.theatlantic.com/ideas/archive/2020/04/make-soap-free-prisons/609202/ (discussing the lack of access among prisoners to supplies such as soap, that are essential to protect against the spread of COVID-19).

⁵⁸ *See* Wendy Sawyer, *How much do incarcerated people earn in each state?*, PPI (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> (discussing prison wages among different states).

⁵⁹ *See, e.g., District Court Responses to COVID-19-based Release Motions*, NLADA, <https://rb.gy/kdtpj6> (last visited Oct. 30, 2020).

⁶⁰ *Id.*

⁶¹ Chunn v. Edge, No. 1:20-cv-01590 (E.D.N.Y. May, 23, 2020).

⁶² *Id.*

⁶³ *See id.*

⁶⁴ Joshua Matz, *The Coronavirus Is Testing America's Commitment to People's Constitutional Rights*, THE ATLANTIC (Apr. 20, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/coronavirus-jails-constitutional-rights/610216/> (discussing constitutional issues brought by the pandemic in jails and ICE detention facilities).

legal precedent surrounding acceptable conditions of confinement and must not steer away from well-established obligations.⁶⁵

a. Solitary Confinement vs. Medical Isolation

The psychological effects of solitary confinement have been strikingly existent for centuries across the United States.⁶⁶ From the suspension of recreational prison activities, increased time in cell blocks, and minimal contact with other inmates, prison conditions mimic solitary confinement.⁶⁷ Psychological consequences could worsen due to the damaging effects of COVID-19 on such a vulnerable group of individuals.⁶⁸ Solitary confinement has well-documented adverse effects, such as psychological harms of segregation, including associations between solitary confinement and self-harm, anxiety, depression, paranoia, and aggression.⁶⁹ Prior to the ongoing pandemic, the psychological and psychiatric care of individuals in prison was already a widespread challenge for many health care systems.⁷⁰ Fears and uncertainties for isolated or quarantined patients will likely worsen pre-existing mental health conditions.⁷¹

Inside these detention centers, the only cells with solid doors for quarantine are those used for solitary confinement.⁷² Although moving detainees at immediate risk of COVID-19 to these segregation units will alleviate the rapid spread of illness, these closed environments may severely impact their physical and mental health.⁷³ Fears of the use of isolation to mitigate the transmission of COVID-19 have surfaced, as incarcerated people become either unwilling to report symptoms to prevent solitary confinement or those who do report are forced to undergo psychological and physical harm from the inhumane settings.⁷⁴ Aside from their primary focus of treating detainees for COVID-19, it is imperative that medical staff also provide psychological care in these settings. As the COVID-19 pandemic sweeps through our nation's jails and prisons, guidance from the medical community on adequate uses of medical isolation and quarantine in these enclosed conditions is pivotal.⁷⁵

Distinguishing solitary confinement and medical isolation is fundamental to help ensure that detainees obtain proper mental health services. Medical isolation is the practice of isolating individuals from the rest of the prisoners as they begin to show signs of, or test positive for,

⁶⁵ Matz, *supra* note 64.

⁶⁶ Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME AND JUSTICE, 365 (2018).

⁶⁷ Thomas Hewson et al., Comment, *Effects of the COVID-19 pandemic on the mental health of prisoners*, 7 THE LANCET PSYCHIATRY, 568-70 (2020).

⁶⁸ *See id.*

⁶⁹ Keramet Reiter et al., *Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017-2018*, 110 AJPH, S56 (2020).

⁷⁰ *See* Haney, *supra* note 66.

⁷¹ Michael Liebrez et al., *Caring for persons in detention suffering with mental illness during the Covid-19 outbreak*, 1 FORE. SCI. INT'L: MIND & L. (2020).

⁷² Williams et al., *supra* note 51.

⁷³ *Id.*

⁷⁴ David H. Cloud et al., *Medical Isolation and Solitary Confinement: Balancing Health and Humanity in US Jails and Prisons During COVID-19*, 35 JGIM, 2738 (2020).

⁷⁵ *See id.*

COVID-19.⁷⁶ This form of treatment is not a punishment and is overseen by medical staff.⁷⁷ The underlying differences between these two forms of practices are that medical isolation takes place in comfortable conditions, ends when the person is no longer contagious, the person has access to virtual contact with loved ones, and access to recreational activities.⁷⁸ Rather, in solitary confinement, the individual is completely restrained from all contact. Separating those who become infected is necessary; however, the punitive practice of solitary confinement will only result in irreparable psychological harm.⁷⁹

b. Are Correctional Officers at an Equally Heightened Risk for COVID-19?

A growing body of significant epidemiology research, shows that mass incarceration increases infection rates for contagious diseases, both for prisoners and the deaths in the greater community.⁸⁰ A majority of custodial systems reporting COVID-19 cases are reporting infection among both detainees and the custodial staff, as these facilities continue to experience a profound occupational health crisis.⁸¹ Correction officers and medical staff are essential personnel during this crisis. However, these professions create a contagious link between prisoners and the community.⁸² Similar to those in custody, correctional officers' physical and mental health may be highly vulnerable during these difficult times.

Federal correctional officers everywhere are expressing their concerns through the press, national lawsuits,⁸³ and complaints with the U.S. Occupational Safety and Health Administration ("OSHA"), about deviations from CDC guidelines in their work environments.⁸⁴ Recognizing the dangers of working in these institutions, employees have filed complaints due to risk exposure to the coronavirus without receiving proper hazard pay.⁸⁵ Stressing the highly contagious nature of COVID-19, the employees in the class action argue that as part of their job, they have been forced to work in close proximity with objects, surfaces, and individuals who may be infected or at high-risk.⁸⁶ Custodial settings serve as a passage for community transmission that will substantially impact communities as millions of people are released from custody each year.⁸⁷ Staff members

⁷⁶ *COVID-19 IN CORRECTIONAL FACILITIES: MEDICAL ISOLATION*, AMEND, <https://amend.us/covid-19-in-correctional-facilities-medical-isolation/> (last visited Oct. 30, 2020) (discussing the enforcement of medical isolation or quarantine to mitigate the spread of COVID-19 in correctional facilities against treatment of solitary confinement).

⁷⁷ *Id.*

⁷⁸ AMEND, *supra* note 76.

⁷⁹ *Id.*

⁸⁰ Sandhya Kajeepeeta & Seth J. Prins, *WHY CORONAVIRUS IN JAILS SHOULD CONCERN ALL OF US*, THE APPEAL (Mar. 24, 2020), <https://theappeal.org/coronavirus-jails-public-health/> (discussing research findings that show a correlation between mass incarceration and infectious diseases in the community).

⁸¹ Barnert et al., *supra* note 44.

⁸² See Oladeru et al., *supra* note 17.

⁸³ See, e.g., Keith L. Alexander & Dan Morse, *As virus spreads in jails and prisons, correctional officers fear for themselves and their loved ones*, THE WASHINGTON POST (May 4, 2020), <https://wapo.st/3bec9Ks>.

⁸⁴ See, e.g., *3-31-20 OSHA Complaint re BOP brought by Council of Prison Locals 33 Union*, NACDL (Apr. 15, 2020), <https://www.nacdl.org/document/033120-OSHA-Complaint-re-BOP-brought-by-Council>.

⁸⁵ See, e.g., *Complaint, Braswell v. United States*, No. 20-cv-359, ECF No. 1 (U.S. Ct. Fed. Claims, Mar. 27, 2020), <https://bit.ly/2WmaQVz>.

⁸⁶ Erin Shaak, *Federal Workers Owed Hazard Pay for Coronavirus Exposure Class Action Claims*, CLASSACTION.ORG (Mar. 31, 2020), www.classaction.org/news/federal-workers-owed-hazard-pay-for-coronavirus-exposure-class-action-claims.

⁸⁷ Kinner et al., *supra* note 47.

must be adequately prepared with proper equipment to fight and reduce the spread of transmission, or cases will continue to rise dramatically. Although correctional environments might often be considered isolated from society, COVID-19 is creating a connection to the health of the country as a whole. Prisoner and correctional staff safety is inherently a matter of public health.⁸⁸

III. Federal, State, and Local Government's Response.

Advocates, activists, and prosecutors have been pleading with state and local officials to release vulnerable people from jails, emphasizing the risks to the health of incarcerated individuals, staff, and the public.⁸⁹ Additional measures include the release of those in pre-trial detention, convicted of a nonviolent crime or incarcerated on a technical parole violation, and those with less than two years of their sentences remaining.⁹⁰ States and local governments have begun to take such meaningful steps previously mentioned to protect prisoner's health and safety.⁹¹ In April of 2020, in an attempt to flatten the curve of COVID-19 infection rates, California set a statewide emergency bail schedule that set bail at \$0 for most misdemeanor and lower-level felonies.⁹²

As of July 1, 2020, throughout the United States, twenty-one states had released inmates at the state level, twelve states had released inmates on the local level, eleven states had not released inmates, two states had prohibited the release of certain inmate populations, and four states had temporarily released certain populations of inmates.⁹³ Jail populations have reduced in states some states: Michigan, North Dakota, Massachusetts, Colorado, Florida, Ohio, Arizona, and many more.⁹⁴ These reductions stem from release orders for individuals who were nearing the end of their misdemeanor sentences, held for low-level offenses, held in jails pretrial for nonviolent offenses, technical probation, and parole violations.⁹⁵ Several state jurisdictions have also reduced jail and prison admissions by making fewer arrests and issuing citations for certain misdemeanors.⁹⁶ Additionally, while most states require incarcerated people to pay from \$2-\$5 copays for physician visits, much-needed medication, and testing, some states have suspended all copays in their response to the COVID-19 pandemic.⁹⁷ Most federal prisons, state prisons, and

⁸⁸ Montoya-Barthelemy et al., *supra* note 54.

⁸⁹ See *Covid-19's Impact on People in Prison*, EJI, <https://eji.org/news/covid-19s-impact-on-people-in-prison/> (last updated Apr. 16, 2021) (discussing the rapid spread of the virus infecting incarcerated persons and their plea for reduced populations).

⁹⁰ Laura Hawks, *COVID-19 in Prisons and Jails in the United States*, JAMA INTERN. MED. (Apr. 28, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2765271>.

⁹¹ *Id.*

⁹² Darrell Smith, *Judicial Council of California approves \$0 bail for low-level suspects*, THE SACRAMENTO BEE (Apr. 8, 2020), <https://www.sacbee.com/news/coronavirus/article241817606.html> (discussing California's effort to temporarily end cash bail for lower-level offenders as a response to the global health crisis).

⁹³ *Prison inmate release responses in response to the coronavirus (COVID-19) pandemic, 2020*, BALLOTPEDIA, [https://ballotpedia.org/Prison_inmate_release_responses_in_response_to_the_coronavirus_\(COVID-19\)_pandemic_2020](https://ballotpedia.org/Prison_inmate_release_responses_in_response_to_the_coronavirus_(COVID-19)_pandemic_2020) (last updated July 1, 2020) (exploring the states and local governments that released prison inmates in response to the coronavirus pandemic).

⁹⁴ *The most significant criminal justice policy changes from the COVID-19 pandemic*, PPI, <https://www.prisonpolicy.org/virus/virusresponse.html> (last updated May 18, 2021) (discussing which jurisdictions are implementing ways to reduce coronavirus cases inside jails and prisons and protect the general public).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

many local jails have either completely suspended visitations or drastically reduced these practices to reduce exposure in facilities.⁹⁸ In response, the BOP made phone calls and video calls free-of-charge for inmates.⁹⁹ While other states may have not been so generous and continue to restrict contact between prisons and their families, they are implementing cost reductions.¹⁰⁰

On March 27, 2020, Congress unanimously passed the CARES Act,¹⁰¹ which authorized the Attorney General to expand dramatically the use of home confinement to protect vulnerable individuals from COVID-19. This measure was taken to recognize the public-health consensus and take aggressive action to minimize the spread of COVID-19. Since March 2020, the BOP has increased home confinement by over 40%, resulting in 3,419 inmates on home confinement and 7,199 inmates in Residential Reentry Centers.¹⁰² Concerned for the health and safety of inmates, the BOP has also waived financial requirements to pay subsistence fees for inmates in pre-release custody.¹⁰³ To further safeguard the community from the spread of COVID-19, the BOP is operating under some of the following conditions: (1) non-contact visitations have been reinstated; (2) increased access to counsel and legal material for inmates; (3) modified operations to maximize social distancing; (4) inmate programming; (5) screening for all new inmates, staff, contractors, and visitors; (6) and alternative measures for secure transfers.¹⁰⁴

IV. The Solution.

While the pandemic has created a crisis within the United States correctional system, moving forward necessitates enacting bold legislation throughout the nation. In the criminal justice system, aggressive and proactive measures are fundamental to minimize the virus from spreading throughout the walls in prisons and jails.¹⁰⁵ Failure to develop a comprehensive plan for these individuals would be akin to cruel and unusual punishment. Without relying on DOJ or BOP's discretion, Congress should take immediate and decisive action to mitigate the long-term effects of COVID-19 inside these detention centers.

a. Decarceration

Decarceration from correctional facilities is one strategy. Decarceration is the process of reducing the incarcerated population through accelerated release and by diverting from custody

⁹⁸ See *How Prisons in Each State Are Restricting Visits Due to Coronavirus*, THE MARSHALL PROJECT (May 7, 2021), <https://www.themarshallproject.org/2020/03/17/tracking-prisons-response-to-coronavirus>.

⁹⁹ John Hendel, *Federal prisons make inmate calling, video visits free during pandemic*, POLITICO (Apr. 14, 2020), www.politico.com/news/2020/04/14/federal-prisons-make-inmate-calling-free-186383 (discussing how the BOP is ensuring inmates maintain contact with their family since social and legal visitations were suspended).

¹⁰⁰ PPI, *supra* note 94.

¹⁰¹ See *Coronavirus Aid, Relief, and Economic Security Act*, H.R. 748 § 6002 at Div. B, Tit. II, Sec. 12003(b)(2)(2020) (“CARES Act”).

¹⁰² *Update on COVID-19 and Home Confinement*, FEDERAL BUREAU OF PRISONS (Apr. 05, 2020), https://www.bop.gov/resources/news/20200405_covid19_home_confinement.jsp (discussing the enforcement of home confinement since the release of Attorney General Barr's original memo to the BOP).

¹⁰³ FEDERAL BUREAU OF PRISONS, *supra* note 102.

¹⁰⁴ *BOP Modified Operations*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/coronavirus/covid19_status.jsp (Oct. 8, 2020) (discussing how the BOP is operating under several conditions in response to COVID-19).

¹⁰⁵ Hawks, *supra* note 90.

people who would otherwise be incarcerated.¹⁰⁶ While prison and jail populations have fallen, new evidence of an increase in incarceration from July 2020 to March 2021 has emerged as cities and courts begin to reopen.¹⁰⁷ Such increases combined with high rates of new COVID-19 cases underscore the necessity for decarceration in support of public health. By creating smaller populations within correctional institutions, other strategies such as social distancing, diagnostic testing, and the ability to quarantine and medically isolate may become easier to implement.¹⁰⁸ Indeed, some states have worked to achieve population reduction inside these correctional facilities since the onset of the pandemic.¹⁰⁹ However, reductions have occurred from fewer arrests, jail bookings, and prison admissions due to the temporary closures of state and local courts rather than utilizing best practices for decarceration in prisons and jails.¹¹⁰

Reports of continued outbreaks in correctional facilities across the country suggest additional efforts are needed on a facility-by-facility basis.¹¹¹ Congress should propose legislation for federal, state, and local officials to consider policy options to safely reduce incarceration, including community supervision, sentencing and sanctions, jail and prison release mechanisms, re-entry strategies, and community reintegration. This mitigation strategy is a process and not a one-time action. Some actions will be immediately feasible, while others will take longer to implement, but if efforts are shown throughout the United States, the prevention and control of COVID-19 transmission in correctional facilities is possible. All federal, state, and local officials must act in unison and exercise their discretion to divert individuals from incarceration.

Additionally, very few individuals who petition for compassionate release during the pandemic have been approved.¹¹² Due to the extreme medical vulnerability of some incarcerated people to COVID-19, Congress should build upon the actions taken in the CARES Act by expanding the authority of courts to order compassionate release and reduce sentences for individuals incarcerated in the federal prison system. Congress must account for petitioners' medical condition, age, functional or cognitive impairment, or family circumstances. Enforcement of the COVID-19 Safer Detention Act of 2020¹¹³ is required as it would clarify the authority of courts to order compassionate release based on COVID-19 vulnerability and shorten the waiting period for judicial review during the coronavirus crisis.

¹⁰⁶ See Matthew J. Akiyama et al., *Flattening the Curve for Incarcerated Populations – COVID-19 in Jails and Prisons*, 382 NEW ENG. J. MED. 2075, 2076 (2020).

¹⁰⁷ See *JAIL DATA INITIATIVE*, PUBLIC SAFETY LAB, <https://publicsafetylab.org/jail-data-initiative> (last visited Nov. 12, 2020) (reporting aggregated population data of the United States jail population from March 2020 to an increase in November 2020).

¹⁰⁸ See Brandy F. Henry, *Social Distancing and Incarceration: Policy and Management Strategies to Reduce COVID-19 Transmission and Promote Health Equity Through Decarceration*, 47 HEALTH EDUCATION & BEHAVIOR (2020).

¹⁰⁹ See PPI, *supra* note 94.

¹¹⁰ Joan Stephenson, *National Academies Report Urges Reducing Inmate Population to Curb COVID-19 in Prisons, Jails*, JAMA NETWORK (Oct. 27, 2020), <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2772506>.

¹¹¹ See Lauren-Brooke Eisen & Jennifer Weiss-Wolf, *supra* note 12.

¹¹² Emily Widra & Wanda Bertram, *Compassionate release was never designed to release large numbers of people*, PPI (May 29, 2020), <https://www.prisonpolicy.org/blog/2020/05/29/compassionate-release/> (discussing the difficult process of getting approved for compassionate release).

¹¹³ See *COVID-19 Safer Detention Act of 2020*, S.4034, 116th Cong. §2 (2020).

b. Support For Re-Entry In The Community

Even though the criminal justice system has responded to the threat of the virus by effectively reducing incarcerated populations and offering some suitable supplies, doubts still arise of the effect that these steps have had on the spread of the virus in local communities or how successful those efforts have been.¹¹⁴ Because these incarcerated individuals are being released back into society, the physical toll of the virus on this population remains unclear.¹¹⁵ Additionally, previously incarcerated people are usually on the margin of the labor force.¹¹⁶ After release, the most urgent needs for material well-being are housing, health care, and income support.¹¹⁷ Without proper financial assistance, it is likely that they will struggle during and after the current pandemic to formulate stable lives.

Congress should incorporate language from the COVID-19 Correctional Facility Emergency Response Act of 2020.¹¹⁸ It would establish a grant program within DOJ to facilitate re-entry planning and enforce correctional facility releases by states. The grant program should incorporate a bundle of services that encompass housing, health care, and financial support. In respect to housing, the following strategies should be implemented and enforced by federal, state, and local authorities: perform COVID-19 tests on individuals prior to release, provide financial support to families that provide housing, and provide appropriate housing programs prior to release. For food, officials should facilitate Supplemental Nutrition Assistance Program (“SNAP”)¹¹⁹ enrollment pre-release.¹²⁰ Finally, regarding healthcare, community health systems should facilitate health care access after release by prioritizing the urgency of in-person first appointments to improve engagement in primary care, substance use, and mental health treatment. State officials should enforce the creation of influential programs that target the health problems faced by newly released prisoners, such as the Transitions Clinic Network (“TCN”).¹²¹

Through the CARES Act, Congress administered \$100 million in emergency funding to the federal prison system in response to the pandemic.¹²² In future legislation, Congress should provide an additional fund to expand testing, administer personal protective equipment and hygiene supplies, and sanitation services that incarcerated individuals have been neglected during this lethal pandemic. The potential devastation likely to follow if we do not immediately adhere

¹¹⁴ Jennifer Doleac et al., *Incarceration and the COVID-19 Crisis*, ECONOFACT (May 21, 2020), econofact.org/incarceration-and-the-covid-19-crisis.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Wanda Bertram, *Returning from prison and jail is hard during normal times — it’s even more difficult during COVID-19*, PPI (Sept. 2, 2020), <https://www.prisonpolicy.org/blog/2020/09/02/covidreentry/> (discussing the difficulties presented to people released from prison and how some states respond to provide support).

¹¹⁸ See *COVID-19 Correctional Facility Emergency Response Act of 2020*, H.R.6416, 116th Cong. §2 (2020).

¹¹⁹ *About FNS*, USDA (July 1, 2019), <https://www.fns.usda.gov/about-fns> (discussing the functions, accomplishments, and commitments of the Food and Nutrition Service (“FNS”).

¹²⁰ *COVID-19 Resources for Individuals and Families*, USDA, <https://www.fns.usda.gov/disaster/pandemic/covid-19/resources-individuals-families> (last visited Nov. 12, 2020) (discussing possible avenues of resources to help individuals and families during the pandemic).

¹²¹ See *Transitions Clinic Network Program*, TCN, <https://transitionsclinic.org/transitions-clinic-program/> (last visited Nov. 12, 2020).

¹²² Leola A. Abraham et al., *How COVID-19’s Disruption of the U.S. Correctional System Provides an Opportunity for Decarceration*, 45 AM. J. CRIM. JUST. (2020).

to these correctional facilities, far outweighs the foreseeable risks of utilizing all feasible resources and solutions at our disposal today.

c. Report Standardized Data on COVID-19

Currently, the prison systems within the United States and the BOP are providing some data pertaining to COVID-19 prevention efforts and cases, but it is not enough.¹²³ There is a lack of consistently defined, publicly available data on COVID-19 testing, infection rates, hospitalizations, and deaths in jails and prisons. Gaps in reporting obscures research and efforts to improve upon evidence-based guidance on how to prevent the transmission of COVID-19 within correctional facilities. A solution to this disturbance would be for Congress to enforce the COVID-19 in Corrections Data Transparency Act,¹²⁴ requiring the BOP, the United States Marshals Service (“USMS”), and state governments to collect and publicly report detailed data about COVID-19 in federal, state, and local correctional facilities. All correctional facilities should report daily on COVID-19 testing rates, hospitalizations, and mortality among incarcerated people and staff by age, gender, and race/ethnicity.

These measures, along with an empathetic yet aggressive order from the highest levels of leadership, will not reverse but will mitigate the devastating impact of COVID-19 inside correctional facilities and protect the health and safety of every individual in our communities.

¹²³ Doleac et al., *supra* note 114.

¹²⁴ See *COVID-19 in Corrections Data Transparency Act*, H.R.7983, 116th Cong. §2 (2020).