



## Averting an Imminent Catastrophe: Recommendations to US Local, State and Federal Officials to Covid-19 in Jails and Prisons

As of April 23, 2020, 373 of 3,854 people incarcerated at Rikers Island, the main jail in New York City, had tested positive for Covid-19.<sup>1</sup> Over 800 New York city correction employees also have tested positive.<sup>2</sup> Staff members and imprisoned people have died, and hundreds are being held in isolation or quarantine as preventive measures. These numbers continue to rise. And while New York City has seen the highest number of cases in the country, the known infection rate for Covid-19 for people held in the Rikers Island jail has been nearly six times higher than the rate citywide.<sup>3</sup>

Rikers is just one of thousands of jails and prisons in the United States, which leads the world in reported rates of incarceration.<sup>4</sup> These institutions are at extreme risk of uncontrollable outbreaks of Covid-19 in the coming weeks due to conditions of confinement that include general lack of adequate sanitation and hygiene, co-sharing of facilities, inability to implement strict “social distancing,” a key way to lower risk of infection, high rates of underlying chronic diseases among incarcerated people, lack of adequate medical care, and an older population especially susceptible to severe disease and death.

The harms are not confined to those in custody. Jail staff, including correctional officers, food service providers, and medical staff, have been exposed and continue to risk exposure and infecting their own families and communities. They also risk bringing the infection into the jails. People who contract the virus in jails and prisons risk circulating it to communities outside.

Without urgent action, Covid-19 in jail and prison populations will cause substantial suffering and death. Authorities need to take immediate action to protect incarcerated individuals and to limit transmission. Failure to do so will undermine measures already in place outside of jails, including

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<sup>1</sup> The Legal Aid Society, “COVID-19 Infection Tracking in NYC Jails,” last updated April 23, 2020, <https://www.legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/> (accessed April 24, 2020). This number does not include those who tested positive but were transferred or released from the jail or who had died in custody.

<sup>2</sup> Deanna Paul and Ben Chapman, “Rikers Island Guards are Dying in One of the Worst Coronavirus Outbreaks,” *The Wall Street Journal*, April 22, 2020, <https://www.msn.com/en-us/news/us/rikers-island-guards-are-dying-in-one-of-the-worst-coronavirus-outbreaks/ar-BB131XO4> (accessed April 24, 2020).

<sup>3</sup> The Legal Aid Society, “COVID-19 Infection Tracking in NYC Jails.”

<sup>4</sup> Sintia Radu, “Countries with the Highest Incarceration Rates,” *U.S. News & World Report*, May 13, 2019, <https://www.usnews.com/news/best-countries/articles/2019-05-13/10-countries-with-the-highest-incarceration-rates> (accessed April 21, 2020).

orders to shut down businesses and to “shelter in place,” by adding to further spread. Failure to do so will contribute to overwhelming the capacity to meet medical needs. Failure to do so will result in avoidable deaths.

Without adequate facilities to provide for quarantine and medical isolation, many jails will almost certainly place people who are sick or suspected of being sick in solitary confinement, a punitive placement.<sup>5</sup>

Maintaining public health and public safety within penal institutions and their surrounding communities depends on taking immediate and decisive steps that will control the spread of the disease and treat those afflicted.

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## **A Baseline Standard for Safer Jails and Prisons**

Human Rights Watch calls on authorities responding to the Covid-19 crisis in jails and prisons to meet the following baseline:

**Reduce jail and prison populations to the point, at a minimum, at which: (1) all people in the facilities can engage in social distancing in accordance with the standard guidance authorities have given to the general population (currently six feet or greater distance in all directions at all times),<sup>6</sup> without resorting to punitive conditions that resemble solitary**

<sup>5</sup> Human Rights Watch Memo of Support for the HALT Solitary Confinement Act, S.1623/A.2500, April 30, 2019, <https://www.hrw.org/news/2019/04/30/human-rights-watch-memo-support-new-york-state-halt-solitary-confinement-act> (accessed April 20, 2020).

<sup>6</sup> The UN Subcommittee on the Prevention of Torture has stated the principle that people inside detention facilities should be able to maintain the same physical distancing that is being recommended for people outside. UN Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or

**confinement; and (2) the facility has enough available space to put all people who are ill or close contacts of those who are ill in non-punitive isolation or quarantine with access to appropriate medical care.**

Human Rights Watch also calls on federal, state, and local officials to ensure that carceral facilities:

- 1) Provide sufficient medical monitoring, screening and appropriate testing for people who remain incarcerated, who are suspected of having the disease or showing symptoms, and who are at high risk of severe illness due to age, underlying health conditions or close contact with known infected people, and provide appropriate care and non-punitive housing, including isolation and quarantine for people in each category.
- 2) Establish proper cleaning, disinfecting and hygiene protocols, including making soap, water, and all other necessary cleaning and hygiene materials and protective gear available to incarcerated people and staff.
- 3) Establish effective screening systems for people being admitted into jails and prisons and for staff that enter and exit these facilities to guard against introduction of the virus. Entrance into facilities should be limited to essential people only, but incarcerated people should be given free access to phone and video conferencing with families and loved ones.
- 4) Ensure that people released from jail and prison, including those that would otherwise be homeless, have access to adequate healthcare, hygiene, and housing that is safe for them and their families and that allows them to maintain social distancing, isolation and quarantine, as needed to maintain their health.<sup>7</sup> However, the inability or unwillingness of the state to ensure this level of support should not be used as a reason to continue detaining people in conditions that threaten their health.

## **Recommendations to Achieving Safe Reductions in Jail and Prison Populations**

Government officials with authority over aspects of incarceration, including police, prosecutors, judges and jailers, should take the following steps to facilitate reductions of jail and prison populations:

- 1) Adopt an early release protocol for people who are close to the end of their sentence, for example within six months of their release dates or people who have served 75 percent of their sentence.
- 2) Release all people held on technical (not a new crime) violations of probation or parole, postponing hearings on those violations.

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Punishment, “Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” U.N. Doc. CAT/OP/10 (2020), adopted on March 25, 2020, para. 9(c). Currently, the US Centers for Disease Control and Prevention’s recommendation is physical distancing of six feet. Centers for Disease Control and Prevention, “Coronavirus Disease 2019, Social Distancing,” last updated April 4, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (accessed April 25, 2020). However, if that recommendation were to change in either direction, then that change would also apply to the requirements within detention facilities.

<sup>7</sup> This recommendation includes the option of paying for hotel rooms for people who would be homeless, an action that would help the hotel industry while decreasing disease spread and suffering among unhoused people and their surrounding communities.

- 3) Release all people being held pretrial, unless they are accused of a serious offense and their release would pose a specific and known risk of harm to others or unless they are a known risk to deliberately flee the jurisdiction to avoid prosecution, and those risks cannot be managed through measures other than detention. Postpone further hearings on their cases.
- 4) Identify people who are especially vulnerable to severe illness from Covid-19,<sup>8</sup> including older people, pregnant people, those with underlying health conditions, and those with certain disabilities, such as neurological conditions, epilepsy or intellectual disabilities, and establish a process to release them unless authorities establish that (1) there are adequate measures to protect their health in detention; and (2) their release would pose a specific and known risk of harm to others that cannot be managed through measures other than detention.
- 5) Release all young people held in juvenile detention facilities, camps and prisons who are not a substantial and immediate safety risk to others, providing a safe placement to those who do not otherwise have a safe home to return to, while ensuring that conditions for those remaining in facilities meet the baseline standards stated above, and relocating young people with health conditions that make them vulnerable to serious illness, but who otherwise cannot be released, to settings that protect them from infection.
- 6) Refrain from custodial arrests for misdemeanor and low-level felony offenses that do not involve the infliction or threat of infliction of serious bodily injury, sexual assault or a known likelihood of physical harm, issuing citations instead.
- 7) Postpone all out-of-custody court appearances indefinitely, to allow rapid and rights-respecting resolution of cases involving people who remain in custody and handling of urgent matters such as orders of protection.
- 8) Refrain from arresting people for warrants that do not involve serious offenses, and then only arrest if the person would pose a specific and known risk of harm to others.
- 9) Identify people in jails and prisons who are caregivers for children or who provide care or support to older people or to people with disabilities or health conditions, and prioritize them for release.
- 10) Ensure adequate services for people experiencing domestic violence, including providing shelters, help hotlines, legal assistance, mental health services, child protection support and efficient processes for obtaining orders of protection.

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<sup>8</sup> The CDC identifies “older adults and people of any age who have serious underlying medical conditions” as at higher risk of severe disease and death from Covid-19. The CDC identifies underlying medical conditions to include: blood disorders, chronic kidney or liver disease, compromised immune system, endocrine disorders, including diabetes, metabolic disorders, heart and lung disease (“including asthma or chronic obstructive pulmonary disease [chronic bronchitis or emphysema] or other chronic conditions associated with impaired lung function”), neurological and neurologic and neurodevelopmental conditions “[including disorders of the brain, spinal cord, peripheral nerve, and muscle such as cerebral palsy, epilepsy (seizure disorders), stroke, intellectual disability...]”, and current or recent pregnancy. The CDC also identifies individuals with a body mass index (BMI) greater than 40 to be at higher risk for severe illness. See Centers for Disease Control and Prevention, “Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission,” March 12, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf> (accessed April 20, 2020).

While government officials should be cautious about releasing people who pose a specific known danger of harming others, the burden should be on those officials to identify such people. This caution should not be an excuse to slow the process of release, as any delay in reaching safe population levels threatens public health and safety on a large scale.

## Covid-19's Threat to People in Custody

The United Nations High Commissioner for Human Rights, Michelle Bachelet, in a March 25 news release, said that governments need to prevent foreseeable threats to public health and have a particular duty to protect the physical and mental health of prisoners.<sup>9</sup>

Bachelet said that “COVID-19 has begun to strike prisons, jails and immigration detention centres... and risks rampaging through such institutions’ extremely vulnerable populations.”<sup>10</sup> She described the “potentially catastrophic” consequences of neglecting the duty to protect the health of people in custody and urged governments to “act now to prevent further loss of life among detainees and staff.”

The High Commissioner’s grave concerns align with warnings from public health experts. Professor Richard Coker of the London School of Hygiene and Tropical Medicine reported that prisons and jails provide ideal incubation conditions for the rapid spread of COVID-19 and that crowded congregate living settings should be avoided if possible.<sup>11</sup>

Covid-19 is a pandemic. As of April 17, there were over 2.2 million identified cases and close to 155,000 deaths worldwide.<sup>12</sup> These numbers are rapidly increasing, particularly in the United States, which had over 957,000 reported cases and close to 54,000 deaths as of April 26, the most of any country.<sup>13</sup> These numbers almost certainly underestimate the extent of the contagion, due to the lack of testing capacity.

People over the age of 60 and those with underlying conditions, like cardiovascular disease, diabetes, chronic respiratory disease, and cancer, have the highest risk.<sup>14</sup> Data indicates that risk of severe disease increases substantially for people over the age of 40, and the risk of death increases

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<sup>9</sup> “Urgent action needed to prevent COVID-19 ‘rampaging through places of detention’—Bachelet,” United Nations High Commissioner for Human Rights press release, March 25, 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E> (accessed April 20, 2020).

<sup>10</sup> Ibid.

<sup>11</sup> “Report on Coronavirus and Immigration Detention,” Richard Coker, March 17, 2020, <https://detentionaction.org.uk/wp-content/uploads/2020/03/Report-on-Detention-and-COVID-Final-1.pdf>, p. 15-16 (accessed April 20, 2020).

<sup>12</sup> “Johns Hopkins University & Medicine, Coronavirus Resource Center,” last updated April 20, 2020, <https://coronavirus.jhu.edu/map.html> (accessed April 20, 2020).

<sup>13</sup> “Coronavirus Disease 2019: Cases in the US,” Centers for Disease Control and Prevention, last updated April 21, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (accessed April 27).

<sup>14</sup> “World Health Organization: Coronavirus disease 2019 (COVID-19) Situation Report—51,” last updated March 11, 2020, [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-Covid-19.pdf?sfvrsn=1ba62e57\\_4](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-Covid-19.pdf?sfvrsn=1ba62e57_4) (accessed April 20, 2020).

with age.<sup>15</sup> However, younger people can experience severe symptoms and even death.<sup>16</sup> Pregnant people do not necessarily have a higher risk of contracting Covid-19, but may experience more severe symptoms.<sup>17</sup> The extent of impact on pregnant people is not yet known.

There is no curative treatment for Covid-19; some have estimated its mortality rate at 2.3 percent.<sup>18</sup>

Close contact between people, inevitable in normal jail and prison conditions, leads to the spread of Covid-19.<sup>19</sup> Infected people cough or sneeze, expelling droplets containing the virus into the air and onto surfaces around them. Others breathe in these droplets, or touch the surfaces then touch their eyes, nose or mouth, thus transmitting the disease.<sup>20</sup> Covid-19 survives for several hours in the air and can last for days on certain surfaces, including plastic and stainless steel.<sup>21</sup>

Asymptomatic people may spread it.<sup>22</sup> Infected people may not display symptoms for as long as 14 days, during which time they are potentially transmitting the disease unknowingly.<sup>23</sup> Even if detention facilities screen newly admitted prisoners for symptoms, they may easily miss many infected people. Testing kits are not available in adequate numbers in the US for effective screening of all people entering or working in jails.<sup>24</sup>

A group of doctors specializing in medicine in correctional facilities stated, in a declaration in court filings concerning the Cook County jail in Chicago, that “[jails] and prisons promote the spread of respiratory illness because large groups of strangers are forced suddenly into crowded congregate

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<sup>15</sup> Ibid.

<sup>16</sup> J. Edward Moreno, “WHO warns more young people dying from coronavirus,” *The Hill*, April 3, 2020, <https://thehill.com/policy/international/491041-who-we-are-seeing-data-that-more-young-people-are-dying-from-coronavirus> (accessed April 20, 2020).

<sup>17</sup> Center for Disease Control and Prevention, “Pregnancy and Breastfeeding,” last updated April 15, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html> (accessed April 20, 2020).

<sup>18</sup> “Declaration of Medical Professionals Concerned about the Risk of the Spread of COVID-19 in the Cook County Jail and Illinois Department of Corrections: Dr. Michael Puisis, Dr. Robert Cohen, Dr. John Raba, Dr. Sergio Rodriguez, and Dr. Ron Shansky,” In re State and National Emergency and Protection of the Life and Health of Detainees in the County Jail and Those who Interact With, 2020 Misc.#MR0010, Circuit Court of Cook County, IL, March 20, 2020, [https://chicagobond.org/wp-content/uploads/2020/03/final-cook-county-publib-defender-petition-for-release-from-jail\\_exhibits\\_supporting-amicus-brief-20-march-20201.pdf](https://chicagobond.org/wp-content/uploads/2020/03/final-cook-county-publib-defender-petition-for-release-from-jail_exhibits_supporting-amicus-brief-20-march-20201.pdf) (accessed April 20, 2020). Mortality rates for Covid-19 are extremely difficult to estimate accurately, because, due to insufficient testing capacity, public health professionals cannot identify how many people have been infected. Regardless, many people are dying from the disease and the numbers in the US are increasing rapidly.

<sup>19</sup> Centers for Disease Control and Prevention, “Coronavirus Disease 2019 (COVID-19),” last updated April 13, 2020, [https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Fprevention.html](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Fprevention.html) (accessed April 20, 2020).

<sup>20</sup> Ibid.

<sup>21</sup> National Institutes of Health, “New coronavirus stable for hours on surfaces,” last updated March 17, 2020, <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (accessed April 20, 2020).

<sup>22</sup> Ibid.

<sup>23</sup> “Declaration of Medical Professionals Concerned about the Risk of the Spread of COVID-19 in the Cook County Jail and Illinois Department of Corrections: Dr. Michael Puisis, Dr. Robert Cohen, Dr. John Raba, Dr. Sergio Rodriguez, and Dr. Ron Shansky.”

<sup>24</sup> Ibid.

housing arrangements. The situation is complicated by the fact that [jail staff]...live in the community and can carry the virus into the jail with them.”<sup>25</sup> Staff take infection with them, in and out of the facility. Further, the short-term nature of jail stays means people enter with disease and leave with disease.

Even without the introduction of Covid-19, outbreaks of diseases like tuberculosis are common in penal institutions.<sup>26</sup> Many people enter jails and prisons with compromised health due to histories of poverty, lack of access to health care, and other factors. Close physical contact fosters the spread of disease, as does the recirculated air in jails and prisons.<sup>27</sup> Handwashing and social distancing, the only measures available to protect against infection, are extremely difficult, and probably not possible, in most jails at current population levels. The repeated cleaning of surfaces, necessary to maintain sanitation, is rarely done in jails.<sup>28</sup>

The Center for Disease Control and Prevention (CDC), in its “Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities,” issued on March 23,<sup>29</sup> recommended the testing and isolation of detainees, as well as cleaning and maintaining hygiene. Jail medical staff have criticized these strategies as unrealistic in most carceral settings.<sup>30</sup>

The CDC said that social distancing, the practice of increasing space between individuals and decreasing the frequency of contact to reduce the risk of spreading a disease between individuals, “is a cornerstone of reducing transmission of respiratory diseases such as COVID-19.”<sup>31</sup> It said that ideally six feet of distance should be maintained between all individuals, at all times, regardless of the presence of symptoms.<sup>32</sup>

Most jails and prisons house people in substantially smaller spaces with multiple people in each cell and stacked bunks. Some house large numbers of people in dormitories. People in prison have

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<sup>25</sup> Ibid.

<sup>26</sup> Lauren-Brooke Eisen, “How Coronavirus Could Affect U.S. Jails and Prisons,” *Brennan Center for Justice*, March 13, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/how-coronavirus-could-affect-us-jails-and-prisons> (accessed April 20, 2020).

<sup>27</sup> “Declaration of Medical Professionals Concerned about the Risk of the Spread of COVID-19 in the Cook County Jail and Illinois Department of Corrections: Dr. Michael Puisis, Dr. Robert Cohen, Dr. John Raba, Dr. Sergio Rodriguez, and Dr. Ron Shansky.”

<sup>28</sup> Ibid.

<sup>29</sup> Centers for Disease Control and Prevention, “Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities,” last updated March 27, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf> (accessed April 20, 2020).

<sup>30</sup> “Declaration of Medical Professionals Concerned about the Risk of the Spread of COVID-19 in the Cook County Jail and Illinois Department of Corrections: Dr. Michael Puisis, Dr. Robert Cohen, Dr. John Raba, Dr. Sergio Rodriguez, and Dr. Ron Shansky.”

<sup>31</sup> Centers for Disease Control and Prevention, “Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities,” p. 4.

<sup>32</sup> Centers for Disease Control and Prevention, “Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities,” p. 11.

meals, showers, recreation and other activities in close quarters. The Sheriff of Orange County, California acknowledged, “social distancing is very challenging to achieve in a custody setting.”<sup>33</sup>

Attempting to implement social distancing in a full jail or prison also risks increasing use of solitary confinement and “locking down” people incarcerated in the facility, depriving them of access to services such as educational, vocational, drug treatment, reintegration programming, healthcare and mental health services.<sup>34</sup> Lockdowns and solitary confinement can be harmful to people’s mental health. They can be particularly dangerous for people with psychosocial disabilities or histories of trauma. The added anxiety created by the pandemic and risk of serious health consequences from Covid-19 infection could exacerbate this impact further.<sup>35</sup> A large proportion of people in jails and prisons, especially women and girls, have psychosocial disabilities and histories of trauma.<sup>36</sup>

Jails and prisons will need to substantially reduce the number of people they are housing to meet social distancing standards. The CDC implies this need in recommending that jail staff coordinate with local law enforcement and court officials to explore strategies to prevent overcrowding.<sup>37</sup> What constitutes “overcrowding” needs to be assessed in the context of social distancing standards.

Other corrections and medical experts are more direct in their advocacy for reductions in the numbers of prisoners. Human Rights Watch consultant Joseph Amon, an infectious disease epidemiologist and director of global health at the Drexel Dornsife School of Public Health, who has conducted extensive research on infectious diseases in detention settings, has said “reducing the overall number of individuals in detention facilities will facilitate social distancing for remaining detainees and lessen the burden of ensuring the safety of detainees and corrections officers.”<sup>38</sup>

The Illinois correctional doctors have called for the release of any prisoner who is a low risk to the community, saying that the “risk of promoting the spread of the infection to the inmate population,

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<sup>33</sup> Tony Saavedra, “OC jail deputies seek more protections after inmate tests positive for coronavirus,” *The Orange County Register*, March 25, 2020, <https://www.ocregister.com/2020/03/25/oc-jail-deputies-seek-more-protections-after-inmate-tests-positive-for-coronavirus/> (accessed April 23, 2020).

<sup>34</sup> Keri Blakinger, “What Happens When More Than 300,000 Prisoners are Locked Down?” *The Marshall Project*, April 15, 2020, <https://www.themarshallproject.org/2020/04/15/what-happens-when-more-than-300-000-prisoners-are-locked-down> (accessed April 23, 2020).

<sup>35</sup> B.O. Hogan, et al., “History of Solitary Confinement is Associated with Post-Traumatic Stress Disorder Symptoms among Individuals Recently Released from Prison,” *Journal of Urban Health*, April 2018, <https://www.ncbi.nlm.nih.gov/pubmed/28281161> (accessed April 23, 2020).

<sup>36</sup> Heather Stringer, “Improving mental health for inmates,” *American Psychological Association*, Vol. 50, No. 3, March 2019, <https://www.apa.org/monitor/2019/03/mental-health-inmates> (accessed April 23, 2020).

<sup>37</sup> Centers for Disease Control and Prevention, “Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities,” p. 6.

<sup>38</sup> “Declaration of Joseph J. Amon, Ph.D. MSPH,” *Thakker v. Doll*, Case No. \_\_\_, United States District Court, Middle District of Pennsylvania, March 24, 2020. Amon was formerly the director of the Health and Human Rights Division of Human Rights Watch and currently serves as a consultant for the organization. See also, Joseph Amon, “COVID-19 and Detention: Respecting Human Rights,” *Health and Human Rights Journal*, March 23, 2020, <https://www.hhrjournal.org/2020/03/Covid-19-and-detention-respecting-human-rights/> (accessed April 23, 2020). See also, “Releasing detainees is a critical part of the COVID-19 response and is both good public health and human rights policy.”

and thereby to the community, needs to be weighed against the reason for not releasing the inmate from incarceration.”<sup>39</sup>

The head of the union representing sheriff’s deputies in Orange County, California has called for a reduction in their jail population, citing the risk to the deputies’ health.<sup>40</sup>

On March 15, the World Health Organization (WHO) advised taking steps to prevent introduction of the disease into jails, including extensive screening of people showing symptoms, but acknowledged the difficulty of effective identification of contagious people.<sup>41</sup> It also advised reducing jail populations.<sup>42</sup>

## Officials with Power to Reduce Jail and Prison Populations and Meet Baseline Standards

Several actors within law enforcement and government have authority to reduce jail and prison populations.<sup>43</sup> Each have different, often overlapping roles. Some can take unilateral action to keep people out of the dangerous situation inside jails and prisons.

**Police Departments** function as gatekeepers. Imprisonment generally starts with arrest. Police departments could lower jail populations by limiting the number and types of arrests they make. They could establish policies to issue citations instead of making custodial arrests and booking people into jail for certain conduct.<sup>44</sup>

Police departments could abstain from enforcing laws that have traditionally resulted in arrest, like prohibitions on sex work and or possession of drugs for personal use—conduct that Human Rights Watch contends should not be criminalized at all. They should reduce enforcement of laws criminalizing non-violent conduct or issue citations for court appearances rather than make custodial arrests. They should also stop the proactive enforcement of warrants that do not relate to serious crimes.<sup>45</sup> Even without the threat of Covid-19, many of the people in these categories should not be entering jail at all.

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<sup>39</sup> “Declaration of Medical Professionals Concerned about the Risk of the Spread of COVID-19 in the Cook County Jail and Illinois Department of Corrections: Dr. Michael Puisis, Dr. Robert Cohen, Dr. John Raba, Dr. Sergio Rodriguez, and Dr. Ron Shansky.”

<sup>40</sup> Tony Saavedra, “OC jail deputies seek more protections after inmate tests positive for coronavirus.”

<sup>41</sup> World Health Organization, “Preparedness, prevention and control of COVID-19 in prisons and other places of detention, interim guidance,” March 15, 2020, [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf](http://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf) (accessed April 23, 2020), p. 8.

<sup>42</sup> World Health Organization, “Preparedness, prevention and control of COVID-19 in prisons and other places of detention, interim guidance,” p. 4.

<sup>43</sup> The descriptions cited below are intended as examples of actions taken at a specific point in time and may not account for actions taken subsequently. They are to highlight a variety of responses taken in various jurisdictions at various times in a rapidly evolving crisis.

<sup>44</sup> For example, California Penal Code section 853.6 authorizes citation for most misdemeanors.

<sup>45</sup> For example, one of the most common charges leading to booking in Tulsa’s county jail is failure to pay court debt. Human Rights Watch, “Get on the Ground!”: Policing, Poverty, and Racial Inequality in Tulsa, Oklahoma,

For example, Philadelphia Police Commissioner Danielle Outlaw issued a directive to her officers suspending custodial arrests for a broad variety of crimes, including narcotics offenses, prostitution, thefts and burglaries, vandalism, and for bench warrants, unless release poses a threat to public safety.<sup>46</sup> Instead of arresting, officers are to detain temporarily and seek arrest warrants to be served at a later time. The order provides rules designed to protect officers from infection. Philadelphia's police union has expressed support for this directive.<sup>47</sup>

The Phoenix, Arizona police chief issued a similar, less specific but more comprehensive directive, telling officers to take "violent or dangerous" individuals into custody, but not to transport others.<sup>48</sup> While it is unknown yet how much these directives are impacting jail populations, these policies may help.

In other jurisdictions, police departments are not changing their approach to low-level arrests, and continue to take people to jail for petty thefts, suspended license violations, and other offenses that do not appear to threaten public safety.<sup>49</sup> The New Orleans Police Department, for example, issued a statement indicating that they were not changing arrest policies in response to the pandemic.<sup>50</sup>

Limitations on arrests and transportation of people to jails will protect those arrested and the police. Officers across the country are contracting Covid-19, some fatally.<sup>51</sup> The New York Police Department has reported hundreds of positive tests.

**Jail administrators**, often county sheriffs, have a variety of tools to reduce populations. For years, the Los Angeles County Sheriff's Department has operated an early release program to ease overcrowding by allowing many sentenced prisoners to serve only a relatively small percentage of their time. Such programs can be expanded to reduce overcrowding during the pandemic. Jail

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(New York: Human Rights Watch, 2019), <https://www.hrw.org/report/2019/09/12/get-ground-policing-poverty-and-racial-inequality-tulsa-oklahoma/case-study-us-law> (accessed April 23, 2020).

<sup>46</sup> Order from Danielle Outlaw, Commissioner of the Philadelphia Police Department, March 17, 2020, <https://www.documentcloud.org/documents/6811943-Outlaw-Memo.html> (accessed April 23, 2020).

<sup>47</sup> Samantha Melamed and Mike Newall, "With courts closed by pandemic, Philly police stop low-level arrests to manage jail crowding," *The Philadelphia Inquirer*, March 18, 2020, <https://www.inquirer.com/health/coronavirus/philadelphia-police-coronavirus-covid-pandemic-arrests-jail-overcrowding-larry-krasner-20200317.html> (accessed April 23, 2020).

<sup>48</sup> Jeri Williams, Chief of the Phoenix Police Department, "Community Message from Police Chief Jeri Williams," March 24, 2020, <https://www.phoenix.gov/newsroom/police/1089#.Xnp8VNxLW30.twitter> (accessed April 23, 2020).

<sup>49</sup> Richard Webster, Emma Brown, and Kimberly Kindy, "New Orleans police are jailing people for minor offenses even as the city becomes a covid-19 hotspot," *The Washington Post*, March 31, 2020, [https://www.washingtonpost.com/investigations/new-orleans-police-are-jailing-people-for-minor-offenses-even-as-the-city-becomes-a-COVID-19-hotspot/2020/03/31/e2183dd8-71eb-11ea-85cb-8670579b863d\\_story.html](https://www.washingtonpost.com/investigations/new-orleans-police-are-jailing-people-for-minor-offenses-even-as-the-city-becomes-a-COVID-19-hotspot/2020/03/31/e2183dd8-71eb-11ea-85cb-8670579b863d_story.html) (accessed April 23, 2020).

<sup>50</sup> Richard Webster, Emma Brown, and Kimberly Kindy, "New Orleans police are jailing people for minor offenses even as the city becomes a covid-19 hotspot."

<sup>51</sup> Jake Bleiberg and Corey Williams, "'Officers are scared out there': Coronavirus hits US police," *AP News*, March 28, 2020, [https://apnews.com/o69do1bafbb1f15b1f6c4a4479ab1456?utm\\_source=The+Marshall+Project+Newsletter&utm\\_campaign=ac49f7a9e4-EMAIL\\_CAMPAIGN\\_2020\\_03\\_30\\_11\\_35&utm\\_medium=email&utm\\_term=o\\_5e02cdad9d-ac49f7a9e4-174364053](https://apnews.com/o69do1bafbb1f15b1f6c4a4479ab1456?utm_source=The+Marshall+Project+Newsletter&utm_campaign=ac49f7a9e4-EMAIL_CAMPAIGN_2020_03_30_11_35&utm_medium=email&utm_term=o_5e02cdad9d-ac49f7a9e4-174364053) (accessed April 23, 2020).

administrators could release new pretrial admissions immediately, with citations to appear in court at a future date.

The Cook County Sheriff's Office in Illinois announced on March 18 that it was working with the State's Attorney and Public Defender to identify "potential populations for consideration of release," especially older people and those with medical conditions.<sup>52</sup> They have limited the number of people being brought into the jail.<sup>53</sup> Though the public defender sought categorical release of people facing misdemeanor and non-violent felony charges, the State's Attorney has insisted on case-by-case review, a position that resulted in very limited reduction in jail populations by March 25.<sup>54</sup>

In the following week, as Covid-19 cases in the jail increased exponentially, the pace of releases increased somewhat. The jail population has dropped from 5,593 on March 18 to 4,508 on April 8.<sup>55</sup> However, by April 8, the jail had the nation's highest concentration of known cases.<sup>56</sup> By April 13, there were over 500 confirmed cases among detainees and staff.<sup>57</sup>

In Los Angeles County, the nation's largest jail system, the sheriff announced plans to release about 10 percent of the existing population.<sup>58</sup> Other factors have resulted in several thousand fewer people in the jail system than before the Covid-19 outbreak.<sup>59</sup> However, even with these reductions, the jail population remained over its officially rated capacity, without regard to the reductions needed to

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<sup>52</sup> Cook County Sheriff's Office, "Update on Efforts to Reduce Population at Cook County Jail and Ongoing Precautions to Prevent COVID-19," last updated March 18, 2020, <https://www.cookcountysheriff.org/update-on-efforts-to-reduce-population-at-cook-county-jail-and-ongoing-precautions-to-prevent-COVID-19/> (accessed April 23, 2020).

<sup>53</sup> Chuck Goudie et al, "Illinois Coronavirus: Cook County Jail reports first positive coronavirus tests," *ABC News*, March 23, 2020, <https://abc7chicago.com/health/cook-county-jail-reports-first-positive-coronavirus-tests/6043622/> (accessed April 23, 2020).

<sup>54</sup> Jonah Newman, "As coronavirus spread in Cook County jail, 300 people have been released," *Injustice Watch*, March 25, 2020, <https://www.injusticewatch.org/news/2020/as-coronavirus-spreads-in-cook-county-jail-300-people-have-been-released/> (accessed April 23, 2020).

<sup>55</sup> "Cook County Sheriff's Office," last updated April 23, 2020, <https://www.cookcountysheriff.org/data/2020/04/> (accessed April 23, 2020).

<sup>56</sup> Timothy Williams and Danielle Ivory, "Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars," *The New York Times*, April 8, 2020, <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>, (accessed April 23, 2020).

<sup>57</sup> Cheryl Corley, "The COVID-19 Struggle in Chicago's Cook County Jail," *NPR*, April 13, 2020, <https://www.npr.org/2020/04/13/833440047/the-covid-19-struggle-in-chicagos-cook-county-jail> (accessed April 23, 2020).

<sup>58</sup> Justin Carissimo, "1,700 inmates released from Los Angeles County in response to coronavirus outbreak," *CBS News*, March 24, 2020, [https://www.cbsnews.com/news/inmates-released-los-angeles-county-coronavirus-response-2020-03-24/?utm\\_source=The+Marshall+Project+Newsletter&utm\\_campaign=cc1354b3f1-EMAIL\\_CAMPAIGN\\_2020\\_03\\_25\\_11\\_31&utm\\_medium=email&utm\\_term=0\\_5e02cdad9d-cc1354b3f1-174364053](https://www.cbsnews.com/news/inmates-released-los-angeles-county-coronavirus-response-2020-03-24/?utm_source=The+Marshall+Project+Newsletter&utm_campaign=cc1354b3f1-EMAIL_CAMPAIGN_2020_03_25_11_31&utm_medium=email&utm_term=0_5e02cdad9d-cc1354b3f1-174364053) (accessed April 23, 2020).

<sup>59</sup> Vera Institute of Justice, "COVID-19 and Criminal Justice: City Spotlights," last updated April 23, 2020, <https://www.vera.org/covid-19/criminal-justice-city-spotlights/los-angeles> (accessed April 23, 2020). As of April 23, 2020, the Los Angeles County jail population was down to 11,990.

make the jail safe during the pandemic.<sup>60</sup> In Santa Clara County, California, the sheriff is cooperating with court officials to release about 20 percent of their jail population.<sup>61</sup> In New York, the state’s Department of Corrections announced that it would release 1,100 people held in state jails on “low level technical violations” of their parole conditions.<sup>62</sup> The question remains whether the speed and scale of population reduction in these and other jurisdictions will be enough to slow the spread of Covid-19 and to prevent jail medical facilities from being overwhelmed.

**Prosecutors** could request that judges refrain from setting bail; agree to bail reviews for people already in pretrial custody; advocate for release of large categories of people on their “own recognizance” except in cases where there is a serious risk to public safety; and choose not to seek jail or prison sentences. They could also decline to file charges for conduct such as the possession of drugs for personal use and sex work, or other crimes that cause no or minimal harm to others.

A group of prosecutors from across the United States have called for rapid reductions of jail populations by urging law enforcement officials to issue citations with return court dates, instead of carrying out custodial arrests (known as “cite and release”), release people unable to pay cash bail who do not pose a serious risk to public safety, and identify vulnerable people who do not pose a safety risk for early release, among other measures.<sup>63</sup>

Very early in the crisis, Chesa Boudin, the San Francisco district attorney, directed his prosecutors to agree to pretrial release for low-level charges and to favor “time served” plea offers.<sup>64</sup> Baltimore state’s attorney, Marilyn Mosby, has ordered her prosecutors to dismiss drug, prostitution, traffic and other low-level charges.<sup>65</sup> In making this order for categorical dismissals, Mosby said, “Now is not the time for a piecemeal approach.”

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<sup>60</sup> Los Angeles County Sheriff’s Department, “Custody Division Population Quarterly Report, October-December 2019,”

<https://lasd.org/transparency%20data/custody%20reports/Custody%20Division%20Population%202019%20Fourth%20Quarter%20Report.pdf> (accessed April 23, 2020).

<sup>61</sup> Aviva Shen, “How to Prevent a Coronavirus Catastrophe in Jails,” *Slate*, March 21, 2020, <https://slate.com/news-and-politics/2020/03/coronavirus-jail-santa-clara-let-people-out.html> (accessed April 23, 2020).

<sup>62</sup> Asher Stockler, “New York to Release 1,100 Low Level Parole Violators, as Worries Over Prison System’s Vulnerability to COVID-19 Mount,” *Time*, March 28, 2020, <https://www.newsweek.com/new-york-city-jails-coronavirus-1494852> (accessed April 6, 2020).

<sup>63</sup> Fair and Just Prosecution, “Joint Statement from Elected Prosecutors on Covid-19 and Addressing the Rights and Needs of Those in Custody,” March 2020, <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf> (accessed April 23, 2020).

<sup>64</sup> Darwin Bond-Graham, “San Francisco Officials Push to Reduce Jail Population to Prevent Coronavirus Outbreak,” *The Appeal*, March 11, 2020, <https://theappeal.org/coronavirus-san-francisco-reduce-jail-population/> (accessed April 23, 2020).

<sup>65</sup> Tim Prudente and Phillip Jackson, “Baltimore State’s Attorney Mosby to stop prosecuting drug possession, prostitution, other crimes amid coronavirus,” *The Baltimore Sun*, March 18, 2020, <https://www.baltimoresun.com/coronavirus/bs-md-ci-cr-mosby-prisoner-release-20200318-u7knneb605gqvnqmtpejftavia-story.html> (accessed April 23, 2020). Brooklyn district attorney Eric Gonzalez ordered his prosecutors to decline prosecution of “low level offenses that don’t jeopardize public safety; District Attorney King’s County Office, “Statement from Brooklyn DA Eric Gonzalez regarding the Coronavirus (COVID-19),” <http://brooklynda.org/wp-content/uploads/2020/03/Statement-from-the-Brooklyn-DA’s-Office-regarding-the-Coronavirus-COVID-19.pdf> (accessed April 23, 2020).

In New York City, as Covid-19 cases in jails mount exponentially, local district attorneys objected to larger scale releases they said were planned by the Department of Corrections, claiming that some people being released were “high risk.” They demanded that the Mayor and jail commissioner “immediately reassure the public” that that the jail’s medical capacity, following the relatively minimal population reductions already made, was “capable of appropriately managing the health needs of the remaining inmates,” in a manner consistent with CDC guidance.<sup>66</sup> In response, the chief medical officer at Rikers, calling the pandemic “a crisis of a magnitude no generation living today has ever seen,” and citing to the virus’ quick growth in the jail, explained that they could not guarantee adequate care for all sick people. He said that the prosecutors “fail[ed] to appreciate the public health disaster unfolding before our eyes.”<sup>67</sup> He said, “I simply ask that in this time of crisis the focus remain on releasing as many vulnerable people as possible.”<sup>68</sup>

In Orange County, California, District Attorney Todd Spitzer objected to a proposed court order that would facilitate release.<sup>69</sup> Some district attorneys in Massachusetts have opposed efforts to release people from jails and prisons, despite positive tests in those institutions.<sup>70</sup>

**Defense attorneys**, especially public defenders who represent most people accused of crimes, can request bail review hearings, especially through blanket motions that cover large classes of people, and through other mechanisms. Of course, defense attorneys cannot order releases, but their insistence and advocacy has been crucial to pressure those with authority to take necessary action.

On March 10, the San Francisco Public Defender’s Office began filing motions in court for release of those being held pretrial that they deemed most vulnerable, on account of their age or pre-existing health condition. The office also reached out to the county sheriff to request early release for those with six months or less time remaining on their sentences.<sup>71</sup>

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<sup>66</sup> Letter from New York City District Attorneys to Cynthia Brann, Commissioner of the New York City Department of Corrections, and Mayor Peter de Blasio, undated,

<https://drive.google.com/file/d/1PqNzjXCD6cByCxKEl8Uz4qoaN-iRX6o/view> (accessed April 23, 2020).

<sup>67</sup> Twitter thread from Dr. Ross MacDonald, Chief Physician of Rikers Island, posted March 30, 2020, <https://twitter.com/RossMacDonaldMD/status/1244822686280437765>; Craig McCarthy, “Rikers doc: DAs fail to recognize ‘public health disaster’ of coronavirus, March 31, 2020, <https://nypost.com/2020/03/31/rikers-doc-das-fail-to-recognize-public-health-disaster-of-coronavirus/> (accessed April 23, 2020).

<sup>68</sup> Ibid.

<sup>69</sup> Human Rights Watch interview with (name withheld), Orange County official, Santa Ana, California, March 26, 2020; City News Service, “Coronavirus: Orange County to Start Releasing Jail Inmates,” *Patch, Orange County*, March 28, 2020, <https://patch.com/california/orange-county/coronavirus-orange-county-start-releasing-jail-inmates> (accessed April 23, 2020).

<sup>70</sup> Jackson Cote, “Coronavirus and prisons: Massachusetts district attorneys oppose petition calling for release of inmates due to COVID-19 concerns,” *MassLive*, March 31, 2020, <https://www.masslive.com/coronavirus/2020/03/coronavirus-and-prisons-massachusetts-district-attorneys-oppose-petition-calling-for-release-of-inmates-due-to-COVID-19-concerns.html> (accessed April 23, 2020).

<sup>71</sup> San Francisco Public Defender, “Public Defender Seeks Immediate Release for People in Jail with Short Sentences and Heightened Risk of Coronavirus,” March 10, 2020, <http://sfpublicdefender.org/news/2020/03/public-defender-seeks-immediate-release-for-people-in-jail-with-short-sentences-and-heightened-risk-of-coronavirus/> (accessed April 23, 2020).

When the Oklahoma Supreme Court postponed all trials for 30 days, Tulsa public defenders pressured the district court to hold a special docket to hear motions for release from jail, resulting in many people being freed.<sup>72</sup>

New York City public defenders from five different agencies raised the alarm of the impending crisis in the jails before the first confirmed case at Rikers Island jail.<sup>73</sup> They called on the governor, mayor and chief judge to take immediate action to release vulnerable people, those held pretrial or on parole or probation violations, and those jailed for missing court dates.<sup>74</sup> Since the crisis grew, some people have been released.<sup>75</sup>

**Judges** have tremendous power and responsibility to release prisoners on the scale necessary to limit the potentially deadly spread of Covid-19 in jails and prisons. Judges can order people in detention released on their “own recognizance” when they do not pose a specific and known risk of harm to others. They can decline to sentence people to custody, and order diversions for those eligible. They can postpone cases involving out-of-custody people, to more rapidly hear cases involving those in custody, in order to facilitate resolution of their cases. They can agree to bail review hearings and make blanket orders for release of large classes of people in jail pretrial. Federal and state courts should use their power to order “compassionate releases” to remove people at high risk of serious illness due to the virus from prison.<sup>76</sup>

On March 24, Los Angeles courts agreed to release people from a list agreed upon by defenders and prosecutors.<sup>77</sup> In response to pressure from Public Defenders, and the cooperation of prosecutors,

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<sup>72</sup> Radley Balko, “As courts shut down, one city’s public defenders try to save their clients from the virus,” *The Washington Post*, March 24, 2020, <https://www.washingtonpost.com/opinions/2020/03/24/courts-shut-down-one-citys-public-defenders-try-save-their-clients-virus/> (accessed April 23, 2020).

<sup>73</sup> The Bronx Defenders, “Joint Defender Statement Calling for Immediate Release of Vulnerable Incarcerated New Yorkers in Response to Coronavirus,” March 16, 2020, <https://www.bronxdefenders.org/joint-defender-statement-calling-for-immediate-release-of-vulnerable-incarcerated-new-yorkers-in-response-to-coronavirus/> (accessed April 23, 2020).

<sup>74</sup> Ibid.

<sup>75</sup> Andrew Denney, “Number of NYC inmates with coronavirus soars as jail population dwindles,” *New York Post*, March 27, 2020, [https://nypost.com/2020/03/27/number-of-nyc-inmates-with-coronavirus-soars-as-jail-population-dwindles/?utm\\_source=The+Marshall+Project+Newsletter&utm\\_campaign=ac49f7a9e4-EMAIL\\_CAMPAIGN\\_2020\\_03\\_30\\_11\\_35&utm\\_medium=email&utm\\_term=0\\_5e02cdad9d-ac49f7a9e4-174364053](https://nypost.com/2020/03/27/number-of-nyc-inmates-with-coronavirus-soars-as-jail-population-dwindles/?utm_source=The+Marshall+Project+Newsletter&utm_campaign=ac49f7a9e4-EMAIL_CAMPAIGN_2020_03_30_11_35&utm_medium=email&utm_term=0_5e02cdad9d-ac49f7a9e4-174364053) (accessed April 23, 2020).

<sup>76</sup> Thomas Rachko, Jr., “Court Orders Asthmatic Rapper Released from Federal Prison,” *Human Rights Watch*, April 8, 2020, <https://www.hrw.org/news/2020/04/08/court-orders-asthmatic-rapper-released-federal-prison> (accessed April 23, 2020). Many states have variations on the federal “compassionate release” that allow for people with serious illnesses or terminal diagnoses to be freed from prisons; Families Against Mandatory Minimums, “Everywhere and Nowhere: Compassionate Release in the States,” June 2018, <https://famm.org/wp-content/uploads/Executive-Summary-Chart.pdf> (accessed April 23, 2020).

<sup>77</sup> Superior Court of California, County of Los Angeles, “Superior Court of Los Angeles County Orders Release of County Jail Inmates Awaiting Trial After Justice Partners Reach Agreement,” March 24, 2020, [http://www.lacourt.org/newsmedia/uploads/142020324174155NR\\_Justice\\_Partners\\_Request\\_March\\_24\\_2020\\_FINAL.pdf](http://www.lacourt.org/newsmedia/uploads/142020324174155NR_Justice_Partners_Request_March_24_2020_FINAL.pdf) (accessed April 23, 2020).

the Chief Justice of the New Jersey Supreme Court signed an order releasing up to 1,000 people from the state’s county jails.<sup>78</sup>

On March 27, the California Judicial Council, the judiciary’s policy-making body, issued an order to all courts extending time limits on criminal cases, including delaying arraignments—the first opportunity to ask a judge for release—from 48 hours to seven days, and delaying trial deadlines by an additional 30 days.<sup>79</sup> This harmful order, designed to relieve overcrowding in courtrooms and to reduce exposure for judges and court staff, will keep people who cannot pay bail waiting in jail longer for their day in court.

The California Judicial Council subsequently issued a new order that should have a positive impact on reducing jail populations.<sup>80</sup> Among other changes, this order set bail amounts to zero for most misdemeanor and lower-level felony offenses, thus allowing for immediate release after arrest. It also reduces bail to zero for those already in jail awaiting trial on those offenses. Judges can still use their discretion to set higher amounts, but this order should reduce the flow of people into the jails and could free people already in custody.<sup>81</sup> The crucial question will be how California courts implement the orders—if they will order bail reductions for all eligible people in custody or if they will insist on case-by-case procedures that will slow releases.<sup>82</sup>

**State and federal authorities**, including prison administrators, departments of corrections, and parole boards, can expedite release of people in prison. Parole boards can approve releases more expeditiously. The Federal Bureau of Prisons can transfer people from prison to home confinement and can approve requests for compassionate release.<sup>83</sup>

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<sup>78</sup> ACLU of New Jersey, “NJ Order to Release People in County Jails Breaks New Ground in Covid-19 Pandemic,” March 23, 2020, <https://www.aclu-nj.org/news/2020/03/23/nj-order-release-people-county-jails-breaks-new-ground-covid> (accessed April 23, 2020).

<sup>79</sup> Judicial Council of California, “Judicial Branch Administration: Response to the COVID-19 Pandemic,” March 28, 2020, <https://jcc.legistar.com/View.ashx?M=F&ID=8224138&GUID=74767244-139D-4B11-914E-32AFC10CCEf1> (accessed April 23, 2020).

<sup>80</sup> Judicial Council of California, “Emergency Rules 1 through 11,” April 6, 2020, <https://jcc.legistar.com/View.ashx?M=F&ID=8234474&GUID=79611543-6A40-465C-8B8B-D324F5CAE349> (accessed April 23, 2020).

<sup>81</sup> In fact, judges throughout the state are circulating a memo from a retired judge that emphasizes their power to require individual hearings and to deviate from the new \$0 bail schedule to set higher bail that will keep people in custody. J. Richard Couzens, “Memorandum, Re: Emergency Rule 4—Emergency Statewide Bail Schedule,” April 9, 2020, <https://www.vcba.org/wp-content/uploads/2020/04/Guidance-Memo-re-Emergency-Statewide-Bail-Schedule.pdf> (accessed April 23, 2020).

<sup>82</sup> John Raphling, “California’s bail-rule changes could save lives in coronavirus crisis,” *San Francisco Chronicle*, April 17, 2020, <https://www.sfchronicle.com/opinion/openforum/article/California-s-bail-rule-changes-could-save-lives-15206852.php> (accessed April 23, 2020).

<sup>83</sup> Letter from Federal Public & Community Defenders Legislative Committee to The Honorable William P. Barr, Attorney General, U.S. Department of Justice, April 1, 2020, [https://www.fd.org/sites/default/files/covid19/other\\_resources/defender\\_letter\\_ag\\_barr\\_re\\_Covid-19\\_4-1-20.pdf](https://www.fd.org/sites/default/files/covid19/other_resources/defender_letter_ag_barr_re_Covid-19_4-1-20.pdf) (accessed April 23, 2020); Human Rights Watch, *The Answer is No: Too Little Compassion*, (New York: Human Rights Watch, 2012), <https://www.hrw.org/report/2012/11/30/answer-no/too-little-compassionate-release-us-federal-prisons> (accessed April 23, 2020).

On March 30, the California Department of Corrections and Rehabilitation ordered release of 3,500 people from the state's prisons to address the spread of the virus.<sup>84</sup> Lawyers representing prisoners acknowledged that this action was a start but questioned its sufficiency. They sought an order mandating further releases to facilitate adequate social distancing and medical care, but the court rejected them.<sup>85</sup>

Federal officials acknowledged that 75 prisoners had Covid-19 as of April 2.<sup>86</sup> On March 26, Attorney General William Barr ordered the Bureau of Prisons to identify people for release to home confinement, prioritizing those in low security facilities, older and vulnerable (pursuant to CDC guidelines) people, while excluding those with violent and other convictions and those with above a minimum score on the PATTERN risk assessment tool.<sup>87</sup> Critics contend that these restrictions are biased in favor of white people in prison.<sup>88</sup> Using an algorithmic risk assessment tool to influence decisions about release in the face of a life-threatening pandemic is extremely problematic, given the inherent racial and class bias of the tools and their inability to account for individualized circumstances.<sup>89</sup>

On March 31, the Bureau of Prisons placed all people in their custody on a 14-day quarantine to their cells.<sup>90</sup>

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<sup>84</sup> Paige St. John, "California to release 3,500 inmates early as coronavirus spreads inside prisons," *The Los Angeles Times*, March 31, 2020, <https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons> (accessed April 23, 2020).

<sup>85</sup> Paige St. John, "Mass release of California prisoners weighed by judges amid coronavirus fears," *The Los Angeles Times*, April 2, 2020, [https://www.latimes.com/california/story/2020-04-02/coronavirus-california-prisons-mass-release-virus-threat?utm\\_source=The+Marshall+Project+Newsletter&utm\\_campaign=efbe1b9911-EMAIL\\_CAMPAIGN\\_2020\\_04\\_03\\_11\\_35&utm\\_medium=email&utm\\_term=0\\_5e02cdad9d-efbe1b9911-174364053](https://www.latimes.com/california/story/2020-04-02/coronavirus-california-prisons-mass-release-virus-threat?utm_source=The+Marshall+Project+Newsletter&utm_campaign=efbe1b9911-EMAIL_CAMPAIGN_2020_04_03_11_35&utm_medium=email&utm_term=0_5e02cdad9d-efbe1b9911-174364053) (accessed April 23, 2020); Richard Winton, "Judge rejects more inmate releases from California prisons," *The Los Angeles Times*, April 17, 2020, <https://www.latimes.com/california/story/2020-04-17/judge-rejects-more-inmates-releases-from-california-prisons-says-state-not-indifferent-to-covid-19> (accessed April 23, 2020).

<sup>86</sup> Federal Bureau of Prisons, "COVID-19 Coronavirus," <https://www.bop.gov/coronavirus/> (accessed April 23, 2020).

<sup>87</sup> Office of the Attorney General, "Memorandum for Director of Bureau Prisons," March 26, 2020, <https://www.themarshallproject.org/documents/6820452-Memorandum-from-Attorney-General-to-BOP-re-Home> (accessed April 23, 2020).

<sup>88</sup> Sean Collins, "Federal prisons are fighting coronavirus with home release and a quarantine, but that may not be enough," *Vox*, April 1, 2020, <https://www.vox.com/policy-and-politics/2020/4/1/21202808/coronavirus-federal-prisons-doj-barr-14-day-quarantine> (accessed April 23, 2020).

<sup>89</sup> Chelsea Barabas, et al, "Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns," June 2019, [https://dam-prod.media.mit.edu/x/2019/07/16/TechnicalFlawsOfPretrial\\_ML%20site.pdf](https://dam-prod.media.mit.edu/x/2019/07/16/TechnicalFlawsOfPretrial_ML%20site.pdf) (accessed April 23, 2020); Human Rights Watch, "Submission to Illinois Supreme Court Commission on Pretrial Practices," June 26, 2019, <https://www.hrw.org/news/2019/06/26/submission-illinois-supreme-court-commission-pretrial-practices> (accessed April 23, 2020).

<sup>90</sup> U.S. Department of Justice, Federal Bureau of Prisons, "Bureau of Prisons COVID-19 Action Plan: Phase Five," March 31, 2020, [https://www.bop.gov/resources/news/pdfs/20200331\\_press\\_release\\_action\\_plan\\_5.pdf](https://www.bop.gov/resources/news/pdfs/20200331_press_release_action_plan_5.pdf) (accessed April 23, 2020).

**Governors and the President** have the authority to grant clemency, pardons, commutations or make other orders that would result in release from prisons and jails. Increased use of these powers would lower jail and prison populations and signal to the others that they need to act to avert potential catastrophe.

As Covid-19 cases surged in the state's prisons,<sup>91</sup> Michigan Governor Gretchen Whitmer issued an executive order on March 29 to address the impending health crisis.<sup>92</sup> This order instructed the Michigan Department of Corrections to establish "risk reduction protocols" related to screening people entering prisons, treating those showing symptoms, cleaning within the prison, and hygiene and social distancing for incarcerated people. It addressed crowding by encouraging county jails to release large categories of people, so long as they do not pose public safety risks, including older and medically vulnerable people, those nearing release dates, those jailed for traffic violations, failures to appear in court, or failures to pay court debt.<sup>93</sup> The order stated that all young people who are not a "substantial and immediate safety risk to others" should be released from custody.

By contrast, Texas Governor Greg Abbott issued an executive order designed to prevent local officials from effectuating "broad-scale release of arrested or jailed individuals" due to the health risk of Covid-19.<sup>94</sup> He issued the order as officials in Harris County, Texas announced their first confirmed Covid-19 case, and as they were working on a plan to release large numbers of people from jail.<sup>95</sup>

## International Human Rights and US Constitutional Standards Related to the Health of Incarcerated People

The United States is bound by the International Covenant on Civil and Political Rights (ICCPR), which obligates states to respect the rights to life and to humane treatment.<sup>96</sup> The United Nations Human

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<sup>91</sup> Ted Roelofs, "Coronavirus cases surge in Michigan's crowded prisons," *Bridge*, March 27, 2020, <https://www.bridgemi.com/michigan-government/coronavirus-cases-surge-michigans-crowded-prisons> (accessed April 23, 2020).

<sup>92</sup> The Office of Governor Gretchen Whitmer, "Executive Order 2020-29 (COVID-19)," March 10, 2020 [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-523422--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-523422--,00.html) (accessed April 23, 2020).

<sup>93</sup> Karen Drew and Meaghan St. Pierre, "Metro Detroit county jails reviewing cases to see which inmates could be released amid coronavirus (COVID-19) outbreak," *Click on Detroit*, April 6, 2020, <https://www.clickondetroit.com/news/defenders/2020/03/25/metro-detroit-county-jails-reviewing-cases-to-see-which-inmates-could-be-released-amid-coronavirus-COVID-19-outbreak/> (accessed April 23, 2020). Prior to the Governor's order, local officials were taking steps to release some prisoners.

<sup>94</sup> Governor Greg Abbott, "Executive Order No. GA-13 relating to detention in county and municipal jails during the COVID-19 disaster," March 29, 2020, [https://gov.texas.gov/uploads/files/press/EO-GA-13\\_jails\\_and\\_bail\\_for\\_COVID-19\\_IMAGE\\_03-29-2020.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-13_jails_and_bail_for_COVID-19_IMAGE_03-29-2020.pdf) (accessed April 23, 2020).

<sup>95</sup> Jolie McCullough and Emma Platoff, "As local officials shrink jail populations due to coronavirus, Abbott blocks release of some inmates who can't pay bail," *The Texas Tribune*, March 29, 2020, <https://www.texastribune.org/2020/03/29/texas-governor-bans-release-without-bail-some-inmates-amid-coronavirus/> (accessed April 23, 2020).

<sup>96</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966). 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States in 1992, arts. 6 and 10.

Rights Committee, the independent expert body that interprets the ICCPR, has stated that the right to life “concerns the entitlement of individuals to be free from acts and omissions that...may be expected to cause their unnatural or premature death ...[T]he Covenant guarantees this right for all human beings...including for persons suspected or convicted of even the most serious crimes.”<sup>97</sup>

The committee has also stated that states have:

[a] heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the State, since by arresting, detaining, imprisoning or otherwise depriving individuals of their liberty, States parties assume the responsibility to care for their lives and bodily integrity, and they may not rely on lack of financial resources or other logistical problems to reduce this responsibility...The duty to protect the life of all detained individuals includes providing them with the necessary medical care and appropriate regular monitoring of their health.<sup>98</sup>

The right to life under the ICCPR also requires states to take appropriate measures to address the prevalence of life-threatening diseases.<sup>99</sup>

Failure to provide adequate medical care can also violate the prohibition of cruel, inhuman or degrading treatment under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the US is party.<sup>100</sup> The UN Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has also issued advice on how states should respond to the Covid-19 pandemic with respect to people deprived of their liberty, recommending, among other measures, that states: urgently identify those most at risk of serious illness in detention facilities; reduce detention populations through schemes of early, provisional, or temporary release when it is safe to do so; pay particular attention to detention settings where occupancy exceeds official capacity and doesn't allow for adequate social distancing; review pretrial detention to determine whether it is strictly necessary in this context; ensure that people still in detention have adequate facilities and supplies to maintain hygiene; and more.<sup>101</sup>

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<sup>97</sup> UN Human Rights Committee, General Comment No. 36, para. 3.

<sup>98</sup> *Ibid.*, para. 25.

<sup>99</sup> *Ibid.*, para. 26.

<sup>100</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. Res. 39/46, annex, 39, U.N. GAOR Supp. (No. 51) at 197, U.N. Doc., A/39/51 (1984), entered into force June 26, 1987, ratified by the United States on October 1, 1994, art. 1. The American Convention on Human Rights, which the US has signed but not ratified, also provides for the right to humane treatment, which bars torture, cruel, and inhumane treatment of people in detention. American Convention on Human Rights, Art. 5. Other UN standards set out the need to ensure adequate health care for all prisoners and other detainees. (See [Nelson Mandela Rules](#), revised UN rules for the treatment of prisoners, rules 24 to 35.)

<sup>101</sup> UN Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” U.N. Doc. CAT/OP/10 (2020), adopted on March 25, 2020, para. 9. The United States is not a party to the Optional Protocol, which is being interpreted here, but it is a party to the Convention Against Torture.

International human rights law also protects the right of everyone to the highest attainable standard of health.<sup>102</sup> The International Covenant on Economic, Social and Cultural Rights, which the US has signed but not ratified, requires states to take effective steps to prevent, treat and control epidemics and diseases.<sup>103</sup> Governments have an obligation to provide adequate health care, including preventive services, to all people in custody. They are prohibited from denying or limiting equal access to health care to anyone, including prisoners and detainees.<sup>104</sup>

The UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), provide that:

The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.<sup>105</sup>

The Eighth Amendment to the US Constitution also forbids the infliction of “cruel and unusual punishment.” The US Supreme Court has established that the state must provide medical care for the people it incarcerates.<sup>106</sup> The court has held that “deliberate indifference” to serious medical needs violates the Eighth Amendment.

## Conclusion

As Covid-19 continues to spread in US jails and prisons, those who play a role in the care and custody of people held, or who will be held in these facilities, should work to further the population reductions necessary to ensure proper social distancing, appropriate non-punitive isolation, effective medical care and mental health services. Authorities should take urgent action to reach that standard quickly, or thousands may die unnecessarily.

As the crisis escalates, some authorities are seeing the gravity of the situation and acting to mitigate the danger, while others resist or delay implementation of reduction strategies. Those that refuse to act decisively will bear responsibility.

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<sup>102</sup> UN Committee on Economic, Social, and Cultural Rights, “General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12),” U.N. Doc. E/C.12/2000/4 (2000), paras. 1 and 2; Universal Declaration of Human Rights, G.A. Res. 217, UN GAOR, 3<sup>rd</sup> Sess., pt. 1 UN Doc. A/810 (1948).

<sup>103</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted December 16, 1966, GA Res. 2200A (XXI), UN GAOR (no.16) at 49, UN Doc. A/6316 (1966), 99 UNTS 3, entered into force January 3, 1976, signed by US on October 5, 1977, art. 12.

<sup>104</sup> CESCR “General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12),” U.N. Doc. E/C.12/2000/4 (200), para. 34.

<sup>105</sup> See Mandela Rules, “The UN Standard Minimum Rules for the Treatment of Prisoners,” Rules 24 - 34.

<sup>106</sup> *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), <https://supreme.justia.com/cases/federal/us/429/97/#tab-opinion-1952035>.