

Educating the Judiciary about the Social Determinants of Health

OCTOBER 2020

White Paper Two:

**The Public Health Legal Norm:
Why Judges Should Understand the SDOH**

About the Project:

Salus Populi: Educating the Judiciary about the Social Determinants of Health is a project in collaboration with the Center for Health Policy and Law at Northeastern University School of Law and the Institute for Health Equity and Social Justice Research at Northeastern University.

The Center for Health Policy and Law at Northeastern University School of Law promotes innovative solutions to public health challenges in Massachusetts and around the globe. The Center advances law and policy reforms to strengthen population health, reduce health disparities, nourish public health programs, and enhance access to affordable, high-quality healthcare. Wendy E. Parmet is the faculty director of the Center for Health Policy and Law, and Matthews Distinguished University Professor of Law and Professor of Public Policy and Urban Affairs at Northeastern University.

The Institute for Health Equity and Social Justice Research is dedicated to generating scientific knowledge to promote health equity and social justice, and reduce disparities in health, mental health and well-being. The Institute's projects focus on public mental health and substance use disorders, violence prevention and trauma studies, refugee, immigrant and global health, and health promotion and disease prevention across the life course. The director of the Institute for Health Equity and Social Justice Research is Alisa K. Lincoln, Associate Dean of Research for the College of Social Sciences and Humanities and Professor of Health Sciences and Sociology at Northeastern University.



Acknowledgements:

The Center for Health Policy and Law and the Institute for Health Equity and Social Justice Research would like to acknowledge the dedicated research assistants who provided support for this report: Christopher Petronio, Gregory Paal, Somer Brown, and Larissa Brito de Senna. Thank you to Faith Khalik, legal fellow for Public Health Law Watch, for her valuable work on this paper.

Support for this report was provided by the Robert Wood Johnson Foundation. The views expressed here do not necessarily reflect the views of the Foundation.

Table of Contents

Executive Summary	3
Salus Populi Suprema Lex	4
How an Understanding of the SDOH can Help Judges	6
Where It Matters: Problem-Solving Courts	8
The COVID Cases	11
Petition for Release Cases	12
Evictions	13
Conclusion: The SDOH are Relevant to the Work of Judges	14

Executive Summary

American law has long treated the protection of health as an **important legal norm**, a public good that the law seeks to protect. This norm, expressed by the common law maxim, *salus populi suprema lex*, is evident in a wide range of constitutional, statutory, and common law cases.

Judges who have a fuller understanding of the **social determinants of health (SDOH)**, and how they help to establish the risks faced by individual litigants as well as the health of different populations, are better equipped to respect and uphold the public health norm. They also can make more informed decisions relating to the myriad legal issues—including evidentiary rulings, statutory interpretations and constitutional determinations—that implicate the SDOH.

COVID-19 has highlighted the importance of the SDOH to the administration of justice. Once the pandemic struck the U.S., courts were charged not only with rendering justice safely during a pandemic, but also with deciding a rapidly escalating number of cases contesting state public health emergency powers. Courts have also had to rule upon thousands of compassionate release claims by prisoners and civil detainees, as well as challenges to the risks of contagion created by the conditions of confinement. In all of these cases, and many more, **a richer understanding of the SDOH, and how they intersect with the law, can help judges reach legally sound decisions that do not undermine the public’s health.**

As a result of the pandemic, cases that relate to many of the SDOH are especially likely to proliferate in the months to come. The intersection between health and social conditions will be central to post-pandemic evictions, occupational safety cases, negligence claims, and a wide range of other disputes resulting from the pandemic. In such cases, knowledge about the SDOH will be important to ensuring a just outcome in accordance with established legal authority. An understanding of the SDOH will also help judges assess the relevance and credibility of litigants’ evidentiary claims. In other words, understanding the SDOH can help judges advance justice.

Salus Populi Suprema Lex

The protection and preservation of public health has continually played a central role in American jurisprudence. This is especially evident in constitutional law. The U.S. Supreme Court has long identified public health protection as a core component of the states' police power. For example, in 1824, in *Gibbons v. Ogden*, Chief Justice Marshall pointed to “quarantine laws [and] health laws of every description” as examples of laws that fell within the police power, the authority that the states reserved to themselves when they joined the Constitution.¹ Initially, the police power jurisprudence applied primarily in cases concerning the boundaries between state and federal authority. After the Civil War, the Supreme Court utilized it to determine whether state laws violated the Fourteenth Amendment.² To oversimplify, the Court held that laws that sought to protect the public's health fell within the police power and hence did not violate the Fourteenth Amendment. Even as the Court in the late nineteenth and early twentieth centuries began to review state action more vigorously under the Fourteenth Amendment,³ the question of whether a state law related to public health remained crucial to determining its constitutionality.

Public health's centrality to constitutional jurisprudence was exemplified in the 1905 case, *Jacobson v. Massachusetts*.⁴ *Jacobson* concerned a challenge to a Cambridge, Massachusetts regulation requiring that all residents be vaccinated against smallpox. In upholding the law, the Supreme Court declared that “Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”⁵ That did not mean that courts had no role to play. Rather, in his opinion for the Court, Justice Harlan made clear that courts were charged with determining whether the law in question had a “real or substantial relation” to the protection of public health.⁶ Courts also had to determine whether the law was reasonable, or applied in a manner that was oppressive, in violation of fundamental law, or particularly inhumane to the individual.⁷ Still, the *Jacobson* court was emphatic about the breadth and importance of public health protection to the constitutional enterprise.

In *Jacobson v. Massachusetts*, Justice Harlan explained that courts were charged with determining whether the law in question had a “real or substantial relation” to the protection of public health.

Constitutional jurisprudence has evolved significantly since 1905. Nevertheless, the Supreme Court continues to recognize that public health protection constitutes an important and often compelling end for law. This can be seen in free speech cases, in which the Court has accepted that protecting health constitutes an important state interest for purposes of applying intermediate

scrutiny.⁸ The Court has also underscored the importance of state efforts to protect the public's health in free exercise and dormant commerce clause cases.⁹ Likewise, the Court has noted the states' traditional prerogative over public health in cautioning courts against too readily preempting state health laws.¹⁰

Such rulings, and many others, show that the Court and U.S. law more generally treat the protection of population health as a legal norm, a value or goal that our law generally seeks to respect.¹¹ This norm has been especially apparent during the COVID-19 pandemic. Since March 2020, federal and state courts have decided dozens of challenges to state emergency orders. These cases have required courts to consider the meaning of *Jacobson*, and the appropriate level of review when public health emergency orders infringe upon constitutionally-protected rights.¹² Although the lower courts have reached different conclusions to these questions, they have consistently recognized the pandemic's salience to their analysis.

So has the Supreme Court. In *South Bay United Pentecostal Church v. Newsom*, the Court, by a 5-4 vote, rejected an emergency appeal brought by a church seeking to enjoin an order by California Governor's limiting the number of in-person worshippers.¹³ Although the Court did not write an opinion, in his concurrence, Chief Justice Roberts quoted *Jacobson*: "Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States."¹⁴ In addition, in explaining why the order was unlikely to violate the Free Exercise clause, he explained that California imposed "[s]imilar or more severe restrictions ... [on] comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time."¹⁵ By emphasizing these distinctions, the Chief Justice demonstrated that the real-world impact of a disease in different social settings was relevant to the constitutional analysis.

Importantly, the public health norm is not limited to constitutional law. As discussed below, the promotion of public health is a common imperative in a wide range of cases. It is also a well-respected common law principle, as the maxim *salus populi suprema lex* attests. For example, much of negligence law is predicated on the principle that people must act reasonably so as not to injure (create bodily injury or ill health) in others.¹⁶ Indeed, deterrence, or the avoidance of injuries, is generally considered to be one of the goals of the law of torts.¹⁷ Specific tort doctrines, such as public nuisance, further evince the value the common law places on public health.¹⁸

In short, the protection of health is a traditional and still widely-followed *legal* norm, relevant in a broad range of cases. This is not to say that public health is the only legal norm or that the promotion of health should override all other considerations. It simply means public health

matters to law; and that by understanding the forces that affect public health (the SDOH), judges can be better equipped to render legally-appropriate decisions.

How an Understanding of the SDOH can Help Judges

Although it is common to think that the health of individuals and populations is determined primarily on individual biology or behavior, researchers over the last several decades have found that health depends to a very significant degree on the complex interaction between individual-level factors (biology and choice) and a constellation of social factors, including education, housing, employment, the environment, social norms, and access to healthy food and health care, widely known as the SDOH.¹⁹ According to the National Academy of Medicine, the SDOH are responsible for 80 to 90 percent of the modifiable contributors to human health.²⁰

According to the National Academy of Medicine, the SDOH are responsible for 80 to 90 percent of the modifiable contributors to human health.

The SDOH remain an important influence on individual and population health even with respect to an infectious disease such as COVID-19. As Chief Justice Roberts recognized in *South Bay*, the types of social interactions people engage in, for example, whether they gather inside in large groups, can impact the spread of the pandemic, and are thus relevant to determining the constitutionality of state social distancing laws.²¹ Moreover, pre-existing social conditions, including economic vulnerability, employment status, discrimination, and housing instability, appear to be driving significant racial and class disparities in vulnerability to the pandemic.²² Prisoners and detainees, as well as workers who are employed in such settings, also face enhanced risks.²³ Immigrant communities have also faced heightened risks as a result of occupational exposures, poor housing and fear of potential immigration-related consequences for accessing health care.²⁴

An understanding of how such factors interact to affect the health of individuals and populations can be valuable to courts when they apply or follow the public health norm in several ways. [See Table 1]

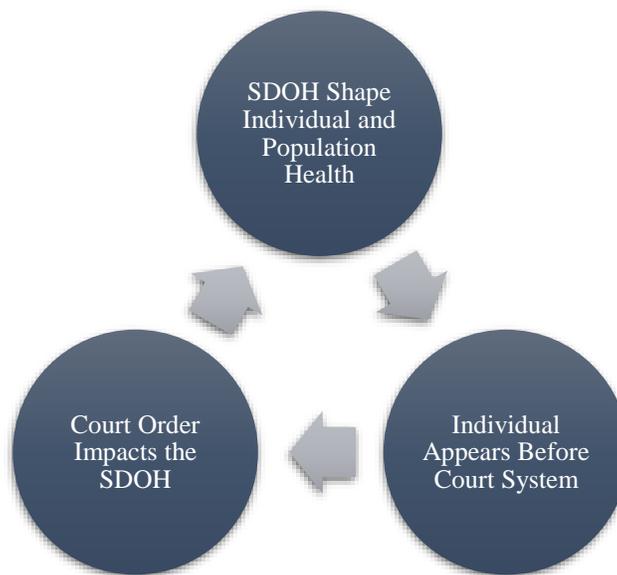
TABLE 1

Examples of Cases Where Knowledge of the SDOH Could Be Relevant	How an Increased Understanding of how the SDOH Impact Health Could Be Useful
Constitutional Cases	Helps judges in determining whether state action is related to the preservation of health.
Challenges to Public Health Regulations	Provides judges with a greater understanding of issues that relate to public health and thus fall within an agency’s public health mission.
Toxic Tort Claims	Provides judges with a richer understanding of multi-factorial causation, as well as how to assess reliability and relevance of evidence.
Public Nuisance Claims	Helps judges to appreciate how social factors can affect public health when deciding the validity of a public nuisance claim
Compassionate Release Claims	Allows for a greater appreciation of how social conditions in a facility can affect petitioner’s health.
Challenges to Immigrant Detention Center Conditions	Helps judges recognize how social conditions in detention centers affect individual and population health.

First, increased understanding of the SDOH can help judges apply constitutional rules and interpret statutory and regulatory language relating to public health. Judges who understand the SDOH are better able to assess whether executive officials have properly reviewed evidence relevant to determining the impact of their actions on public health.

Second, judges who are well-versed in SDOH will be better able to understand how social factors have influenced the decisions and behaviors of the litigants who are before the court, as well as the impact of court orders relating to sentencing, evictions, and family court matters on the health of the litigants and their communities. [See Figure A]

FIGURE A



Third, judges who have some familiarity with the SDOH and the epidemiological evidence and models that relate to them will be better equipped to rule on the admissibility of evidence in private and public law cases in which the SDOH are relevant. [See Appendix A] A greater understanding of the SDOH and how they relate to legal issues can help judges to decide controversies that implicate the SDOH and respect the public health norm.

Where It Matters: Problem-Solving Courts

The SDOH are relevant to a wide range of cases. Appendix A offers examples. This section focuses on problem-solving courts, which have long integrated an understanding of SDOH into their practice.

Problem-solving courts are specialized trial-level courts that seek to prevent individuals from falling into a cycle of repeat appearances in the legal system.²⁵ An understanding of the SDOH is essential to this goal, as courts must understand the social conditions that shape an individual's health and choices in order to craft solutions that reduce the risk of recidivism and promote successful social integration and health and well-being. For this reason, problem-solving courts recognize that the "larger context of social problems outside courts must be addressed in formulating solutions."²⁶

To achieve their mission, problem-solving courts employ a collaborative approach that relies on

multi-disciplinary teams. For example, judges in problem-solving courts typically seek the advice of knowledgeable non-legal professionals, such as social workers and professionals in welfare agencies.²⁷ In a study of 20 problem-solving courts, “a majority” included a representative of a local treatment provider as a part of the team, thirteen included a police officer, twelve included a probation officer, and two included a physician.²⁸ Some judges also gain additional expertise in areas relevant to their particular work.²⁹ For instance, judges in domestic violence courts may receive special training in the “unique dynamics of domestic violence,” while judges in drug courts are sometimes “asked to understand basic pharmacology.”³⁰

Family courts further illustrate the relevance of the SDOH to problem-solving courts. Like other problem-solving courts, family courts aim to support litigants by addressing the underlying issues that brought them to court.³¹ Family court judges recognize that their decisions implicate the SDOH and that “intra-family problems are not primarily legal in nature, but are instead manifestations of psychological, medical, and social problems, and are best addressed by a multidisciplinary, therapeutic approach.”³² Like other problem-solving courts, family courts also incorporate the SDOH by admitting inter-disciplinary evidence in order to assist the judge in making the best possible decision.

Family court judges recognize that intra-family problems are not primarily legal in nature, but manifestations of psychological, medical, and social problems best addressed by a multidisciplinary, therapeutic approach.

The SDOH are particularly relevant in custody cases, in which courts must consider the capacity of each parent to provide for the child’s needs as well as the home environment.³³ Family court judges must also appreciate the effects of trauma and be aware of the detrimental impacts that court processes and procedures can have on families.³⁴ In custody cases, judges must exercise their discretion to determine the best interests of the child and what will best promote the child’s welfare and happiness.³⁵ Judges who have a deeper understanding of the SDOH, and appreciate how they can impact the health and happiness of the child, will be better equipped to issue orders that are in the child’s best interest. Similarly, in reviewing a parent’s failure to make required child support payments, courts may need to recognize how employment instability, transportation barriers or other social factors can impede the parent’s ability to comply with a court order.³⁶ In effect, an increased understanding of the SDOH helps to inform judges about the constricted choices available to individuals who come before the court, as well as the role of social context in preventing recidivism and promoting social integration.

Research suggests that problem-solving courts, which often focus on the SDOH, have produced positive results. One study of a community court³⁷ reported a decrease in the two-year re-arrest rate for participants compared to similar defendants in a traditional court, a sharp decrease in the number of arrests in the court’s area, and an increased perception of judicial legitimacy, all “in a manner that is cost-efficient from the perspective of taxpayers.”³⁸ In that case, the willingness of the court to demonstrate an understanding of the values and challenges that exist within a community played a role in offenders’ adherence to program requirements.³⁹ Several states and counties also reported drug court system benefits, including a 50% decrease in the three-year re-arrest rate for participants and a total of \$88 million in savings to the taxpayer over ten years of operation.⁴⁰ A review of problem-solving courts from the U.K. found that their domestic violence courts reduced the number of cases dismissed, increased the number of convictions, and left victims feeling more satisfied with the process.⁴¹

Problem-solving courts thus illustrate the benefits that accrue to the judicial system when courts consider the SDOH and recognize that “cases are often symptoms of larger social and neighborhood problems.”⁴² The consideration of the SDOH by the judges in these courts appears to play a large part in their positive outcomes, as the increased information provided to judges leads to an understanding of possibilities that might not otherwise have been considered.⁴³

Knowledge about the SDOH can address the concerns of judges who feel like they have a “lack of tools” for dealing with complex cases like drug addiction or domestic violence

Judges frustrated by rising caseloads and the mechanical processing of hundreds of cases per day could learn from problem-solving courts and be more attentive to the SDOH in order to achieve similar positive outcomes that prevent repeat appearances and benefit their community.⁴⁴ Likewise, knowledge about the SDOH can address the concerns of judges who feel like they have a “lack of tools” for dealing with complex cases like those involving drug addiction or domestic violence.⁴⁵ Most importantly, an understanding of the SDOH can help judges break the cycle of re-appearances and make a tangible impact on the lives of the individuals who come before them.⁴⁶

TABLE 2

Kinds of Problem-Solving Courts	The SDOH They Might Consider	Impact of SDOH on judicial decision making
Family Courts	<ul style="list-style-type: none"> ▪ Parent’s employment prospects ▪ Living conditions for the child ▪ Parent’s education level 	Better understand what environment is most conducive to the health and well-being of the child
Drug Courts	<ul style="list-style-type: none"> ▪ Conditions contributing to individual’s addiction ▪ Background behind behavior bringing individual into court 	Greater knowledge as to what sanctions are likely to be effective, and any alternative resources that could make a difference
Domestic Violence Courts	<ul style="list-style-type: none"> ▪ Environmental conditions that contribute to domestic violence ▪ Services available to protect victims 	Develop partnerships with batterer’s programs, and recognize interventions that may help protect victims
Housing Courts	<ul style="list-style-type: none"> ▪ Health issues associated with homelessness ▪ Social conditions affecting individual’s ability to obtain housing 	Understand the health risks of homelessness and how best to reduce these risks and maintain housing

The COVID Cases

Since the start of the pandemic, courts have decided a wide range of issues that relate to the SDOH. In addition, courts have had to grapple with finding ways to administer justice in a safe manner. Here, too, an understanding of the SDOH will prove vital to appreciating the varied factors that affect the risk faced by different parties and jurors. For instance, a district court in New York recently demonstrated a recognition of the impacts that social structures can have on health by enjoining the enforcement of the Department of Homeland Security’s redefined public charge rule.⁴⁷ The court based its decision on the grounds that the rule would have a chilling effect on immigrants seeking health care during the COVID-19 crisis, creating a risk to the public health that made granting equitable relief “critical.”⁴⁸

The societal factors that shape health have become especially relevant in the many pandemic-related cases that have come before the courts. As the virus sweeps across the country, its spread has in large part been driven by social and environmental conditions.⁴⁹ For instance, social

factors including frequently working in public-facing jobs and less access to primary care have helped to create heightened vulnerabilities to the pandemic among communities of color.⁵⁰ The pandemic's impact in prisons and civil detention centers likewise shows how social conditions can affect the spread of the disease, as the infection rate in jails and prisons is two-and-a-half times higher than in the general population.⁵¹ The discussion below offers a few examples of the relevance of the SDOH to cases relating to the pandemic.

Prison and Detention Cases

Since March 2020, thousands of inmates have petitioned for compassionate release, or have challenged prison conditions due to their potential to spread COVID-19. In deciding such cases, some courts have focused on the petitioner's own health status, overlooking the role that prison conditions may play in spreading the disease. For example, a federal district court in Nevada denied a petition, stating there is no "extraordinary and compelling reason [for granting a petition for release] unless [the petitioner] also shows that [they are] in a high-risk category."⁵²

Many other courts, however, have demonstrated an understanding of the SDOH and have recognized that the risk of the disease is not purely internal to the individual. These courts have recognized the impact of the conditions of the facility in which the petitioners are confined. For example, one federal court in New York stated, "What perhaps tips the scale in Flores' favor is the location where she is being housed."⁵³ Flores was confined in a facility that had previously been instructed to address its high rates of COVID infection, and had been cited as "one of the worst institutions in the federal system"⁵⁴ in which "the Warden had demonstrated deliberate indifference to the health needs of the inmates."⁵⁵ Other courts have also considered the petitioner's ability to receive adequate medical attention in a facility grappling with COVID-19.⁵⁶ Taking such considerations into account does not necessarily mean the court will grant a release.⁵⁷ Nevertheless, this recognition of the influence of social forces on an individual's health helps judges respect the public health norm, and rule in a manner that is supportive of public health. For instance, one court's understanding of the dangers of cramped and unsanitary conditions led it to appreciate that the public health could be endangered by an outbreak in a prison, and in recognition of that risk, to order a decrease in the population of detainees facing such conditions.⁵⁸

Many courts have demonstrated an understanding of the SDOH, looking not only at the individual's health status, but also at the conditions of the facility in which they are confined.

The SDOH are also relevant in the many cases that immigrant detainees have brought seeking release due to the pandemic. One recent high-profile example comes from the ongoing *Flores v. Barr* litigation concerning the government's treatment of minor children in detention. On June 26, 2020, the federal court overseeing *Flores* ruled that the children detained by ICE had to be released due to "the severity of the outbreak in the counties" where the facilities are located, as well as "non-compliance or spotty compliance with masking and social distancing rules."⁵⁹

In deciding such cases, judges have to recognize the ways in which the facilities themselves may create risks to the health of the detainees.⁶⁰ For example, one court said, "Petitioners need not demonstrate that 'they actually suffered from serious injuries' to show a due process violation. Instead, showing that the conditions of confinement 'pose an unreasonable risk of serious damage to their future health' is sufficient."⁶¹ Another court showed a similar awareness of the effects social factors can have on health by deciding that the conditions in the detention center amounted to cruel and unusual punishment because they "placed Petitioners at a heightened risk" of contracting the disease.⁶² Just as in the prison cases, the court's consideration of the SDOH does not automatically mean release will be granted.⁶³ Some courts also persist in making only individualized judgments, and grant relief only to petitioners who have provided sufficient evidence of underlying conditions.⁶⁴ Their failure to at least consider the impact of the SDOH on the health of prisoners and the broader population illustrates the need for informing judges about the SDOH.

Evictions

Eviction proceedings during the pandemic provide another example of how courts have considered the SDOH in hearing COVID-related claims. **As of June 3, 2020, twenty-one U.S. states, commonwealths, and territories had suspended both eviction cases and eviction enforcement, with another twenty-one suspending one or the other or leaving the option open to local discretion.**⁶⁵ Of the state eviction moratoria issued during the pandemic, 89.8% had a court as their source in one way or another, with 45.8% coming directly from a court and 44.1% coming from both a court and the governor.⁶⁶ Given the numerous negative effects homelessness has on individual health, and the risk that that increased homelessness creates for increased transmission of COVID-19,⁶⁷ these actions reducing the amount of individuals left homeless in the face of a highly infectious respiratory disease gripping the country will likely save lives. Judges with a deeper understanding of the SDOH may be more likely to recognize the risks that homelessness presents (especially during a pandemic).

Conclusion: The SDOH are Relevant to the Work of Judges

An understanding of the SDOH can be vital to judges in a wide range of cases. Whether they sit in a problem-solving court or a court of general jurisdiction, a trial court or an appellate court, judges aim, in relevant cases, to apply the public health norm, and rule in ways that reflect the law's concern for public health. Doing so effectively requires an appreciation of how social factors affect the health of individuals and populations; in other words, of the SDOH. Likewise, in a range of judicial duties, from interpreting statutes to reviewing administrative actions, judges who understand the SDOH may be better equipped to issue legally sound decisions. This knowledge will be especially important during and in the wake of the COVID-19 pandemic. However, understanding how upstream social factors affect the public's health will continue to be essential long after the pandemic is finished. Equipping judges with the most current public health knowledge will likely enhance their ability to uphold the public health norm.

¹ 22 U.S. (9 Wheat). 1, 203 (1824).

² See *Slaughter-House Cases*, 83 U.S. (16 Wall) 36 (1873).

³ See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

⁴ 197 U.S. 11 (1905).

⁵ *Id.* at 37.

⁶ *Id.* at 31.

⁷ *Id.* at 38-39.

⁸ E.g., *Thompson v. Western States Medical Center*, 535 U.S. 357, 369 (2002). The Court has also recognized that many traditional health and safety warnings are permissible despite protections against compelled speech. See *National Institute of Family Life and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2376 (2018).

⁹ *Prince v. Massachusetts*, 321 U.S. 158 (1944); *United Haulers Ass'n v. Oneida Herkimer Solid Waste Management Auth.*, 550 U.S. 330 (2007).

¹⁰ *Medtronic v. Lohr*, 518 U.S. 470 (1996).

¹¹ See e.g., LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 15-17, 87 (3rd ed. 2016); WENDY E. PARMET, *POPULATIONS, PUBLIC HEALTH AND THE LAW* 2 (2009). See also Wendy E. Parmet, *Health Policy or Law? A Population-Based Analysis of the Supreme Court's ACA Cases*, 41 J. HEALTH POL. POL'Y & L. 1061, 1061-66 (2016); Micah L. Berman, *Defining the Field of Public Health Law*, 15 DEPAUL J. HEALTH CARE L. 45, 47 (2013); Lawrence O. Gostin, Scott Burris & Zita Lazzarini, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 61-64 (1999); Michael R. Ulrich, *A Public Health Law Path for Second Amendment Jurisprudence*, 71 HAST. L. J. 1053, 1071-1074 (2020).

¹² See, e.g., *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct.1613 (2020)(mem.); *In re Rutledge*, 956 F.3d 1018 (8th Cir. 2020) (upholding state ban on abortions during public health emergency); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (finding ban on in-person religious services violates First Amendment).

¹³ *South Bay*, 140 S.Ct. at 1613.

¹⁴ *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J. concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)).

¹⁵ *Id.*

¹⁶ See, e.g., *Bethel v. New York City Transit Auth.*, 703 N.E.2d 1214 (N.Y. 1998).

- ¹⁷ See, e.g., RESTATEMENT (SECOND) OF TORTS, § 901 cmt. c (AM. LAW INST. 1979) (“The law of torts . . . has within it elements of punishment or deterrence”).
- ¹⁸ See, e.g., *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 444 (R.I. 2008).
- ¹⁹ See, e.g., Paula Braveman & Laura Gottlieb, *The Social Determinants of Health: It’s Time to Consider the Causes of the Causes*, 129 PUBLIC HEALTH REP. SUPP. 2, 19 (2014).
- ²⁰ Sanne Magnan, *Social Determinants of Health 101 for Health Care*, NAT’L ACAD. OF MED. (2017), <https://nam.edu/social-determinants-of-health-101-for-health-care-five-plus-five/>.
- ²¹ *South Bay*, 140 S.Ct.at 1613 (Roberts C.J. concurring).
- ²² Merlin Chowkwanyun & Adolph L. Reed, Jr., *Racial Health Disparities and COVID-19 – Caution and Context*, 383 NEW ENG. J. OF MED. 201, 203 (2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2012910>. See also Marc R. Larochelle, “Is it Safe for Me to Go to Work?” *Risk Stratification for Workers during the COVID-19 Pandemic*, 383 NEW ENG. J. OF MED. e28 (2020).
- ²³ Matthew J. Akiyama, Anne C. Spaulding & Josiah D. Rich, *Flattening the Curve for Incarcerated Populations – COVID-19 in Jails and Prisons*, 382 NEW ENG. J. OF MED. 2075, 2075 (2020), https://www.nejm.org/doi/full/10.1056/NEJMp2005687?query=recirc_artType_railA_article.
- ²⁴ Usha Lee McFarling, *Fearing Deportation, Many Immigrants at Higher Risk of COVID-19 Are Afraid to Seek Testing or Care*, STAT NEWS (Apr. 15, 2020), <https://www.statnews.com/2020/04/15/fearing-deportation-many-immigrants-at-higher-risk-of-covid-19-are-afraid-to-see-testing-or-care/>.
- ²⁵ RACHEL PORTER ET AL., CTR. FOR COURT INNOVATION, WHAT MAKES A COURT PROBLEM-SOLVING? UNIVERSAL PERFORMANCE INDICATORS FOR PROBLEM-SOLVING JUSTICE 1 (2010), https://www.courtinnovation.org/sites/default/files/What_Makes_A_Court_P_S.pdf; see Judith Kaye, *Delivering Justice Today: A Problem Solving Approach*, 22 YALE L. & POL’Y REV. 125, 129 (2004).
- ²⁶ Stacy Lee Burns, *The Future of Problem Solving Courts: Inside the Courts and Beyond*, 10 U. MD. L.J. OF RACE, RELIGION, GENDER, AND CLASS 73, 74 (2010).
- ²⁷ See Raymond H. Brescia, *Beyond Balls and Strikes: Towards a Problem-Solving Ethic in Foreclosure Proceedings*, 59 CASE WESTERN L. REV. 305, 317 (2009).
- ²⁸ Barbara Andraka-Christou, *What is “Treatment” for Opioid Addiction in Problem-Solving Courts? A Study of 20 Indiana Drug and Veterans Courts*, 13 STAN. J. OF CIV. RTS. AND CIV. LIBERTIES 189, 197 (2017).
- ²⁹ See GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* 33 (digital ed., Quid Pro Quo Books 2015) (2005).
- ³⁰ *Id.*
- ³¹ Kelly Frailing, *The Achievements of Specialty Courts in the United States*, SCHOLARS.ORG (2016), <https://scholars.org/contribution/achievements-specialty-courts-united-states>.
- ³² Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People’s Courts*, 22 GEO. J. ON POVERTY L. & POL’Y 473, 485 (2015), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1962&context=facpub>.
- ³³ O.C.G.A. § 19-9-3 (2010) (providing a statutory example of discretion of judge in custody disputes).
- ³⁴ See Kristine Buffington, et. al., *Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency*, 61 JUV. & FAM. CT. J. 13, 14 (2010), http://www.ncjfcj.org/sites/default/files/trauma%20bulletin_1.pdf; *Trauma Informed System of Care*, NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES, <http://www.ncjfcj.org/our-work/trauma-informed-system-care> (last visited June 19, 2020).
- ³⁵ Ga. Code. Ann. § 19-9-3 (2010).
- ³⁶ Josh Gupta-Kagan, *Rethinking Family-Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. 743, 751 (2018).
- ³⁷ A community court is a kind of problem-solving court that is focused on the particular neighborhood it is based in rather than any specific type of offense. Community courts aim to improve the conditions in their area by becoming an integral part of the community, typically by bringing the justice process out of centralized court systems and back to the neighborhood. See CYNTHIA G. LEE ET AL., NATIONAL CENTER FOR STATE COURTS, *A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER 2* (2013), https://www.ncsc.org/data/assets/pdf_file/0031/18967/11012013-red-hook-final-report.pdf.
- ³⁸ *Id.* at 174.
- ³⁹ *Id.*
- ⁴⁰ N.M. LEGISLATIVE FIN. COMM., *PROGRAM EVALUATION: UPDATE ON NEW MEXICO DRUG COURTS* 15 (2017), https://www.nmlegis.gov/Entity/LFC/Documents/Program_Evaluation_Reports/Program%20Evaluation%20Update%20on%20New%20Mexico%20Drug%20Courts.pdf; MICHAEL W. FINIGAN ET AL., NPC RESEARCH, *IMPACT OF A*

MATURE DRUG COURT OVER 10 YEARS OF OPERATION: RECIDIVISM AND COSTS 54 (2017),

<https://www.ncjrs.gov/pdffiles1/nij/grants/219225.pdf>.

⁴¹ CENTRE FOR JUSTICE INNOVATION, PROBLEM SOLVING COURTS: AN EVIDENCE REVIEW 16 (2019),

<https://justiceinnovation.org/sites/default/files/media/documents/2019-03/problem-solving-courts-an-evidence-review.pdf>.

⁴² BERMAN & FEINBLATT, *supra* note 29, at 33.

⁴³ Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 JUST. SYS. J. 35, 50-51 (2005).

⁴⁴ GREG BERMAN & JOHN FEINBLATT, CENTER FOR COURT INNOVATION, PROBLEM-SOLVING COURTS: A BRIEF

PRIMER 7-8 (2003), http://www.courtinnovation.org/sites/default/files/cci-d6-legacy-files/pdf/prob_solv_courts.pdf.

⁴⁵ *Id.* at 7.

⁴⁶ Kaye, *supra* note 25, at 150.

⁴⁷ *New York v. U.S. Dep't of Homeland Sec.*, No. 19 Civ. 7777, 2020 WL 4347264, at *14 (S.D. N.Y. July 29, 2020).

⁴⁸ *Id.* at *9.

⁴⁹ See Emily A. Benfer et al., *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Inequity During and After COVID-19*, YALE J. OF HEALTH POL'Y, L., AND ETHICS (forthcoming 2020).

⁵⁰ CHRISTOPHER R. KNITTEL & BORA OZALTUN, MIT CENTER FOR ENERGY AND ENVIRONMENTAL POLICY

RESEARCH, WHAT DOES AND DOES NOT CORRELATE WITH COVID-19 DEATH RATES 2-3 (2020),

<http://ceep.mit.edu/files/papers/2020-009.pdf>; *COVID-19 in Racial and Ethnic Minority Groups*, CENTERS FOR

DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> (last visited July 16, 2020). See also Sharon Begley, *To Understand Who's Dying of COVID-*

19, Look to Social Factors Like Race More than Preexisting Diseases, STAT NEWS (June 15, 2020),

[https://www.statnews.com/2020/06/15/whos-dying-of-covid19-look-to-social-factors-like-](https://www.statnews.com/2020/06/15/whos-dying-of-covid19-look-to-social-factors-like-race/?utm_source=STAT+Newsletters&utm_campaign=19fa72f910-)

[race/?utm_source=STAT+Newsletters&utm_campaign=19fa72f910-](https://www.statnews.com/2020/06/15/whos-dying-of-covid19-look-to-social-factors-like-race/?utm_source=STAT+Newsletters&utm_campaign=19fa72f910-MR_COPY_01&utm_medium=email&utm_term=0_8cab1d7961-19fa72f910-150722109)

[MR_COPY_01&utm_medium=email&utm_term=0_8cab1d7961-19fa72f910-150722109](https://www.statnews.com/2020/06/15/whos-dying-of-covid19-look-to-social-factors-like-race/?utm_source=STAT+Newsletters&utm_campaign=19fa72f910-MR_COPY_01&utm_medium=email&utm_term=0_8cab1d7961-19fa72f910-150722109); Meghana Keshavan, *'The*

Direct Result of Racism': COVID-19 Lays Bare How Discrimination Drives Health Disparities Among Black

People, STAT NEWS (June 9, 2020), [https://www.statnews.com/2020/06/09/systemic-racism-black-health-](https://www.statnews.com/2020/06/09/systemic-racism-black-health-disparities/)

[disparities/](https://www.statnews.com/2020/06/09/systemic-racism-black-health-disparities/); ADD https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3636975.

⁵¹ *COVID-19's Impact on People in Prison*, EQUAL JUSTICE INITIATIVE, [https://eji.org/news/covid-19s-impact-on-](https://eji.org/news/covid-19s-impact-on-people-in-prison/)

[people-in-prison/](https://eji.org/news/covid-19s-impact-on-people-in-prison/) (last visited July 16, 2020).

⁵² *U.S. v. Baye*, No. 3:12-CR-00115-RCJ, 2020 WL 2857500, at *10 (D. Nev. June 2, 2020).

⁵³ *U.S. v. Flores*, No. 19-CR-6163L, 2020 WL 3041640, at *1 (W.D. N.Y. June 8, 2020); see also *U.S. v. Hodges*,

No. 04 CR 993-3, 2020 WL 2935101, at *2 (N.D. Ill. June 3, 2020) (“Hodges is incarcerated at FCI Elkton, which has the second-highest number of inmates testing positive.”); *U.S. v. Dillabaugh*, No. 3:18-CR-30062-01-RAL,

2020 WL 3402392, at *4 (D. S.D. June 19, 2020) (“The question becomes whether Dillabaugh’s age and medical

conditions...combined with the crowded conditions of confinement justify compassionate release.”).

⁵⁴ *Id.* at 3.

⁵⁵ *Id.*

⁵⁶ *Snell v. U.S.*, No. 16-20222-6, 2020 WL 2850038, at *3 (E.D. Mich. June 2, 2020) (“What little medical

resources FCI Milan has are now being funneled to COVID-19 patients, leaving inmates with chronic conditions,

like Snell, more vulnerable.”); *U.S. v. Parramore*, No. CR18-156-RSM, 2020 WL 3051300, at *5 (W.D. Wash. June

8, 2020) (“The COVID-19 outbreak at Terminal Island has undermined BOP’s ability to provide him with the

immediate care required.”).

⁵⁷ See *U.S. v. Partida*, No. CR-17-08260-001-PCT-DGC, 2020 WL 3050705, at *6 (D. Ariz. June 8, 2020); see also

U.S. v. Hamman, No. 3:16-cr-185-SI, 2020 WL 3047371, at *5 (D. Or. June 8, 2020).

⁵⁸ Basank v. Decker, No. 20 Civ. 2518, 2020 WL 1481503, at *4, *6 (S.D. N.Y. March 26, 2020); Jan Ransom &

Alan Fears, *“A Storm is Coming”*: *Fears of an Inmate Epidemic as the Virus Spreads in Jails*, N.Y. TIMES (March

20, 2020), <https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html>.

⁵⁹ *Flores v. Barr*, No. CV 85-4544-DMG, 2020 WL 3488040, at *2 (C.D. Cal. June 26, 2020).

⁶⁰ See *Basank*, 2020 WL 1481503 at *4, *6 (finding that conditions were inadequate and the public health would be

better served by decreasing the number of individuals detained in cramped conditions); *Castillo v. Barr*, No. CV 20-

00605 TJH, 2020 WL 1502864, at *5-6 (C.D. Cal. March 27, 2020) (finding that conditions in the facility were such

that the government had been deliberately indifferent to the potential exposure of detainees to the disease, in

violation of the Constitution).

⁶¹ *Basank*, 2020 WL 1481503 at *5 (citing *Darnell v. Pineiro*, 849 F.3d 17, 31 (2nd Cir. 2017); *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2nd Cir. 2002)).

⁶² *Gayle v. Meade*, No. 20-21553, 2020 WL 2086482, at *4 (S.D. Fla. April 30, 2020).

⁶³ See *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL 1304557, at *2 (W.D. Wash. March 19, 2020); see also *Mendez-Ramirez v. Decker*, No. 1:19-cv-11012-GHW, 2020 WL 1674011, at *16 (S.D. N.Y April 3, 2020).

⁶⁴ See *Fofana v. Albence*, No. 20-10869, 2020 WL 1873307, at *10 (E.D. Mich. April 15, 2020).

⁶⁵ Emily A. Benfer, Presentation to the American Bar Association COVID-19 Pandemic Task Force: COVID-19 Eviction & Housing Policy (June 3, 2020). See also MAGGIE MCCARTY & DAVID H. CARPENTER, CONG. RESEARCH SERV., CARES ACT EVICTION MORATORIUM (2020), <https://crsreports.congress.gov/product/pdf/IN/IN11320> (Noting that the federal “CARES Act provides a temporary moratorium on eviction filings as well as other protections for tenants in certain rental properties with federal assistance or federally related financing.”).

⁶⁶ *Id.*

⁶⁷ Michelle D. Laysner, et al., *Mitigating Housing Instability During a Pandemic*, Northeastern University School of Law Research Paper No. 386-2020 12-13 (July 22, 2020), available at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3613789. See also *COVID-19 and People Experiencing Homelessness: Resources and Guidance*, NAT’L HEALTH CARE FOR THE HOMELESS COUNCIL,

https://nhhc.org/clinical-practice/diseases-and-conditions/influenza/?gclid=Cj0KCQjwpNr4BRDYARIsAADIx9y8fMywL_Fp6TVQxpqEFYT1NzgJ0KN11kOQH_HW_KvmKM56t30D9V8aAg5cEALw_wcB (last visited July 21, 2020); *Disease Risks and Homelessness*, HUD EXCHANGE, <https://www.hudexchange.info/homelessness-assistance/diseases/> (last visited July 21, 2020).