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Cruel and Usual: Contaminated Water in New York State Prisons

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CRUEL AND USUAL: CONTAMINATED WATER IN NEW YORK STATE PRISONS

Shannon Haupt[†] & Phil Miller[‡]

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I. INTRODUCTION

People who are currently or formerly incarcerated in New York State prisons know that the water inside is often not safe to drink.¹ However,

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when they advocate for access to clean water, they are regularly met with retaliation and denial.

This article brings together firsthand accounts, case law, and ongoing investigations regarding water quality in New York State prisons. Contaminated water is not an anomaly in prisons—it is one of many severe conditions that people in prison are forced to live under which threaten their physical, mental, and emotional health.² The daily abuses and harms suffered by incarcerated people are normalized by prison officials, the courts, and accepted societal narratives around crime and punishment. This research was born of firsthand accounts shared by Ramon Henriquez, Phil Miller, and others who have survived or are currently surviving deplorable conditions of incarceration. Section II of the article presents written versions of two of these accounts, one written firsthand by Phil Miller,³ the other based on interviews between Shannon Haupt and Ramon Henriquez.⁴

Section III summarizes the statutory mechanisms in place to monitor public water system compliance with Federal and State drinking water standards.⁵ Section IV examines barriers to due process.⁶ Section V discusses recent *pro se* litigation raising the issue of contaminated water in

application from January 2021–November 2021 and have volunteered with the Parole Preparation Project of New York since 2019. Prior to law school, Shannon worked in Detroit, Michigan as an environmental educator and advocate for clean air and water. They seek to engage in legal work that supports frontline communities facing the most deleterious effects of climate change and racial capitalism. This article has benefitted greatly from discussions, feedback, and support from Susie Charlop, Ramon Henriquez, Colby Williams, Mark Shervington, Jeff Jones, Steven Zeidman, Erin Tomlinson, Sarah Lamdan, Rebecca Bratspies, and Anthony Moffa. Many thanks to Phil for sharing his insights and to the CUNY Law Review editors for their careful work.

‡ Phil Miller is a third-year law student at the CUNY School of Law. He spent 17 years incarcerated in New York State prisons, where he learned to speak multiple languages, studied theater, and worked as a “jailhouse lawyer.” Prior to law school, his career focused on criminal justice policy and reform.

¹ Char Adams, *Women in New York Prisons Complain of Contaminated Water After Hurricane Ida*, NBC NEWS (Sept. 14, 2021, 3:15 PM), <https://perma.cc/9K33-6NNB>; “People who have consumed the water have gotten extremely sick and are NOT being given proper medical care, the facilities are also NOT providing bottled water . . . [P]eople’s family and friends are trying to send water, but because of the rules a lot of people can’t even get it.” SURVIVED AND PUNISHED N.Y., *Take Action: People in Bedford Prison Urgently Need Support* (Sept. 15, 2021), <https://perma.cc/29LC-QRCW>.

² See generally Emily J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, 103 AM. J. PUB. HEALTH 523, 523-28 (2013); Emily Widra, *Incarceration Shortens Life Expectancy*, PRISON POL’Y INITIATIVE (June 26, 2017), <https://perma.cc/6GBK-9LL3>.

³ See *infra* Section II, “Water Roulette.”

⁴ See *infra* Section II, “The Water Smelled Like A Pond.”

⁵ See *infra* Section III.

⁶ See *infra* Section IV.

New York courts.⁷ Section VI concludes with a discussion of current efforts to uncover more information on the current state of New York prison water systems compliance and monitoring.⁸

Prisons are inherently violent⁹ and toxic¹⁰ places by design. The goal of this work is to amplify the tireless work of people currently incarcerated in New York State prisons to advocate for their rights, despite the gauntlet of administrative and legal barriers to doing so. The authors and contributors of this work hope to advance critical discussion of how these barriers can be not reformed but removed.

II. FIRST-HAND ACCOUNTS

“Water Roulette”

Phil Miller

At the beginning of my incarceration during a twenty-year sentence, I never thought that the quality of water would be something I’d miss about being free. In fact, water quality was something I had never thought about at all. It seemed to be a given that water was always available and always potable. But as the years went by, I repeatedly realized that I missed good water just as much as I missed good food. There were various times throughout my prison experience when the water was not potable, and the incarcerated population was advised not to drink the water at all, usually for a few days. Of the seven New York State maximum-security prisons that I spent time in, there were two where the water issues were unforgettable: Auburn Correctional Facility (“Auburn”) and Sing Sing Correctional Facility (“Sing Sing”).¹¹

⁷ See *infra* Section V.

⁸ See *infra* Section VI.

⁹ Kaba writes: “When we sentence people to prison, we are essentially sentencing them to judicial rape . . . think of the routine strip searches . . . Prisoners are of course subjected to these but so too are the people who visit them . . . Oppression and domination are the main features of the prison industrial complex (PIC).” MARIAME KABA, *Introduction* to ROBIN MCDUFF ET. AL., *LETTER TO THE ANTI-RAPE MOVEMENT*, 6-7, (ISSUU 2020) (1977) <https://perma.cc/CL73-YDPK>.

¹⁰ See FIGHT TOXIC PRISONS, <https://perma.cc/CCJ5-2VQS>; see also PRISON ECOLOGY PROJECT, <https://perma.cc/K6WW-UJ8W>.

¹¹ New York State currently has 17 operational, maximum-security prisons, 16 of which are for men. See generally, *Facility Map*, N.Y. DEP’T OF CORR. & CMTY. SUPERVISION, (Apr. 8, 2021), <https://perma.cc/FL6F-C7AL> (listing and mapping all maximum-security prisons in New York State).

From the inside, Auburn looks like a dungeon from medieval times. Opened in 1817, it is one of the country's oldest prisons.¹² There are many other problems than just the water. For example, I've observed windows near the ceiling of the housing blocks, where everyone sleeps, stay broken for years. It got so cold in some areas of the facility during the winter that I had to wear a sweatshirt, a hat, and coat inside of my cell in order to sleep at night. The broken windows also allowed birds to fly in and out all day, every day; bird feces was everywhere. Roaches were so plentiful in certain parts of the prison that, before falling asleep at night, I had to put tissue in my ears and nose to keep them from crawling inside. Occasionally, raccoons, skunks, and cats got inside the buildings, too.

While I can't speak about the quality of the pipes that bring water into the prison, I think it is safe to assume that most of them are very old and corroded. The primary source of drinking water for most of the people incarcerated is a small sink located inside each cell. Drinking water is also served during meals in the mess hall, and it is also available at water fountains that are outside in the yard or in the gym. But no matter the source, the water itself is the same, and it is most frequently consumed or used in each person's cell. Water in the cell is used for drinking, making tea or coffee, boiling rice or pasta, and even doing laundry by hand. It's impossible to avoid using water frequently.

The water at Auburn frequently had a very strong metallic flavor but, even then, most people still drank it or at least tried to drink it. I tried to mask the flavor by making coffee or tea, but sometimes the metallic flavor was too strong for even that to work. The worst was when the water would come out of the sink with a brown or reddish-brown color. During those times, we could not drink the water at all, and we were not warned by the facility administration of its toxicity. The water was so discolored that after washing my white t-shirts, boxers, or sheets the first few times, they would turn light brown. Turning on the sink and hoping the water would be clear was like playing a game of roulette.

Most of the corrections officers that worked there would not drink the water. They'd make comments like, "you couldn't pay me to drink this water" or "you guys really shouldn't be drinking this water," but as an incarcerated person, I did not have a choice. Every single day each corrections officer brought their own gallon water jug that they would drink throughout their shift. I can't remember a single time when I saw a corrections officer drink the same water as me at Auburn.

One of the most memorable moments was when the facility administration instructed the incarcerated population to not drink the water until

¹² EILEEN MCHUGH, CAYUGA MUSEUM, IMAGES OF AMERICA: AUBURN CORRECTIONAL FACILITY 8 (2010).

further notice. We received this announcement over the loudspeakers in the housing blocks¹³ and, later that day, we received a printed document that was taped to the wall. I don't remember the cause of the problem, but it was related to the quality of the pipes that the water had to pass through. Something had recently agitated the water system, causing more contamination than usual. None of the staff knew how long we would go without water, but thankfully the facility administration had ordered giant containers of water to be delivered to the prison so that we had drinking water during that time. This lasted for one or two days, but it was a rare moment that the administration acknowledged that something was wrong with the water. We knew from daily experience that something was frequently wrong with the water, but complaints¹⁴ about it went nowhere.¹⁵ The Incarcerated Liaison Committee ("ILC")¹⁶ had brought the issue up with the facility administration on behalf of the incarcerated population at some of their monthly meetings, and the facility administration's response was usually a statement that the water was fine, it was tested at the source, and sometimes harmless sediment from pipes made the water look rusty. There was no way to counter the facility administration's reply that the water was fine because we did not have the ability to test it.

My friends would sometimes boil the water to kill any bacteria. I tried to do this, but eventually I went back to playing water roulette with my sink, becoming tolerant to the gradations of metallic taste. Sometimes I tried to filter the water by pouring it through multiple hair nets that I got from the mess hall, but that only helped a little. Other than extremely dry skin as a result of the water in the showers, I didn't suffer any maladies from the drinking water. Well, none that I know about, at least.

¹³ A "housing block," also known as a "housing unit" or a "cellblock," is a building that contains the cells in which incarcerated people live. *See generally*, N.Y. COMP. CODES R. & REGS. tit. 9, § 7040.5 (2019).

¹⁴ Complaints are referred to as "grievances" in New York State prisons. They can be filed by incarcerated individuals to seek solutions to issues or problems that affect that individual. *See* N.Y. DEP'T OF CORRS. & CMTY. SUPERVISION, NO. 4040, INMATE GRIEVANCE PROGRAM 1 (2016), <https://perma.cc/3QMU-6RQU>.

¹⁵ I was at Auburn for the last three years of my incarceration. By that time, I had stopped filing grievances because I lost all faith in the fairness of the grievance process. They almost always get denied despite the validity of the underlying complaint, and they frequently result in staff retaliation against the incarcerated people who file them. *See* 2018 N.Y. DEP'T OF CORRS. & CMTY. SUPERVISION, INMATE GRIEVANCE PROGRAM ANN. REP. 25 (2020), <https://perma.cc/7PU5-DUKY>.

¹⁶ Formerly known as the "Inmate Liaison Committee," the ILC is an elected body of incarcerated people, and its role is to bring collective issues, rather than individual complaints (as in the grievance process), to the facility administration during monthly meetings. *See* N.Y. DEP'T OF CORRS. & CMTY. SUPERVISION, NO. 4002, INCARCERATED LIAISON COMMITTEE (ILC) 2 (2021), <https://perma.cc/4YE3-GGHX>.

Similar water problems existed at Sing Sing, also one of the oldest operational prisons in the country.¹⁷ I spent five years in that place and was lucky not to suffer from the water there. The same could not be said for others, including a friend of mine. I remember the day when he had stomach pains and was vomiting uncontrollably. He hadn't eaten anything that could have caused it, and he wasn't sick with the flu or anything else before the vomiting began. When he went to the prison infirmary to be treated, the medical staff explained that he had contracted a spiral bacterium called *Helicobacter Pylori* ("H. Pylori").¹⁸ They informed him that this was most likely caused by the contaminated drinking water. He eventually recovered, but adequate drinking water is something that an incarcerated person should not have to worry about. Based on my own experience, I know that incarcerated men tend not to discuss medical issues with one another, so there is no way to really know how many other people were affected in the same way.

When you're in prison, there is no choice but to rely on the resources given to you; there are simply no alternatives. Some commissaries¹⁹ sell cans of soda or juice, but most people don't have enough money²⁰ to buy as many cans of soda as they'd need to completely replace their reliance on the facility's drinking water.²¹ Even if they did, it would be a very unhealthy and expensive choice. Although I wasn't personally harmed by the water I drank in prison, it was still a source of anxiety because it frequently had different colors and metallic tastes, the corrections officers refused to drink it, and other incarcerated people I knew suffered physical

¹⁷ See *History of Sing Sing Prison*, SING SING PRISON MUSEUM, <https://perma.cc/FPB7-V3KC> (last visited Mar. 26, 2022) (noting that construction began in 1825 and was inhabited in 1828).

¹⁸ See *Helicobacter Pylori (H. pylori) Infection*, MAYO CLINIC (May 28, 2021), <https://perma.cc/969V-2SHS> (describing symptoms, causes and risk factors of H. pylori). See also Edward Lyon, *Preliminary Injunction Sought Over Contaminated Drinking Water at Connecticut Prison*, PRISON LEGAL NEWS (Jan. 9, 2020), <https://perma.cc/P96Y-YYSG> (accounting for cases of H. Pylori due to water contamination in prisons in Connecticut).

¹⁹ *Commissary*, N.Y. DEP'T OF CORRS. & CMTY. SUPERVISION, <https://perma.cc/ZPU9-8XF6> (last visited Mar. 26, 2022) (explaining that a commissary is a type of small store located inside the prison that allows incarcerated people to purchase certain items).

²⁰ The pay range for people incarcerated in New York State Prisons is from 10 cents to 62 cents an hour. The most common prison work assignments pay between 10 cents and 26 cents per hour. See *State & Federal Prison Wage Policies & Sourcing Information*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://perma.cc/2RB4-H4TA>.

²¹ I do not remember bottled water being available in either Auburn or Sing Sing's commissary when I was there. Commissary items are selected mostly once a year by the Inmate Liaison Committee (ILC), and that Committee has to be very selective because of space limitations in the facility storage areas. See THE CORR. ASS'N OF N.Y., AUBURN CORR. FACILITY: 2011, at 41 (2011), <https://perma.cc/HZW7-LB9N> ("The commissary is run by five civilian staff and seventeen inmate clerks. Items on the commissary buy sheet are updated by the ILC about once or twice a year.").

harm from it. Not having regular access to clean drinking water was not part of the sentence that the judge imposed, and no incarcerated person should have to endure that on top of all the other problems that exist behind those walls.

“The Water Smelled Like A Pond”

An interview with Ramon Henriquez

Ramon Henriquez²² was incarcerated at Elmira Correctional Facility from June 2016 to December 2018. For nearly eighteen months the water from his faucet was brown and hot to the touch. *“The water looks like tea, all the time. I try straining it, through a handkerchief. I have to drink it. I try all kinds of stuff.”*²³ Ramon often kept the water running at his sink in case it ever got cold. One day, it did. *“The day the pipe broke, my water got cool and crystal clear. I filled up every bucket I had, every garbage bag I could find to fill up with the water.”*²⁴

That night, Ramon heard rumors that the prison had a water main break and theorized that this is what caused the sudden change in water quality. Elmira never issued a formal statement to prisoners acknowledging the status of the water or the pipes carrying it.

When Ramon was transferred to Green Haven, it was the same story. Ramon’s work assignment involved replacing the copper pipes that distributed water throughout the prison.

*Something was eroding them, making them paper thin, so thin you could stick your finger through them. These are thick, expensive lines of copper and we were regularly replacing them because of these leaks. We put in schedule 80 copper tubing, and three weeks later you could stick your finger through [the wall] of the pipe.*²⁵

The water consistently came out of the faucets rusty and “tea colored.” Corrections officers would bring their own water to work.²⁶ Civilians who interacted with people incarcerated at Green Haven would tell

²² Ramon Henriquez is currently serving a sentence of 40 years to life at Sullivan Correctional Facility. He has an active clemency application under review by Governor Hochul’s office. He sought and was denied medical parole in May 2021.

²³ See *infra* app. B at 37.

²⁴ *Id.* at 33.

²⁵ See *infra* app. B at 35.

²⁶ *Id.*

them not to drink the water.²⁷ When Ramon tried to raise complaints²⁸ about water contamination with the prison, he was met with denial and retaliation.

I would write my grievance, hand it to the grievance supervisor, and it would always be shut down because all the officers made statements that water contamination was not happening, and they would write referral letters [stating I should be sent] to a mental health unit, calling me crazy. I had about 30-40 mental health referrals in response to my grievances.²⁹

The futility of the grievance process and the price of purchasing bottled water³⁰ at the commissary led Ramon to a different kind of innovation:

I was the ice machine guy, so we had the filters behind the ice machines, and I put spigots behind the ice machines so that everyone could drink it. All the ice machines require filters, so we bought these big industrial filters at \$75 a cartridge, some of them take four and some take two and then a coarse filter. So, they had this thing, this port that you can attach a valve to that's used to, when you replace the coarse filter you open it and it drains it, and so I would pipe a spigot to it. And you know in some of the blocks the officers would take the valve off so that they were the only ones who could use it and they wouldn't let the prisoners use it, but as soon as the shift changed or those officers that took it leave I would come and put another one.³¹

Now at Sullivan, Ramon reports that not much has changed:

They had that E. coli thing last summer and there were a lot of people throwing up here [at Sullivan]. They didn't tell us anything

²⁷ *Id.*

²⁸ The formal complaint procedure for people incarcerated in New York State prisons are governed by the Prison Litigation Reform Act. The first action a person must take to raise an issue is to file a grievance. The grievance process is an internal complaint system governed by the prison itself. When a grievance is denied, the person can appeal the denial. An incarcerated person cannot pursue legal action until they have exhausted all administrative remedies, e.g. filed a grievance and appealed its denial. This process of “exhaustion” can take years. *See* 42 U.S.C. § 1997e(a); *see also* AM. CIV. LIBERTIES UNION, *Know Your Rights: The Prison Litigation Reform Act (PLRA)* (2002), <https://perma.cc/S5XJ-HPYT>.

²⁹ *See infra* app. B at 34.

³⁰ As of October 2020, the Federal Bureau of Prisons MCC in New York prices a bottle of water at \$1.05. *See* DOJ-BOP MCC NY, *October 2020 Commissary Price List*, <https://perma.cc/GM8A-WZP9>. Most prisons only allow commissary purchases once every two weeks. *See also* *Commissary*, *supra* note 19.

³¹ *See infra* app. B at 35.

*until someone blew the whistle. Some family members saw it online and called the Department of Health, and the DOH emailed the prison. Fallsburg issued a boil water advisory. My friend used the water fountain in the yard and came back throwing up and diarrhea, but he never went to the hospital he stayed in his cell and rode it out for two days . . . Everybody here has gastro[intestinal] problems. Everybody.*³²

III. STATUTORY FRAMEWORK FOR DRINKING WATER PROTECTION

Access to clean water is internationally recognized as a human right.³³ In 2002, the United Nations Committee on Economic, Social and Cultural Rights adopted general comment No. 15 on the right to water, defining it as “the right of everyone ‘to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.’”³⁴ The right to access clean water is further expressed at regional levels across the globe.³⁵ In 2010, the United Nations General Assembly passed Resolution 64/292 which explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realization of all human rights.³⁶ The United States, along with forty other countries, abstained from Resolution 64/292.³⁷ In 2012, California became the first and only state to recognize the human

³² *See id.* at 35-36.

³³ U.N., ECON & SOC. & CULTURAL RTS., Comm. No. 15 on the Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. DOC. E/C.12/11 (2003), <https://perma.cc/LN7Q-VNJK>.

³⁴ *See* U.N. Off. of the High Comm’r for Hum. Rts., *The Right to Water: Fact Sheet No. 35* at 1 (Aug. 2010), <https://perma.cc/AXG9-B2WE>.

³⁵ *See id.* at 6 (explaining that regional charters, such as the African Charter on the Rights and Welfare of the Child (1990) and the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (2003) contain explicit human rights obligations related to safe drinking water, whereas others charters like the Revised European Social Charter (1996), the American Convention on Human Rights (1969), and the African Charter on Human and Peoples’ Rights (1969) don’t explicitly include providing access to safe drinking water but “related jurisprudence has derived protection of such access from the enjoyment of other human rights, such as the rights to adequate housing, health or life.”).

³⁶ G.A. Res. 64/292, *The Human Right to Water and Sanitation* at 2 (Aug. 3, 2010) (“Acknowledging the importance of equitable access to safe and clean drinking water and sanitation as an integral component of the realization of all human rights . . .”).

³⁷ Press Release, General Assembly, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favor, None Against, 41 Abstentions, U.N. Press Release GA/10967 (July 28, 2010) (citing the United States as one of the abstentions), <https://perma.cc/HRJ4-H8X8>.

right to water.³⁸ Recognition of this right is the first step to ensuring meaningful access to clean water.

There are several key statutory mechanisms which govern the monitoring and assurance of clean water distribution through public water systems in the United States. A few of these statutes are discussed below.

Federal Statutes and Regulations

The Safe Drinking Water Act (“SDWA”), passed in 1974, authorized the Environmental Protection Agency (“EPA”) to establish minimum standards to protect tap water.³⁹ The SDWA requires owners and operators of public water systems to comply with these minimum standards through quality monitoring.⁴⁰ These standards are referred to as Maximum Contaminant Levels (“MCL”), and where water contains more than the permissive amount of a contaminant, this violation is referred to as an “exceedance.”⁴¹ The EPA works with state-level agencies to ensure compliance with national MCL standards through the Public Water System Supervision (“PWSS”) program.⁴² The PWSS program is responsible for review and evaluation of analytical results of water samples collected by public water systems.⁴³ When the PWSS program finds an exceedance in a water sample, the EPA is required under the Public Notification (“PN”) Rule of the SDWA to inform the population who sources water from where the sample was taken.⁴⁴

The PN Rule requires the owner or operator of a public water system to “provide public notice to all persons served when the system fails to comply with certain drinking water regulations or is facing other

³⁸ See Wilfredo Lopez, *Access to Water is an American Human Right*, PACE INT’L L. REV. (May 2017), <https://perma.cc/KD4Y-HKXU>.

³⁹ Safe Drinking Water Act (SDWA) of 1974, 42 U.S.C. § 300f, et seq.

⁴⁰ See *Safe Drinking Water Act Compliance Monitoring*, U.S. ENV’T PROT. AGENCY, <https://perma.cc/KY3J-SVK2> (last visited Apr. 10, 2022) (“[The] EPA’s and state’s primary means of monitoring public water system compliance with the SDWA and its implementing regulations is the review and evaluation of analytical results of water samples collected by public water systems.”); see also *Providing Safe Drinking Water in America: National Public Water Systems Report*, U.S. ENV’T PROT. AGENCY, <https://perma.cc/U78Z-CYJH> (last visited Apr. 26, 2022) (providing that snapshots of public water system violations dating back to 2014).

⁴¹ 40 C.F.R. § 141.2 (2004) (“Maximum contaminant level means the maximum permissible level of a contaminant in water which is delivered to any user of a public water system.”).

⁴² See *generally Public Water System Supervision (PWSS) Grant Program*, U.S. ENV’T PROT. AGENCY, <https://perma.cc/N66V-YHWS> (last visited Apr. 23, 2022) (outlining the key activities carried out in compliance with the PWSS program).

⁴³ *Id.*

⁴⁴ U.S. ENV’T PROT. AGENCY, EPA 816-R-09-012, REVISED STATE IMPLEMENTATION GUIDANCE FOR THE PUBLIC NOTIFICATION (PN) RULE (2010) at 4.

situations posing a potential risk to public health.”⁴⁵ The EPA explicitly indicates that public notice is required where there is an MCL exceedance and where there is a fecal indicator-positive groundwater source sample, among other circumstances involving violations of testing procedures, noncompliance, and waterborne disease outbreaks.⁴⁶ For example, *H. Pylori*, the bacterial infection mentioned in both Phil and Ramon’s narratives, and the foundation of the claims for all three case studies examined in Section IV, is commonly associated with fecal matter contamination in water.⁴⁷

The PN Rule organizes violations of drinking water standards along three tiers based on the risk and severity of adverse health effects.⁴⁸ When notice is required, the EPA mandates what information must be conveyed to the public.⁴⁹

The Lead and Copper Rule⁵⁰ (“LC Rule”) was enacted under the Safe Drinking Water Act by the EPA in 1991 to “protect public health by minimizing lead and copper levels in drinking water, primarily by reducing water corrosivity” of plumbing materials.⁵¹ The LC Rule requires that public water systems monitor drinking water at customer taps.⁵² Where lead concentrations exceed an “action level” of 15 parts per billion (ppb)⁵³, or copper concentrations exceed an action level of 1.3 parts per

⁴⁵ *Id.*

⁴⁶ *Id.* at 5, 19.

⁴⁷ See *infra* Section IV; *Helicobacter Pylori*, JOHNS HOPKINS MED., <https://perma.cc/7CVY-CTWD> (last visited Apr. 23, 2022); *Helicobacter Pylori*, SAFE DRINKING WATER FOUND., <https://perma.cc/N4XC-GY47> (last visited Apr. 23, 2022) (“Transmission via the fecal-oral route would occur through the ingestion of waste-tainted food or water. Bacteria from an infected person may end up in the food or water of an uninfected person through improper water and sewage treatment or improper food handling.”).

⁴⁸ PN Rule organizes the tiers as such: “Tier 1 applies to NPDWR violations and situations with significant potential to have serious adverse effects on human health as a result of short-term exposure . . . Tier 2 applies to . . . violations and situations with the potential to have serious adverse effects . . . Tier 3 applies to all other . . . violations and situations.” 40 C.F.R. § 141.202(a)-(b), § 141.203(a)-(b), § 141.204(a)-(b) (2004). See generally U.S. ENV’T PROT. AGENCY, EPA 816-F-09-010, THE PUBLIC NOTIFICATION RULE: A QUICK REFERENCE GUIDE (2009).

⁴⁹ 40 C.F.R. § 141.205 (listing public notice requirements).

⁵⁰ 40 C.F.R. § 141 Subpart I.

⁵¹ U.S. ENV’T PROT. AGENCY, EPA 816-F-08-018, LEAD AND COPPER RULE: A QUICK REFERENCE GUIDE (2008).

⁵² See *id.*

⁵³ Under the SDWA, the EPA identifies contaminants that may adversely affect public health and occur in drinking water with a frequency and at levels that pose a threat to public health. For each contaminant, the EPA determines a maximum contaminant level goal (“MCLG”) for contaminants it decides to regulate. This goal is the level of a contaminant in drinking water below which there is no known or expected risk to health. The EPA also specifies a maximum contaminant level (“MCL”) which is the maximum permissible level of

million (ppm)⁵⁴, the system “must undertake a number of additional actions to control corrosion [and] inform the public about steps they should take to protect their health and may have to replace lead service lines under their control.”⁵⁵ There are many revisions to this rule since its adoption in 1993, due in significant part by the tireless advocacy by residents of Flint, Michigan following the Flint water crisis.⁵⁶

New York Statutes

In New York State, the Department of Environmental Conservation establishes water quality standards.⁵⁷ These standards control the maximum contaminant levels for coliform bacteria, e. coli, groundwater effluent limitations, and pH levels.⁵⁸ Portions of the code are currently being revised in light of recent developments in scientific understanding of water contaminants such as PFOA, PFOS, and 1,4-Dioxane.⁵⁹ As science emerges regarding threats of water contaminants to human health, standards are updated to reflect this.⁶⁰

In 2017, then-governor Cuomo signed into law the Clean Water Infrastructure Act (“CWIA”), which provided funding to “improve municipal drinking water, improve wastewater treatment infrastructure, expedite the cleanup of hazardous waste that may impact drinking water, and support green infrastructure.”⁶¹ The \$2.5 billion in funding created a lead service line replacement grant program, emergency financial assistance

contaminant in drinking water which is delivered to any user of a public water system. These levels are enforceable standards. The EPA considers an action level to be the point at which a contaminant has exceeded the Maximum Contaminant Level, requiring further action to treat the water or remove the contaminant. *See* U. S. ENV'T PROT. AGENCY, EPA 816-F-04-030, UNDERSTANDING THE SAFE DRINKING WATER ACT (2004); *National Primary Drinking Water Regulations*, U.S. ENV'T PROT. AGENCY, <https://perma.cc/7YPS-XYAA> (last visited Apr. 24, 2022); *see also* N.Y. COMP. CODES R. & REGS. tit. 10, § 5-1.1 (2022).

⁵⁴ *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 5-1.1 (2022); BARRY N. TAYLOR, INTERNATIONAL SYSTEM OF UNITS (SI) 44 (Diane Publishing Company) (2009) (“the term ‘ppm,’ meaning 10^{-6} relative value, or 1 in 10^6 , or parts per million, is also used. This is analogous to the meaning of percent as parts per hundred. The term ‘parts per billion,’ and ‘parts per trillion,’ and their respective abbreviations ‘ppb’ and ‘ppt,’ are also used . . .”).

⁵⁵ 40 C.F.R. § 141.1 (2022).

⁵⁶ *See* Steve Carmody, *EPA Updates ‘Lead and Copper Rule’, Critics Say ‘We Can, and Must, Do Better’*, MICH. RADIO (Dec. 22, 2020, 3:56 PM), <https://perma.cc/Y68W-L4BJ>.

⁵⁷ N.Y. COMP. CODES R. & REGS. tit. 6, § 703 (2022).

⁵⁸ N.Y. COMP. CODES R. & REGS. tit. 6, §§ 703.3-703.6 (2022).

⁵⁹ *See* DEC Releases *DRAFT Guidance Values to Advance New York State’s Regulation of Emerging Contaminants PFOA, PFOS, and 1,4-Dioxane*, N.Y. DEP’T OF ENV’T CONSERVATION (Oct. 6, 2021), <https://perma.cc/3S5B-KB9R>.

⁶⁰ *See* CTR. FOR ENV’T HEALTH, *Public Water Standards for PFOA, PFOS, and 1,4-Dioxane*, N.Y. STATE DEP’T OF HEALTH (Sept. 2020), <https://perma.cc/5GEJ-HFPQ>.

⁶¹ N.Y. STATE ASSOC. OF CNTYS., *CLEAN WATER INFRASTRUCTURE IN NEW YORK STATE 2* (2017), <https://perma.cc/WG4R-5T9H>.

for economic hardship due to water contamination, cleanup and abatement of solid waste sites and contaminated drinking water.⁶² Additional funding for the Water Infrastructure Improvement Act is included in the larger Clean Water, Clean Air and Green Jobs Environmental Bond Act, which is up for a vote in November 2022.⁶³

IV. ADMINISTRATIVE AND LEGAL BARRIERS TO REMEDY

Prison Litigation Reform Act

The Prison Litigation Reform Act (“PLRA”)⁶⁴ was enacted in 1996 to reduce the amount of lawsuits filed by and on behalf of incarcerated people.⁶⁵ In particular, the PLRA states “no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”⁶⁶ The Supreme Court has interpreted this condition broadly,⁶⁷ stating, “the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”⁶⁸ Furthermore, in cases where plaintiffs are pursuing compensatory claims for money damages, the PLRA explicitly prohibits actions “for mental and emotional injury suffered while in custody without a prior showing of physical injury.”⁶⁹ Thus, for an incarcerated plaintiff to file a lawsuit, they first must exhaust their administrative remedies. In the context of prisons, the administrative remedy in question is sought through the grievance process.⁷⁰

⁶² *Id.*

⁶³ Governor Hochul Announces \$600 Million in Grants Available for Water Infrastructure and Resiliency Projects Statewide, *Outlines New Resilient New York Agenda*, GOVERNOR’S PRESS OFF. (Sept. 21, 2021), <https://perma.cc/2RU5-H2AE>.

⁶⁴ See generally 42 U.S.C. § 1997(e).

⁶⁵ See 141 CONG. REC. S14,626 (daily ed. Sept. 29, 1995) (statement of Sen. Orrin Hatch: “Jailhouse lawyers with little better to do are tying our courts in knots with the endless flow of frivolous litigation.”); see also Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES (Mar. 21, 1994), <https://perma.cc/6HDQ-CLGG>.

⁶⁶ 42 U.S.C. § 1997e(a).

⁶⁷ See generally *Porter v. Nussle*, 534 U.S. 516 (2002).

⁶⁸ *Id.* at 532.

⁶⁹ 42 U.S.C. § 1997e(e).

⁷⁰ As detailed in Phil and Ramon’s accounts, a grievance is a complaint filed with the prison, to which prison officials can either deny, resulting in inaction and the option to appeal the denial, or grant, and change the course of action complained of. As noted above, grievances can be filed individually or the ILC can bring collective complaints on behalf of a larger group. See N.Y. DEP’T OF CORRS. AND CMTY. SUPERVISION, *supra* note **Error! Bookmark not defined.**

*Eighth Amendment Legal Standard for Conditions of Confinement*⁷¹

Incarcerated plaintiffs typically situate conditions of confinement claims within the framework of Eighth Amendment jurisprudence.⁷² The Eighth Amendment of the Constitution outlaws “cruel and unusual punishment.”⁷³ Amid continuous debate about what constitutes “cruel and unusual” in the context of prison conditions, since the 1970s, courts have recognized a growing number of cases and conditions to constitute cruel and unusual punishment and have ordered remedies in favor of the plaintiff or plaintiffs.⁷⁴ Specifically, there is a growing movement to address heightened exposure to environmental toxins faced by people in prison.⁷⁵ Successful Eighth Amendment litigation around prison conditions has

⁷¹ See Anthony Moffa, *Environmental Indifference*, 45 HARV. ENV'T L. REV. 333, 349-359 (2021) (providing a full discussion of the history and application of the Eighth Amendment deliberate indifference standard).

⁷² See *Farmer v. Brennan*, 511 U.S. 825, 825 (1994) (alleging Eighth Amendment violation where prison officials were deliberately indifferent to petitioner's safety from violent assault); *Estelle v. Gamble*, 429 U.S. 97, 97 (1976) (alleging Eighth Amendment violation where corrections' medical director and other officials failed to provide adequate treatment following respondent's prison work-related injury); *Helling v. McKinney*, 509 U.S. 25, 25 (1993) (alleging Eighth Amendment violation where prison officials put respondent's health at risk by allowing him to be exposed to cigarette smoke).

⁷³ U.S. CONST. Amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

⁷⁴ See *LaBounty v. Coughlin*, 137 F.3d 68, 74 (2d Cir. 1998) (citing *Estelle v. Gamble* in recognition that “the right to be free from deliberate indifference to serious medical needs” encompassed the right to be free from exposure to asbestos); *cf. Citizens Accord, Inc. v. Town of Rochester*, No. 98-CV-0715, 2000 WL 504132, at *24 (N.D.N.Y. Apr. 18, 2000) (distinguishing *Helling's* progeny as “cases [that] involve situations where persons are in custody, are exposed to conditions that are substantially likely to cause serious harm, and the victims therein are unable to take corrective action or avoid the harm because of their custodial status.”).

⁷⁵ *E.g.*, Kimberly M. S. Cartier, *An Unfought Geoscience Battle in U.S. Prisons*, EOS: SCIENCE NEWS BY AGU (Nov. 10, 2020), <https://perma.cc/V49T-YQHW>; *see also* FIGHT TOXIC PRISONS, <https://perma.cc/9WZV-6MPL> (last visited Apr. 24, 2022); *see also* NATION INSIDE: PRISON ECOLOGY PROJECT, <https://perma.cc/S6TS-WLSL> (last visited Apr. 24, 2022).

been brought regarding food⁷⁶, radon gas exposure⁷⁷, secondhand smoke⁷⁸, and extreme temperatures.⁷⁹

In order to bring an Eighth Amendment claim, plaintiffs must establish that the conditions, when viewed objectively, “resulted in unquestioned and serious deprivation of basic human needs” serious enough to “deprive [a prisoner] of the minimal civilized measure of life’s necessities.”⁸⁰ Next, they must demonstrate that the defendants — here, prison officials — were “deliberately indifferent” to the issue at hand.⁸¹ Deliberate indifference is established only when the defendant has actual knowledge of the harm as alleged by the plaintiff, and then disregards that risk by “intentionally refusing or failing to take reasonable measures to prevent the problem.”⁸²

In a landmark Supreme Court case, *Helling v. McKinney*, the Court for the first time established the possibility of bringing an Eighth Amendment claim based on the risk of future harm from present exposure to environmental toxins.⁸³ Where there is not yet an injury, a plaintiff must establish three elements of the risk for the court to determine it is “sufficiently grave”⁸⁴: 1) the injury’s seriousness; 2) the likelihood of the injury

⁷⁶ See *Newman v. Alabama*, 559 F.2d 283, 286 (5th Cir. 1977) (“It is much too late in the day for states and prison authorities to think they may withhold from prisoners the basic necessities of life, which include reasonably adequate food, clothing, shelter, sanitation and necessary medical attention.”).

⁷⁷ See *Vega v. Semple*, 963 F.3d 259, 284 (2d Cir. 2020) (“[F]ailure to take any reasonable steps to abate the risk of excessive radon exposure, of which risk they [officials] were actually aware, would constitute deliberate indifference to a serious medical need that violated inmates’ clearly established Eighth Amendment rights . . .”).

⁷⁸ See *Reilly v. Grayson*, 310 F.3d 519, 520-21 (6th Cir. 2002) (“[E]vidence from which the district court could find that [plaintiff] suffered both an increase in the severity of his asthma and an increase in the risk of future damage to his health as a direct result of his exposure to secondhand smoke” in prison unit supported that court’s award of damages and attorney’s fees in the § 1983 action against state prison officials for “deliberate indifference to his serious medical needs.”).

⁷⁹ See generally Matt Clarke & Christopher Zoukis, *Litigation Heats up Over Extreme Temperatures in Prisons, Jails*, PRISON LEGAL NEWS (June 29, 2018), <https://perma.cc/JC4D-4VVZ>.

⁸⁰ *Rhodes v. Chapman*, 452 U.S. 337, 346-47 (1981).

⁸¹ *Helling v. McKinney*, 509 U.S. 25, 28, 36 (1993) (explaining that “[t]he subjective factor, deliberate indifference, should be determined in light of the prison authorities’ current attitudes and conduct . . .”).

⁸² *Bruton v. Hendler*, No. Civ.A.00-1032, 2004 WL 2370704, at *5 (D. Del. Oct. 15, 2004) (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

⁸³ *Helling* was decided three years before the enactment of the Prison Litigation Reform Act, which then limited the ability to bring a suit for money damages without a showing of physical injury. See *Helling*, 509 U.S. at 35; see also 42 U.S.C. § 1997e(e) (stating injunctive relief, however, can still be sought on a theory of threat of future harm); see e.g., *Mitchell v. Horn*, 318 F.3d 523, 534 (2003).

⁸⁴ *Helling*, 509 U.S. at 36.

occurring; and 3) that the risk “violates contemporary standards of decency to expose *anyone* unwillingly to the risk.”⁸⁵ The first and second elements can be established through statistical and scientific evidence demonstrating the condition of incarceration which poses the risk. The third element requires a showing that the risk itself is one which society is unwilling to tolerate.⁸⁶ In the *Helling* case, which concerned exposure to secondhand smoke, Plaintiffs cited scientific studies, public opinion polling, and a court’s finding of a changed pattern in societal attitudes and behavior towards smoking and smokers.⁸⁷ Taken together, the plaintiff made a successful showing of society’s unwillingness to tolerate the risk of secondhand smoke.

V. FAILURE OF THE COURTS TO ADDRESS CONTAMINATED WATER AND ITS HEALTH IMPACTS ON INCARCERATED PEOPLE

Public Water Systems – The Basics

Many New York State Prisons source their water from community water systems⁸⁸ which often also supply water to the township in which the prison is situated. Some New York State prisons have their own water source and supply infrastructure.⁸⁹ Water contamination in a public water

⁸⁵ *Id.* (emphasis in original).

⁸⁶ Anthony Moffa, *Environmental Indifference*, 45 HARV. ENV’T L. REV. 333, 353-354 (2021).

⁸⁷ *Id.* at 354.

⁸⁸ See N.Y. COMP. CODES R. & REGS. tit. 10, § 5-1.1 (2022) (“Community water system (CWS) means a public water system which serves at least five service connections used by year-round residents or regularly serves at least 25 year-round residents.”). See also 10 N.Y.C.R.R. § 128-4.1(c), N.Y. Dep’t of Health Annual Water Quality Report Certification Form, Otisville Correctional Facility (2015); 10 N.Y.C.R.R. § 128-4.1(c), N.Y. Dep’t of Health Annual Water Quality Report Certification Form, Greenhaven Correctional Facility (2016).

⁸⁹ See 10 N.Y.C.R.R. § 128-4.1(c); Annual Drinking Water Quality Report for 2015, Green Haven Correctional Facility (“Our water system with eight service connections, serves approximately 2,800 people. Our water source is a well water supply consisting of three wells. The wells are located approximately three quarters of a mile to the northwest of the facility.”); see also Keir Chapman & Jeff Cole, *When Prison Closes, What Happens to The Water it Supplies to Neighborhood*, WWNY-TV (Feb. 16, 2021, 5:24 PM), <https://perma.cc/M2M7-R9DQ> (“On the prison grounds [of Watertown Correctional Facility] there is a water treatment facility. It provides town water to the prison complex and, through an agreement struck in the 1980s, extends that water service to a nearby housing development, Boulder Ridge, where there are 40 homes.”); see also *Rehabilitate Waste Water Treatment Plant, Building 44*, N.Y. STATE OFF. OF GEN. SERV. (last updated Apr. 7, 2022), <https://perma.cc/XW3Q-43PX>; *Toxic Waters: Green Haven Correctional Facility*, N.Y. TIMES, <https://perma.cc/UTH5-KWB5> (last visited Apr. 24, 2022); *Toxic Waters: Woodbourne Correctional Facility*, N.Y. TIMES, <https://perma.cc/HU5A-Z6C2> (last visited Apr. 24, 2022).

system can occur in multiple ways. Of interest in this article are source site contamination⁹⁰ and service line contamination.⁹¹

Three Case Studies

In the last twenty years, there have been numerous lawsuits by people incarcerated in New York filing *pro se* civil rights suits against New York State prisons on the basis that contaminated water and its related health effects amount to cruel and unusual punishment, barred by the Eighth Amendment of the United States Constitution – this section will discuss three of those cases which were dismissed at summary judgment: *Cherry v. Edwards*, *Robinson v. Edwards*, and *Wright v. New York State Department of Corrections*.⁹² These cases illustrate the widespread nature of experiences like those of Ramon and Phil, and the insurmountable standard posed to *pro se* incarcerated plaintiffs at the summary judgment stage of litigation.

The summary judgment standard permits a court to dismiss a claim only when “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.”⁹³ In dismissing the cases, each court held plaintiffs failed to establish an issue of material fact as to whether the water was contaminated.⁹⁴ The court must “view the evidence

⁹⁰ Source site contamination refers to an issue at the source of the water used by a community water system, which can involve bacteria which develops in standing water at a well, pond, or lake from which the system draws its water. Source cited contamination can also develop where the source is situated near a site containing hazardous waste, which then leaches into the source water. This can also occur where the hazardous waste is remote from the source but leaches into the groundwater where it then encounters the source site of water for the community water system. See *Water-related Diseases and Contaminants in Public Water Systems*, CTRS. FOR DISEASE CONTROL & PREVENTION, (last updated Apr. 7, 2014), <https://perma.cc/E27P-6DTZ>; see also *Contaminated Land*, U.S. ENV'T. PROT. AGENCY (last updated Sept. 28, 2021), <https://perma.cc/3NAD-RQJM>.

⁹¹ See *Water-related Diseases and Contaminants in Public Water Systems*, CTRS. FOR DISEASE CONTROL AND PREVENTION (last updated Apr. 7, 2014), <https://perma.cc/E27P-6DTZ> (explaining that service line contamination); see also *Basic Information About Lead in Drinking Water*, U.S. ENV'T. PROT. AGENCY (last updated Feb. 1, 2022), <https://perma.cc/SYX2-EFVR>.

⁹² *Cherry v. Edwards*, No. 01 Civ. 7886, 2005 WL 107095, at *1 (S.D.N.Y. Jan. 18, 2005); *Robinson v. Edwards*, No. 04 Civ. 2804, 2006 WL 1889900, at *1 (S.D.N.Y. July 5, 2006); *Wright v. N.Y. State Dep't of Corr. Serv.*, No. 06 Civ. 03400, 2008 WL 5055660, at *1 (S.D.N.Y. Oct. 10, 2008).

⁹³ FED. R. CIV. P. 56(c)(1)(B).

⁹⁴ *Wright*, 2008 WL 5055660, at *13 (“Plaintiff’s submissions fail to undermine or sufficiently rebut Defendants’ evidence of compliance with sanitary standards so as to create an issue of fact about *H. pylori* or *Giardia* in Green Haven’s water. The record would not permit a reasonable jury to conclude that Green Haven’s water was actually contaminated.”); *Cherry*, 2005 WL 107095, at *8 (“[T]he evidence adduced by the Plaintiffs is plainly insufficient to

in the light most favorable to the party against whom summary judgment is sought and draw all permissible inferences in favor of that party.”⁹⁵ The court must also accept as true the non-moving party’s evidence, if supported by affidavits or other evidentiary material.⁹⁶

Cherry v. Edwards

The first case is *Cherry v. Edwards*, in which plaintiffs incarcerated at Otisville Correctional Facility (“OCF”) brought a *pro se* civil rights lawsuit seeking compensatory and punitive damages.⁹⁷ Plaintiffs Eric Cherry (“Mr. Cherry”) and Thomas Robinson (“Mr. Robinson”) alleged that the defendants, the Department of Corrections and Community Supervision (“DOCCS”) Commissioner, OCF Superintendent, the Director of the DOCCS Grievance Program, and two members of the OCF Medical Staff, were deliberately indifferent to their medical needs. Each plaintiff alleged harm arising from H. Pylori infection – a bacteria that can pass through water exposed to animal or human fecal matter.⁹⁸

Mr. Cherry and Mr. Robinson filed their complaint in the Southern District of New York on August 23, 2001. The complaint was originally brought on behalf of nine plaintiffs. The presiding judge dismissed the claims of seven plaintiffs on November 20, 2002, on the grounds that they failed to exhaust their administrative remedies as required under the Prison Litigation Reform Act.⁹⁹

Cherry v. Edwards marks a pinpoint in a long history of contaminated water at OCF, dating back to at least 1998, when they converted their water source from a reservoir to well water.¹⁰⁰ Following the conversion, people incarcerated at OCF began filing complaints that the water turned “dark brown” and “some type of fungus looking slime” was appearing in it.¹⁰¹ These types of complaints continued for eight months

show that there was a greater than normal incidence of infection at OCF and, hence, some reason to believe that the water distribution system was fostering its spread.”); *Robinson*, 2006 WL 1889900, at *9 (“Robinson’s bare assertions of a facility outbreak is ‘plainly insufficient to show that there was a greater than normal incidence of infection at OCF or to show that OCF’s water system contributed in any way to transmitting the pathogen.’”).

⁹⁵ *Fischl v. Armitage*, 128 F.3d 50, 55 (2d Cir. 1997).

⁹⁶ *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

⁹⁷ See *Cherry*, 2005 WL 107095.

⁹⁸ See *Helicobacter Pylori*, JOHNS HOPKINS MED. *supra* note 47 (“H. pylori is a type of bacteria that infects your stomach. It can damage the tissue in your stomach and the first part of your small intestine In some cases it can also cause painful sores called peptic ulcers in your upper digestive tract.”)

⁹⁹ *Cherry*, 2005 WL 107095, at *6.

¹⁰⁰ *Id.* at *2, *Bergus Aff.* 7, 8.

¹⁰¹ *Cherry*, 2005 WL 107095 at *2, *Cherry Aff.* 1.

and were met with inaction by OCF employees.¹⁰² The tipping point came when people filed complaints about visible organisms in the water, which were later determined to be “midges” (commonly known as “blood worms”).¹⁰³ At that point, OCF Superintendent Edwards brought in water via tanker trucks and issued a statement that the “presence of larvae in drinking water is highly unusual,” but according to the New York State Department of Health, did not present a risk to consumers.¹⁰⁴ The water trucks remained at OCF until the facility converted back to sourcing water from the reservoir.¹⁰⁵

After the conversion, prisoners at OCF again found their tap water turning “colors” and they expressed concerns about new contamination, including the fact that OCF was neglecting to post regular testing results from required monthly water tests.¹⁰⁶ This continued for two years, until March 2001, when Mr. Cherry and Mr. Robinson filed grievances regarding the “unprecedented number” of people who had contracted H. Pylori, stating it was reasonable to infer the common agent of infection was the water.¹⁰⁷ They requested a return of the water tanks, and increased water testing, especially of the pipes flowing to the housing units “up by the blocks.” Both grievances were denied, appealed, and denied again.¹⁰⁸ Mr. Cherry and Mr. Robinson then proceeded to file a civil rights action alleging deliberate indifference amounting to cruel and unusual punishment.¹⁰⁹ The plaintiffs argued that the defendants were deliberately indifferent to the health risks posed by the water at OCF, and that the defendants failed to take corrective action with respect to the water supply.

Cherry v. Edwards illustrates the ways in which incarcerated people are denied due process through the mandates of the grievance process,

¹⁰² *Cherry*, 2005 WL 107095 at *2 (stating that the first detection of dark brown water and slime was in or around May 1997, and that Superintendent Edwards did not acknowledge the water issues until January 1998).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at *3 (“On October 13, 2000 inmates complained at an ILC meeting that the quality of water had been ‘compromised’ . . . that the piping system was to blame. The inmates also complained about the facility’s failure to post the results of monthly water tests for the prison population.”) (internal citations omitted).

¹⁰⁷ *Id.* (“[T]he inmates again raised the issue of water quality at an [ILC] meeting. During that meeting, the inmates alleged that an ‘unprecedented number’ of OCF inmates had contracted H. pylori, and that it was reasonable to infer that the ‘common agent of infection’ was the water.”) (internal citations omitted).

¹⁰⁸ *Id.* at *3-4.

¹⁰⁹ *Cherry*, 2005 WL 107095 at *6.

and the exceedingly high bar to bring a successful Eighth Amendment claim based on exposure to contaminated water.

In *Cherry v. Edwards*, the court agreed with the prison executive staff that waiting eight months after initial and persistent complaints to address contaminated water was an acceptable amount of time before providing a clean water alternative via tanker trucks, and thus did not amount to deliberate indifference.¹¹⁰ At the time that Mr. Cherry and Mr. Robinson were filing their initial grievances about the water, Superintendent Edwards denied their requests for increased testing of the housing unit water lines and a return of the water tanks.¹¹¹ His explanation for the denial was as follows:

Currently, there are no plans to truck tank water into facility. Facility water is tested monthly from random areas throughout [the] facility. Tests are not tampered with by any staff and [the] facility water is [the] same water that [the] town uses from [the] same wells. There is no proof that [the] water at [the] facility is causing any type of virus and [the] inmate population does not need to be warned of anything.¹¹²

Despite the flat-out denial and inaction by OCF staff, the prevalence of contaminated water in OCF is further evidenced by the fact that barely three years later, another *pro se* lawsuit was filed by incarcerated plaintiffs at the same facility.

Robinson v. Edwards

In 2004, another prisoner at OCF, Lawrence Robinson (“Mr. Robinson”) filed a lawsuit against Superintendent Edwards. Mr. Robinson also submitted an application to the court for appointment of counsel, which was subsequently denied in February 2005.¹¹³ The facts of this case largely mirror the facts of *Cherry v. Edwards*, indicating a pattern of complaints met with a refusal by prison officials to acknowledge any issue with the water. Mr. Robinson’s complaint alleges that prisoners at Otisville were filing complaints about the water and requesting “continuous testing” of the water,¹¹⁴ and that medical personnel at the prison failed to report a H. pylori outbreak to their supervisors. Mr. Robinson was one of the people who contracted a H. pylori infection during this period. He

¹¹⁰ See *id.* at *8 (“Nor can the plaintiffs show that any of the Defendants were deliberately indifferent to problems with the water system . . .”).

¹¹¹ *Id.* at *3-4.

¹¹² *Id.* at *3.

¹¹³ Robinson v. Edwards, No. 04 2804, 2006 WL 1889900, at *2 (July 5, 2006).

¹¹⁴ *Id.* at *4, *6.

asserted that his symptoms included “constant pain, cramps in the stomach area, periodic vomiting, dark spots of blood inside of stool, and [. . .] halitosis.”¹¹⁵ The infection also caused “stress for him and his family,” and he asserts that he did not receive any treatment for continuing symptoms of the infection.”¹¹⁶

The court’s analysis of Eighth Amendment claims regarding exposure to contaminated water include an assessment of the severity of contaminated water and whether prison officials were deliberately indifferent.¹¹⁷ Here, the court inquired whether the health risks posed by water contamination were “sufficiently serious” by relying almost exclusively on testimony from the prison medical personnel, and no outside experts.¹¹⁸ The prison officials’ assessment of OCF’s water quality is taken by the court as a complete and fair account of the actual risk posed by the water.¹¹⁹ This raises a question of access to discovery material – if the plaintiffs had more resources to bring in their own expert or conduct independent tests on the water, they could have contested the defendants’ testimony that there was no serious health risk posed by the water. The court simultaneously embraced defendant’s testimony as fact but dismissing plaintiffs’ affidavits as insufficient, forming the basis of the court’s decision to grant summary judgment on finding no genuine issue of material fact.¹²⁰

In both cases, defendants moved for summary judgment, and the court granted it, dismissing the case on the grounds that plaintiffs failed to put forward sufficient evidence of contaminated water.¹²¹ In *Cherry v. Edwards*, the court held that plaintiff’s evidence was “plainly insufficient to show that there was a greater than normal incidence of infection at OCF and, hence, some reason to believe that the water distribution system was

¹¹⁵ *Id.* at *1; *See Halitosis (Bad Breath)*, JOHNS HOPKINS MED., <https://perma.cc/Y74V-SQY8> (last visited Apr. 24, 2022) (explaining that Halitosis is an oral health problem where the main symptom is bad smelling breath).

¹¹⁶ *Robinson*, 2006 WL 1889900, at *5 (internal quotation marks omitted).

¹¹⁷ *Id.* at *7-8 (“First, the alleged deprivation must be, in objective terms, sufficiently serious . . . [The] standard contemplates a condition of urgency, one that may produce death, degeneration, or extreme pain”) (internal quotation marks and citations omitted) (citing *Farmer v. Brennan*, 511 U.S. 825, 829-37 (1994)).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at *9 (“[T]he fact that from 2001 to 2004, out of an average of 500 inmates incarcerated at OCF, between two and twelve prisoners tested positive for the bacterium does not indicate a health problem—let alone an outbreak—existed at OCF, or that the bacterium was transmitted through water.”).

¹²⁰ *Id.* (“Robinson’s bare assertions of a facility outbreak is ‘plainly insufficient to show that there was a greater than normal incidence of infection at OCF’ or to show that OCF’s water system contributed in any way to transmitting the pathogen.”).

¹²¹ *Id.* at *11 (“Defendants’ motion for summary judgment is [granted]”).

fostering its spread.”¹²² The holding here is indicative of typical Eighth Amendment prison condition litigation – plaintiffs must show that the risk is greater than what the rest of society tolerates, and without data-driven evidence establishing a greater-than-normal rate of infection, the court was unwilling and uninterested in hearing the case.

The combined effect of the Prison Litigation Reform Act and the Eighth Amendment cruel and unusual punishment standard gives the carceral system autonomy to decide when and whether a condition of its own creation is harmful enough to merit redress. The Eighth Amendment cruel and unusual standard for deliberate indifference allows prison officials to delay action and ignore plausible, urgent complaints about life-threatening conditions.

Wright v. New York State Department of Corrections

Even where contaminated water is present and documented, prisons are granted latitude to decide whether such contamination amounts to an actionable concern. In 2008, Troy Wright (“Mr. Wright”) sued Green Haven Correctional Facility (“Green Haven”) Superintendent, Medical personnel, DOCCS officials, as well as the regional director from the Department of Environmental Conservation, for exposure to *H. pylori* through the central water supply at the prison.¹²³ Wright sought injunctive relief in the form of modification of the water system at Green Haven, as well as damages.¹²⁴ Here, the court finds that Plaintiff’s submissions fail to undermine or sufficiently rebut Defendants’ evidence of compliance with sanitary standards so as to create an issue of fact about *H. pylori* in Green Haven’s water.¹²⁵

Of the three cases discussed here, *Wright* presented the strongest evidentiary support by plaintiffs of a history of contamination known by prison officials. Mr. Wright presented letters between DOCCS, Department of Health, and Department of Environmental Conservation officials regarding the risk of surface water “influencing” the ground water from which Green Haven sources its water. A 2003 Annual Water Quality Report acknowledged that Green Haven has an “elevated susceptibility to microbials, nitrates, industrial solvents and other industrial contaminants.”¹²⁶ Following this report, the New York State Office of General Counsel contracted with a private engineering firm, Earth Tech Northeast,

¹²² *Cherry*, 2005 WL 107095, at *6.

¹²³ *See generally*, *Wright v. New York State Dep’t of Corr. Servs.*, No. 06 Civ. 03400, 2008 WL 5055660 (S.D.N.Y. Oct. 10, 2008).

¹²⁴ *Id.* at *2.

¹²⁵ *Id.* at *13.

¹²⁶ *Id.* at *3.

Inc., to assess the vulnerability of well water to “influence by surface water”.¹²⁷ Earth Tech Northeast submitted a preliminary report concluding that the “wells at . . . Green Haven must be considered suspect” and recommended further testing.¹²⁸ However, no records indicate that further testing was pursued by the New York State Department of Corrections for Green Haven. In response to the Earth Tech Northeast report, Frank Weger, the Green Haven Plant Utilities Engineer, stated that surface water does not create a risk of contamination with bacteria and parasites.¹²⁹ Weger further stated that to his knowledge there was no specific legal requirement to test for H. Pylori or Giardia.¹³⁰

Through a series of correspondence spanning more than a decade, a pattern emerged at Green Haven closely resembling the patterns of complaints and inaction at Otisville. In July 1993, Jean Ann McGrane, then-director of Region 3 for the New York Department of Environmental Conservation, sent a letter to Kelly Green, who was incarcerated at Green Haven at the time.¹³¹ The letter stated that Green Haven was cited for illegal discharge of sewage from an overflowing sewage line, and that the New York State Department of Corrections paid a \$10,000 penalty for past violations at the Green Haven Sewage Treatment Plant on the grounds of Green Haven Correctional Facility.¹³² The penalty also required Green Haven to rebuild the plant.¹³³

In August 1997, a prisoner at Green Haven sent a letter to McGrane, reporting, “[T]he water . . . comes out with a stench of rot and so dark, that we have been at times unable to drink it.”¹³⁴ From the mid-1990s through the mid-2000s, complaints have been filed by people incarcerated at Green Haven reporting “‘brown water[,] ‘stomach cramps[,] and ‘skin discoloration’ from the drinking water”¹³⁵ However, when these complaints were raised with the Department of Health (“DOH”), DOH Director of the Bureau of Public Water Supply Protection responded that his “staff regularly reviews the monthly water operations reports,” “the drinking water filtration plant at Green Haven consistently met the filter performance standard,” and Routine bacteriological monitoring (3 samples

¹²⁷ *Id.* at *4.

¹²⁸ *Id.*

¹²⁹ *Wright*, 2008 WL 5055660 at *4.

¹³⁰ *Id.* at *3. *But see* n.4 (“Although research appears to confirm this is true, neither party cites authority about sanitary standards for water. New York law does closely regulate the permissible level of coliform bacteria in drinking water, and mandates testing to assure compliance with that standard.”) (internal citation omitted).

¹³¹ *Id.* at *5.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at *6.

per month) by [an unnamed] commercial laboratory has consistently shown the water to be of satisfactory sanitary quality.”¹³⁶

On this testimony, the court dismissed Mr. Wright’s claim, again finding no genuine issue of material fact.¹³⁷

VI. A PATTERN OF DENIAL

As with any litigation, the process for seeking redress for conditions of incarceration is made significantly more difficult for people raising claims without representation. The grievance process delays and avoids timely institutional action. When a person does exhaust their administrative remedies and is able to file a lawsuit, the summary judgment standard dismisses plaintiffs first-hand accounts of exposure to contaminated water and the health effects of such exposure.

A major theme flows through the three example cases: the water at the user end of prison water systems is frequently contaminated, and water testing practices are inconsistent and incomplete. DOCCS facilities sidestep the Public Notification Rule of the Safe Drinking Water Act by denying there is any contaminant issue in the first place. Even where there is clearly contamination, the notoriously inadequate medical treatment inside of prisons¹³⁸ serves to downplay and disregard exposure as not being “sufficiently serious,” per the Eighth Amendment standard established in *Farmer v. Brennan*. With no obligation to notify prisoners of water quality or testing updates, people incarcerated in New York state prisons are left in the dark and with no option but to continue drinking water they know is causing them to feel ill.

The majority of cases and interviews used for this article have focused on the issue of bacterial infection through water contamination. However, *H. pylori* is one of many potential contaminations. If something as detectable as fecal matter contamination in water is going untested and unmitigated in New York State prisons, it bears serious consideration that even more severe contamination is also sliding under the radar. Accounts like Ramon’s of corroded copper pipes, and Phil’s of extreme metallic flavored water suggest there could possibly be more than bacterial contamination in New York prison water.

¹³⁶ *Wright*, 2008 WL 5055660 at *6.

¹³⁷ *Id.* at *19 (“[F]or the reasons set forth above, the Court respectfully recommends that the moving Defendants be granted Summary Judgment on each of Plaintiff’s claims . . .”).

¹³⁸ See generally Steve Zeidman, *Dying Behind Bars: The N.Y. Way*, N.Y. DAILY NEWS (Oct. 27, 2021), <https://perma.cc/67N6-8GN5> (stating that reports issued by the Columbia University Center for Justice and the New York State Commission of Correction Medical Review Board found that nearly 1,300 people died in New York State prisons from 2010-2020, and revealed countless medical faults: missed diagnoses; withdrawal of medication; and failure to test, hospitalize, record vital signs, and keep standard records).

There is currently a wide gap between what incarcerated *pro se* plaintiffs can produce as evidence and what the summary judgment standard requires to assert a genuine issue of material fact. Author Shannon Haupt filed Freedom of Information Law (“FOIL”) Requests with involved New York State agencies: the Department of Health, the Department of Corrections and Community Supervision, and the Department of Environmental Conservation.¹³⁹ To date, the Department of Environmental Conservation responded that they possessed no relevant material, and the Department of Health provided a partial response with Annual Water Quality Reports for Elmira, Sullivan, Green Haven, and Otisville. The Department of Corrections and Community Supervision has twice requested extensions on fulfilling the FOIL request.¹⁴⁰

The lack of thorough and consistent testing of water quality in prisons, combined with significant obstructions of due process for incarcerated people who raise complaints about the water, allows prisons to minimize and deny any presence of contaminated water. These conditions of confinement in New York state prisons are themselves an indictment of the deliberate indifference we, as a society, render towards incarcerated people. At present, people incarcerated in New York state prisons are continuously denied access to clean water and are unable to seek remedy when the water they can access is making them sick.

The PLRA and current evidentiary standards for *pro se* litigation impose severe burdens on incarcerated litigants who already risk further punishment by speaking out for their rights. The accounts contained in this article shed light on one of many conditions of incarceration which are created by prisons themselves. In seeking an answer to the question of “what should/can/must we do about it” following this piece, the authors and contributors hope the reader will consider solutions which center on “measures that reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.”¹⁴¹ Rather than moving even more resources into the hands of prisons¹⁴² to address a problem they have systematically denied exists, perhaps those resources

¹³⁹ See *infra* app. A.

¹⁴⁰ See *infra* app. C.

¹⁴¹ See generally Dan Berger, et.al, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://perma.cc/B74P-TEFF> (describing ways in which prison abolitionists organize for concrete reforms as part of a broader transformative vision).

¹⁴² See *Comptroller Stringer: Cost of Incarceration per Person in New York City Skyrockets to All-Time High*, N.Y.C. COMPTROLLER (Dec. 6, 2021), <https://perma.cc/PUD4-66V7> (“[The] annual cost of incarceration [in New York City] grew to \$556,539.00 a person per year—or \$1,525.00 each day. The full annual cost per person nearly quadrupled from FY 2011 to FY 2021.”); see generally LAUREN JONES, ET. AL, *THE COST OF INCARCERATION IN NEW YORK STATE*, VERA INST. OF JUST. (2021).

could be invested to ensure full and free access to clean water inside of prisons, adequate medical care, including liberal application of medical parole and clemency processes, for incarcerated people suffering water-related illnesses, shutting down prisons with outdated infrastructure and reducing incarcerated populations, abolishing the Prison Litigation Reform Act, and supporting *pro se* litigation by incarcerated plaintiffs in ways plaintiffs deem appropriate and useful.

APPENDIX A: FOIL LETTER REGARDING PRISON WATER QUALITY

Figure A.1 FOIL Request NYS Prison Water Quality Records

Shannon Haupt
2 Court Square W
Long Island City, NY 11101

7/13/2021
Records Access Office
New York State Department of Health
Corning Tower, Room 2364
Albany, New York 12237-0044

9/15/2021
Records Access Officer
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-1500

9/15/2021
Records Access Officer
Department of Corrections and Community Supervision
Harriman State Campus
1220 Washington Avenue
Albany, New York 12226-2050

To Whom It May Concern:

Under the New York Freedom of Information Law, N.Y. Pub. Off. Law sec. 84 et seq., I am requesting an opportunity to inspect or obtain copies of the following:

1. Pursuant to 10 NYCRR § 5-1.72, annual water quality reports from 1996 to 2020 for the entities which supply water to the following facilities:

- Otisville Correctional Facility, 57 Sanatorium Avenue, Otisville NY 10963
- Greenhaven Correctional Facility, 594 NY-216, Stormville, NY 12582
- Sullivan Correctional Facility, 325 Riverside Drive, Fallsburg NY 12733
- Elmira Correctional Facility, 1879 Davis Street, Elmira, NY 14901

2. Records indicating sampling site locations for water testing of USER TAPS conducted at Otisville Correctional Facility, Greenhaven Correctional Facility, Sullivan Correctional Facility, and Elmira Correctional Facility between January 1st 1990 to June 30th 2021, pursuant to 10 NYCRR § 5-1.42(a)(2)(i)-(iii).

3. Records indicating sampling site locations for water testing at SERVICE LINES conducted at Otisville Correctional Facility, Greenhaven Correctional Facility, Sullivan Correctional Facility, and Elmira Correctional Facility from January 1st 1990 to June 30th 2021, pursuant to 10 NYCRR § 5-1.42(a)(2)(i)-(iii).

4. All reported incidents of H. Pylori detection in water at Otisville Correctional Facility, Greenhaven Correctional Facility, Sullivan Correctional Facility, and Elmira Correctional Facility from January 1st 1990 to June 30th 2021.

5. All building plans indicating when, if ever, lead pipes were replaced at Otisville Correctional Facility, Greenhaven Correctional Facility, Sullivan Correctional Facility, and Elmira Correctional Facility from January 1st 1990 to June 30th 2021, pursuant to 10 NYCRR 5-1.42(a)(1)(ii)(a)-(c).

If there are any fees for searching or copying these records, please inform me if the cost will exceed \$100. However, I would also like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of environmental health in New York State Prisons. I am a 3L law student at the City University of New York, and all requested records will be used for public interest research. This information is not being sought for commercial purposes.

The New York Freedom of Information Law requires a response time of five business days. If access to the records I am requesting will take longer than this amount of time, please contact me with information

about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for considering my request.

Sincerely,
Shannon Haupt

APPENDIX B: INTERVIEW

Figure B.1 Interview with Ramon Henriquez

On November 2, 2021, Ramon Henriquez gave a phone interview, discussing his personal accounts of water contamination at Elmira Correctional Facility in Elmira, New York, Green Haven Correctional Facility in Stormville, New York, and Sullivan Correctional Facility in Fallsburg, New York.

The following is an edited transcript of the interview:

HAUPT: Can you tell me about the time you stored water in plastic bags?

HENRIQUEZ: They got return lines, which is the condensate for the steam returning back to the powerhouse. One of those lines broke in the superintendent's office, or above his office in Elmira. The water was hot, mine and my neighbors, everyone in our section like only 6 cells it was really hot, like rusty hot water. That day the pipe broke, and my water got cool and crystal clear and I filled up every bucket I had, every garbage bag I could find to fill up with water.

So, I asked my neighbors like hey the waters good Chris! He's like yeah, I know, I'm on the toilet, I said so am I! (laughs)

So I think they had a water main break - the return line - the steam comes in and turns into condensate then it goes back to the power house, that line rusts most of the time because they don't treat the chemicals that are in the boiler to keep it from oxidizing the coils in the boiler. They're supposed to have something that neutralizes the chemicals that are in the water after the thing comes out as steam. So those jets never work, they'll work for a few weeks then get plugged up - with calcium and minerals from the water

HAUPT: How long had it been hot before it changed?

HENRIQUEZ: Since I'd been there, the whole 18 months that's what I'd been drinking. 2016 June to 2018 December.

HAUPT: What did the water look and smell like?

HENRIQUEZ: Water is not supposed to do this - go *shhhhh -thp thp thp* and then run. The only thing that does that is the return line, when the steam, okay the traps open, then the trap closes when it senses steam - only the volume of the water opens it. When that happens, a little burst of steam goes through before it shuts. So that's why it kept having that water taste like that. I would have it running for ever and it would still do the hissing and the spurts like gas, . . .

HAUPT: Was the steam what was making it hot?

HENRIQUEZ: Yes the condensate is hot.

This water [at Elmira] messed my stomach up, that's what it did.

HAUPT: How long were you drinking before the pipe changed?

HENRIQUEZ: Whenever it occurred, I kept my water running all the time hoping I would see some condensation on the pipe indicating it was cold. I wasn't hearing the stuttering so I opened the water faucet up wider and it was cold, and I got a big bowl started filling up buckets and garbage bags all of that.

HAUPT: How did it feel to drink the cold water? Did it have a physical effect?

HENRIQUEZ: Yes a mental effect (sighs in relief) *ahhh* finally. When I went to a visit and drank a bottle of water it was like, oh god. I was in C block when I first got to Elmira it was so cold you couldn't even put your hand in it. Then I got to H block and the water is hot, and the I . . . I would flush the toilet and the toilet would get hot. Everywhere I was after my initial entrance was hot water everywhere and rusty. They tell me oh they're changing the lines that's why it's rusty like that, I said, "it's rusty like that? Yeah? It wasn't rusty like that in C block a couple of days ago."

HAUPT: What do you mean they were changing the line?

HENRIQUEZ: They were redoing all the lines, the main lines in the jail from outside, but that rust never went away that's full of crap. We changed the lines at Green Haven and we never had that issue. A one-time burst of rusty, dirty water came through but that was it.

HAUPT: Did you file grievances about this?

HENRIQUEZ: Yes I filed grievances and they said I was crazy and would refer me to mental health.

HAUPT: What's the process for filing grievances?

HENRIQUEZ: You write a grievance, the grievance supervisor used to walk the area I was in so I would hand it to her. My grievances were about more than the water, because I was complaining about the mail, everything, I had a whole bunch of stuff in there.

And anyway I give it to her and they would say we unanimously disagree because all the officers made statements that that's not happening and they would write a referral to cover their butts and refer me to mental health. I had about 30-40 referrals. But I had a bunch of grievances, some still pending now.

I complain, and then the guards make a statement on their own denying all the facts, and then they say okay we agree with the guards because they said it's not happening. The only time I got further with a grievance with the water to Albany, Albany returned it to me saying that I tried to circumvent the grievance system. I said what are you talking about? So, they kept the cover letter that I did and sent me the rest of it. They wanted me to file it with the grievance committee, but I went straight to Albany because I already had a grievance filed on a separate issue and wanted to add this as an addendum and I didn't give the committee a chance to read it.

The one I sent you was an addendum to the grievance because that's when I figured out the water situation. Like I had that clue, but couldn't prove it, but once they admitted, see where I was, my cell was right behind where the C/Os sat, and one night they were talking like "yeah the superintendent's line broke, they had to shut the water off, the steam barrel, oh it was crazy", and I was like "what? Really? So that's why the water cleared up".

HAUPT: Can you tell me more about the pipes at Green Haven?

HENRIQUEZ: We put in schedule 80 copper tubing, maybe about 200 feet of it, and about three weeks later you could stick your finger through the pipe

HAUPT: Do you have any idea what could be causing that?

HENRIQUEZ: Maybe the ph balance? Maybe the water was getting mixed with condensate - but you know that line went to the bathroom of the ladies and the officers. And you know they told everybody that worked at that prison not to drink the water. The civilians would tell us not to drink the water. Everybody (C/Os) came with their own water but they don't talk about why.

Something was eroding them [the pipes], making them paper thin, you could stick your finger through them. These are thick, expensive lines of copper, the most expensive ones they have.

The old copper lines would leak and they would be replaced with the new ones. I did it with old man ponz.

HAUPT: What was the water like when it came out of those pipes?

HENRIQUEZ: The water smelled like a pond. I was the ice machine guy, so we had the filters behind the ice machines and I put spigots behind the ice machines so that everyone could drink it. All the ice machines require filters, so we bought these big industrial filters at \$75 a cartridge, some of them take 4 and some take 2 and then a coarse filter. So they had this thing, this port that you can attach a valve to that's used to, when you replace the coarse filter you open it and it drains it, and so I would pipe a spigot to it. And you know in some of the blocks the officers would take the valve off so that they were the only ones who could use it and they wouldn't let the prisoners use it, but as soon as the shift changed or those officers that took it leave I would come and put another one.

HAUPT: It sounds like a pretty substantial risk to take on, doing that.

HENRIQUEZ: Yeah well what the hell I'm helping my fellow prisoners.

HAUPT: Can you tell me more about your impression of water testing in Green Haven?

HENRIQUEZ: Andy Barranca was the water guy and he would come and take the tests, or he would take the samples up to somewhere in Westchester where they would test them. I would see him in different housing areas, turning on the water and filling up the bottles. I don't see him having an ulterior motive, he didn't like the system, you know what I mean, he wasn't for the system but he was with the system.

HAUPT: Would you ever get access to test results?

HENRIQUEZ: Not really. Barranca would go to one faucet in each block and get a little bit at each place and he would take them. I know the chlorine was super high because we had these pills that you could drop in the water to see how much chlorine is in there, and it was an incredible amount.

HAUPT: How did you get those pills?

HENRIQUEZ: Got the pills from working in maintenance

Majority of the prison has gotten H. pylori - everybody has gotten it - in here (Sullivan) too, its supposed to be stagnant water where the flies defecate on it and that's how you get it. So, it could be the dish machine, but that's supposed to go up to 200 degrees so it should get hot enough to kill the larvae, so it has to be wherever they're using well water and whatever that well has, with that pump or the tank, maybe there's a bunch of flies around it , I don't know, you know, I can't figure it out because it could be different scenarios. They had that E. coli thing last summer and there were a lot of people throwing up here [At Sullivan]. They didn't tell us anything until someone blew the whistle. Some family member saw it online and called the Department of Health, and DOH emailed the prison. Fallsburg issued a boil water advisory. My friend used the water fountain in the yard and came back throwing up and diarrhea, but he never went to the hospital he stayed in his cell and rode it out for 2 days.

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HAUPT: Can you tell me about the time you tried to show the cup of water to the mental health nurse?

HENRIQUEZ: There was a nurse walking around the company giving out meds, and she was also asking us if we were okay, going cell by cell and stops at my cell and asks are you okay and I said one second and I went to the sink, I showed her the Styrofoam cup before I went to the sink that it was empty, I said look, you know they keep telling you guys I'm crazy but you put your finger in this cup and feel this [water] and tell

me that I'm crazy . The nurse said I can't do that. So, I'm looking out the corner of my eye and see the C/O waving his finger at her, he's like moved out of distance because he's not supposed to listen because of the HIPAA law, but that's crap. Anyway, he's waving at her to not get close, and then, because I whispered to her, and she goes no I can't touch that sorry they won't allow me, and she went past my cell toward the shower area and the officer was like what did he tell you, what did he tell you. She said he said his water's hot, it's coming out hot. And that's when the water [temperature] dropped down.

HAUPT: Can you talk to me more about the rust color you mentioned before?

HENRIQUEZ: The water looks like tea, all the time. I try straining it, through a handkerchief. I have to drink it. I try all kinds of stuff.

HAUPT: What is access to bottled water like?

HENRIQUEZ: You can get 48 bottles of water, 36 cents per bottle. The Department of Health gave us gallon bottles when the E. coli situation was happening, only lasted for a few days, I only got 3 gallons of water.

The water is horrible, I was like yeah, bullshit I'm not buying water and I was drinking it, and then my face looks like mad puss balls all over my face and then I went back to bottled water and my face is clearing up.

Everybody here has gastro problems. Everybody. Everybody wants the antacid pills, everybody running around talking about how they have heartburn. I can't even eat a cracker I get heartburn.

APPENDIX C: FOIL RESPONSES

*Figure C.1 Department of Environmental Conservation Response
Region 3 - New Paltz
P: 845 256-3154 | F:
www.dec.ny.gov*

RE: PUBLIC RECORDS REQUEST of 9/16/2021, Reference #
W089136-091621

Date: 10/15/2021

Dear Shannon Haupt,

I write in response to your Freedom of Information Law (FOIL) request seeking:

1. Pursuant to 10 NYCRR § 5-1.72, annual water quality reports from 1996 to 2020 for the entities which supply water to the following facilities:

- Otisville Correctional Facility, 57 Sanitorium Avenue, Otisville NY 10963
- Greenhaven Correctional Facility, 594 NY-216, Stormville, NY 12582
- Sullivan Correctional Facility, 325 Riverside Drive, Fallsburg NY 12733
- Elmira Correctional Facility, 1879 Davis Street, Elmira, NY 14901
- Bedford Hills Correctional Facility, 247 Harris Road, Bedford Hills, NY 10507
- Taconic Correctional Facility, 250 Harris Road, Bedford Hills, NY 10507

2. Records indicating sampling site locations for water testing of USER TAPS conducted at Otisville Correctional Facility, Greenhaven Correctional Facility, Sullivan Correctional Facility, Elmira Correctional Facility, Bedford Hills Correctional Facility, and Taconic Correctional Facility between January 1st 1990 to June 30th 2021, pursuant to 10 NYCRR § 5-1.42(a)(2)(i)-(iii).

3. Records indicating sampling site locations for water testing at SERVICE LINES conducted at Otisville Correctional Facility, Greenhaven Correctional Facility, Sullivan Correctional Facility, Elmira Correctional Facility, Bedford Hills Correctional Facility, and Taconic Correctional Facility from January 1st 1990 to June 30th 2021, pursuant to 10 NYCRR § 5-1.42(a)(2)(i)-(iii).

4. All reported incidents of H. Pylori detection in water at Otisville Correctional Facility, Greenhaven Correctional Facility, Sullivan Correctional Facility, Elmira Correctional Facility, Bedford Hills Correctional Facility, and Taconic Correctional Facility from January 1st 1990 to June 30th 2021.

5. All building plans indicating when, if ever, lead pipes were replaced at Otisville Correctional Facility, Greenhaven Correctional Facility, Sullivan Correctional Facility, Elmira Correctional Facility, Bedford Hills Correctional Facility, and Taconic Correctional Facility from

January 1st 1990 to June 30th 2021, pursuant to 10 NYCRR 5-1.42(a)(1)(ii)(a)-(c).

Please be advised that a diligent search of the files maintained by DEC produced no responsive records.

If you believe you have been unlawfully denied access to responsive records, you have the right to appeal. Any such appeal must be submitted in writing and within thirty (30) days of the date of this email. Appeals must be directed to:

FOIL Appeals Officer
Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, NY 12233-1500

Your FOIL request is now closed. If I can be of further assistance, please contact me at 845 256-3154 and reference FOIL #W089136-091621, or simply reply to this email. Thank you.

Sincerely,

Region 3 FOIL Coordinator

Figure C.2 Department of Corrections Extension Requests

Found as PDFs in the FOIL materials subfolder: <https://drive.google.com/drive/folders/1Ngo1-Ojjh9ezjGiUkaI8oiIrwNX0E-q1?usp=sharing>

Figure C.3 Annual Water Quality Reports

Found as PDFs in the FOIL materials subfolder: <https://drive.google.com/drive/folders/1Ngo1-Ojjh9ezjGiUkaI8oiIrwNX0E-q1?usp=sharing>