

Insights

COVID-19: INCARCERATED CLIENTS, PRISON RESPONSES, AND REFORM EFFORTS

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COVID-19 has brought unprecedented challenges to the criminal justice system. One such challenge is reducing the spread of COVID-19 within justice institutions.

The nature of incarceration poses grave risks to individuals serving prison sentences or incarcerated while awaiting trial. Through a coordinated effort, defense attorneys and advocates are utilizing several mechanisms to try and protect these individuals. Their efforts include filing bail motions to release individuals awaiting trial, filing requests to release sickly or elderly nonviolent offenders serving time in prison, and calling for outside defense advocacy organizations to “inspect conditions” of the institutions.

For reasons that are self-evident, prisons and jails can pose unique public health concerns during a pandemic. Incarcerated individuals are one of the nation’s most underrepresented and impoverished populations. They also have limited access to health care.¹ Cramped quarters, sanitation issues, compromised immune systems from drug use, and limited access to protective equipment for offenders and prison staff can make prisons and jails “petri dishes” for the highly contagious virus.

Moreover, confined individuals are at the mercy of the institution and its protocol for preventing introduction of the virus through individuals, including staff, who have contact with the general public. Once individuals are exposed, containing the spread may be virtually impossible, as “social distancing” guidelines cannot be sufficiently applied to offenders who are confined in their cells. Further, another cause for concern is that information provided by prison staff regarding the number of infected individuals may be incorrect, given the lack of consistent testing within facilities.

The response to the pandemic by institutions is also affecting incarcerated individuals’ access to legal representation, as counsel and other visitors are being restricted from entering penal facilities in order to contain the spread of the virus. The inability to have access to their lawyers is an added, and unreasonable, burden on litigants who are locked up while trying to pursue their legal cases.

For example, the Louisiana Governor issued an executive order suspending legal deadlines for prosecutors to file charges. The Louisiana ACLU reported that around 57 percent of those individuals in Louisiana jails are being detained for low-level offenses, without formal charge or

conviction, during the COVID-19 crisis. If these individuals are denied access to counsel, they likely will be unable to adequately challenge the legality of their detention. There are [alarming reports](#) of New York City prisons blocking inmates' calls if they are sick, thereby interfering with inmates' access to legal counsel. Even if the intent of these measures is not to prevent clients from speaking with their lawyers, the lack of access to "remote functionalities" (i.e. video conferencing or phone calls) leads to that effect.

There are efforts underway to address the challenges faced by confined persons during the pandemic. The [New Jersey Supreme Court](#), for example, adopted a unique position, stating that all county jail inmates would be temporarily released, but prosecutors and attorneys general could file individual objections stating why certain inmates would pose a significant risk to the public if released. Most other states, however, are relying on bail motions— individualized requests to the judge for release in light of COVID-19—with varying success. [Cook County courts](#) have detailed an expedited bond process for inmates who are "elderly, pregnant, or have underlying conditions, such as asthma, diabetes or a heart condition." Federal Defenders of New York has created a template for bail motions, but defense attorneys are unable to include needed, specific information in the motion given the complete lockdown of facilities. Regardless of these attempts, UCLA Professor of Law [Aaron Littman](#) has said these sorts of bail hearings are not fast enough; once the virus enters a detention center it is likely to infect large numbers at a time.

The pandemic's true impact on justice institutions is unknown, as information from the institutions themselves may not be the most reliable. As a result of inconsistent information regarding conditions in New York prisons from prisoners and prison officials, some judges are requesting added protections to ensure incarcerated individuals' safety.

For example, in April, a New York judge ordered an inspection of a Brooklyn federal prison amid reports that conditions in the prison were [unconstitutional](#) because the prison failed to enact basic COVID-19 safeguards. Alarming accounts of prison conditions have been communicated by prisoners themselves across the country. Thus, these sorts of requests for inspections are likely to increase as prisons close themselves off to advocates, attorneys, and families.

The alarm is also being sounded by prison officials. As [Dr. Robert L. Cohen](#), member of the New York Board of Correction, stated, "[t]here is no death penalty in New York. They weren't sent there to die — and they are going to die, because it's going to spread rapidly." The impact of the COVID-19 pandemic is vast and unprecedented. Defense attorneys, advocates, prison officials, and courts must stay vigilant and commit to protect this vulnerable group.

Below are a few resources from groups and organizations that have coordinated responses for defense attorneys, advocacy groups, and other interested parties. These resources are meant to be guides, resources, and persuasive authority.

- Michigan State Appellate Defender and Criminal Resource Center has provided templates and sample motions for pre-trial motions (including bail motions), motions for clients currently serving jail sentences, motions for clients serving prison sentences, and example medical affidavits for inclusion in said motions. Further, they also offer sample appellate pleadings and examples of where court orders have been successful related to COVID-19. These templates and samples should be tailored based on the jurisdiction and facts of the specific case. <http://www.sado.org/Articles/Article/759>.
- The National Association for Criminal Defense Lawyers has also created templates to challenge pre-trial confinement, emergency reprieves, letters to wardens, and various citations of case law in many states to act as guidance in motions filed. <https://www.nacdl.org/content/coronavirusresources>.
- National Association of Public Defenders has created a chart with associated templates and resources for hundreds of different types of motions, orders, and petitions in a variety of different jurisdictions. Additionally, the group has created a list of solutions to help attorneys to communicate with their clients and co-counsel during this time. <https://www.publicdefenders.us/covid>.
- Congressional Research Service created a document listing the Bureau of Prisons' COVID-19 action plan, as well as existing legal authority within federal law that allows authorities to grant release of prisoners. For such existing authority, please see pages 7-13 of this document. <https://crsreports.congress.gov/product/pdf/R/R46297>.
- The National Conference of State Legislatures has coordinated a list of informational resources from various professional organizations, federal resources, and other advocacy groups for individuals, litigants, and attorneys. <https://www.ncsl.org/research/civil-and-criminal-justice/criminal-justice-and-covid-19.aspx>.

Although the long-term impact of COVID-19 on prisons, jails, and incarcerated individuals is unclear, this difficult time has highlighted potential areas of reform. Legislative and prison reformists have been working to find ways to prevent prisons from becoming disease hotspots.

For example, the [Bail Project](#), a prison reform group, is advocating for an expedited process to release individuals who cannot afford cash bond. This process would utilize a procedure where deputies issue citations and notices to appear, and then release individuals charged with misdemeanors. The Fair and Just Prosecution Group has issued a [statement](#) advocating for the elimination of medical co-pays for confined persons. Further, other groups have promoted [technological advancements](#) (increased access to video visitation, free telephone calls, and other improvements) in prison in order to provide meaningful and safe access to legal and community support. These and other proposed may help prevent the spread of similar illnesses, ensure access to adequate healthcare, and meet basic human rights of incarcerated individuals.

Bryan Cave Leighton Paisner, through its partnership with Concordance, is dedicated to raising social awareness regarding issues affecting society's most vulnerable populations.

1. Federal Bureau of Prisons holds 146,000 inmates across 122 facilities nationwide (not including 21,000 inmates incarcerated in facilities run by private contractors). 10,000 inmates are over the age of 60, and one third have pre-existing conditions. "Federal prisons will confine inmates to cells for 14 days to prevent coronavirus spread," <https://www.cbsnews.com/news/federal-prison-inmates-coronavirus-cells-14-days-covid-19/>.

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