



March 18, 2020

RE: COVID-19 and the Criminal Justice System

To Public Officials in the Commonwealth of Massachusetts:

We are all in this together. The world now confronts the pandemic spread of coronavirus disease 2019 (COVID-19), and there are at least [hundreds](#) of confirmed cases in the Commonwealth. As public officials, you have the most power to change the course of this pandemic. The American Civil Liberties Union of Massachusetts stands ready to support your efforts, and we write to urge you to take immediate action to protect the health and welfare of an especially vulnerable subset of our population: people who are or could soon be incarcerated in our state’s jails, houses of correction, prisons, and other detention facilities.

This vulnerable group includes not only people sentenced for criminal convictions, but also thousands of people who are incarcerated for other reasons: while awaiting trial and presumed innocent, for civil immigration proceedings, for probation violations, and for civil commitments for substance use disorder or other reasons. As described below, we urge you to immediately implement policies that align with guidance from public health experts and that will minimize the harm inflicted on people actually or potentially subject to incarceration—and, by extension, the harm inflicted on jail and prison staff and on broader communities.

All aspects of the system—from policing and pretrial through sentencing, confinement, and release—must be modified to combat this public health crisis. There is no time to waste.

I. Background

We understand that certain correctional and detention facilities in Massachusetts may have implemented certain protective measures, such as enhanced cleaning, screening new arrivals for symptoms, and preparing to quarantine people who become symptomatic. These measures, though a welcome start, are insufficient.

There is strong scientific evidence that people infected with this virus do not show symptoms for at least several days.¹ There is also emerging scientific evidence that such people can infect others *before* they show symptoms, and perhaps even if they *never* show

¹ See, e.g., Wei-jie Guan, et al., “Clinical Characteristics of Coronavirus Disease 2019 in China,” *New England Journal of Medicine* (2020) (4-day median incubation period, with interquartile range of 2-7 days).

symptoms.² This means that every person who enters a prison or other detention facility—even an apparently healthy person—is a potential source of infection to others.

The prospect of widespread infection within prisons and other detention facilities creates many grave dangers. We know that, on average, incarcerated individuals are more likely to suffer from chronic illness and other health challenges. According to the Centers for Disease Control and the World Health Organization, older adults and people with serious chronic medical conditions—such as heart disease, lung disease, or diabetes—or who are otherwise immuno-compromised are at higher risk from COVID-19. Additionally, because prisons and other detention facilities often require large numbers of people to be in close proximity to each other, there is a serious risk that introducing this virus in such facilities would result in a large number of simultaneous hospitalizations that could overwhelm local medical resources upon which all residents of the Commonwealth rely.

With this in mind, public health experts and groups such as [Dr. Gregg Gonsalves](#), [doctors working in New York City Hospitals](#), [Dr. Marc Stern](#), [Dr. Oluwadamilola T. Oladeru](#) and [Adam Beckman](#), [Dr. Anne Spaulding](#), [Homer Venters](#), and [Josiah Rich](#) have stated that the COVID-19 pandemic can be especially dangerous for people involved in the criminal legal system. Being arrested, detained, and incarcerated can drastically limit a person's ability to take precautions to avoid infection or to seek medical help. The longer jurisdictions wait to act, the worse this will be.

II. Recommendations

Immediate medical attention should of course be sought for anyone exhibiting COVID-19 symptoms. But that will not suffice to protect incarcerated people, staff members of jails and prisons, or the public. Therefore, we urge you to partner with local public health experts in developing informed, immediately actionable steps to protect public health and safety. This must include preventing people from unnecessarily entering the criminal legal system in the first place, and ensuring that prisons do not needlessly keep people incarcerated who are especially vulnerable to COVID-19. The recommendations below are by no means exhaustive, but they are meant to acknowledge that no single leader or institution can be held responsible for addressing this crisis alone. Partnership and transparency are crucial.

A. Recommendations to Limit New Arrests, Jailings, and Incarceration

In accordance with recommendations from public health experts, the following actions will reduce the number of people who are coming into the criminal legal system over the next several months, thereby reducing the overall burden on the system and ensuring that people can adhere to recommended health practices like physical distancing.

² See, e.g., Camilla Rothe, et al., "[Letter: Transmission of 2019 nCoV Infection from an Asymptomatic Contact in Germany](#)," *New England Journal of Medicine* (2020); Ruiyun Li, et al., "[Substantial undocumented infection facilitates the rapid dissemination of novel coronavirus](#) (SARS-CoV2)," *Science* (2020) ("pre-symptomatic shedding may be typical").

1. **Police** must drastically limit the number of people who are arrested and then detained, even if just for a short time, in spaces where maintaining hygiene becomes difficult. As has already been [announced](#) in Philadelphia, police should issue citations or summonses in lieu of arrest so that people can return home, in light of the risk that arresting people and bringing them into detention could deliver the virus to other incarcerated people, staff, and first responders. In the current circumstances, arrest is not an appropriate tool if the individual does not present an imminent physical threat to public safety.
2. **Prosecutors, including the Attorney General as the Commonwealth's chief law enforcement official**, must use their immense discretion to limit the number of people who are held in jails or in other confined facilities by drastically reducing the use of pretrial detention and carceral-based sentences. Indeed, to their credit, some Massachusetts prosecutors have already [said so](#).

Prosecutors should move for release in all but the very few cases where pretrial detention is absolutely the least restrictive means necessary to preserve public safety. Any bail imposed must fall within the defendant's ability to pay. With a special focus on populations who the CDC has identified as particularly vulnerable, prosecutors should also institute a review-and-release protocol in which bail was sought and imposed.

When seeking a plea or requesting a sentence, prosecutors must view incarceration into cramped and often un-hygienic facilities as a last resort, particularly for vulnerable populations and those who are primary caretakers for children. And prosecutors should file notices of *nolle prosequi*, or otherwise decline to prosecute, cases involving misdemeanors and other minor offenses, thereby limiting the amount of time any person must spend in court. Likewise, prosecutors should not overburden the accused with excessive fines and fees as an alternative to incarceration.

3. **Courts** have substantial power over whether people remain in carceral facilities. To their credit, Massachusetts courts have already taken [substantial steps](#) to address this crisis, including by limiting the numbers of people coming to court. The next step is to encourage reductions in the overall numbers of cases involving incarcerated or detained persons.

The availability of defense counsel may soon be severely restricted, including by illness and the need to avoid spreading COVID-19 among colleagues, clients, and family. In an analogous context, where the numbers of relevant cases exceeded the numbers of available lawyers, this Court previously urged prosecutors to dismiss "large numbers" of cases. [Bridgeman v. District Attorney for the Suffolk District](#), 476 Mass. 298, 325 (2017) (addressing the Hinton Lab crisis). Here, too, courts should urge prosecutors to exercise their "sound discretion to reduce substantially" the number of defendants in the Commonwealth. Indeed, reducing the number of criminal cases in the

Commonwealth may soon be *necessary* in order to conserve legal resources for cases that actually involve a direct physical threat to public safety.

Similarly, as has happened in Washington, D.C., courts should encourage police departments to [forego custodial arrests](#) and instead issue citations. When arrests occur, courts should streamline processes for the payment of bail, such as by allowing bails to be paid directly at detention facilities without processing delays or additional fees.

Additionally, as has already occurred in Maine, the Commonwealth's courts should [vacate](#) "any outstanding warrants for unpaid fines, unpaid restitution, unpaid court-appointed counsel fees, failure to appear for unpaid fine hearings, and any other failure to appear and pay other fees."

Further, the judicial system should take steps to reduce the increased risks COVID-19 poses to individuals committed under M.G.L. ch. 123, § 35, for addiction to substances. The National Institute on Drug Abuse [warns](#): "people with opioid, methamphetamine, cannabis, and other substance use disorders could find themselves at increased risk of COVID-19 and its more serious complications." The dangers of forced incarceration are especially acute within the context of Section 35 commitments, whose rapid turnover of intake and release could expose an especially high number of individuals to infection, both within the facility and the community.

To help mitigate these harms, the judicial system should adopt at least two measures. First, in deciding whether committing an individual will prevent a "likelihood of serious harm" due to alcohol or substance use disorder, courts should be instructed to consider the countervailing and serious likelihood that a committed individual may contract COVID-19 from or spread COVID-19 to others at a commitment facility. Second, any such involuntary commitments should be made only to facilities run by the Departments of Public Health or Mental Health that have been certified by the Department of Public Health as at low risk of COVID-19 transmissions.³

B. Recommendations to Reduce Existing Incarceration Levels

In accordance with recommendations from public health experts, public officials should also reduce the number of people who are currently incarcerated or supervised whenever it is possible to place them in alternative settings that will present reduced risk of infection to them, to correctional staff, and to the public.

- 1. The Department of Correction (DOC) and County Sheriffs** should exercise their authority to protect the people who are, will soon become, and

³ Similar considerations should inform the courts' analysis of other involuntary commitments authorized under Chapter 123 as well.

who may remain incarcerated even after the recommendations discussed above are put into action. Most importantly, the DOC and sheriffs must ensure that facilities are as sparsely populated, safe, and clean as possible.

As an initial matter, the DOC and sheriffs should assess detained and incarcerated populations and maximize the number of people—with a heightened focus on populations identified by the CDC as particularly vulnerable—who can be immediately released or stepped down to Community Corrections Centers or other community-based settings, including people who are scheduled to be released within the next sixty days.⁴ Those being released or stepped down can engage in physical distancing. It has been reported that at least one facility has removed asymptomatic people from community or home confinement and returned them to a jail setting solely to monitor them for COVID-19. Any such policy is grossly irresponsible and potentially unlawful. The response to this crisis demands the reduction of incarceration, not its expansion.

The DOC and sheriffs must continue to sanitize their facilities and coordinate with local public health experts to ensure adequate supplies of soap, hand sanitizer, and other hygiene products. These products must be freely and constantly available to all staff and incarcerated people—even if, for the latter, prohibitions on alcohol must be modified to allow for hand sanitizer distribution. Incarcerated individuals must be permitted to use these hygiene products on a consistent basis, including before eating meals or taking any medication. And staff should be educated about proper hygiene procedures, both in and out of work.

The DOC and sheriffs must also implement procedures to care for those who become ill in their facilities. Those procedures must include, at a minimum: immediately responding to requests for medical evaluation or care by any person in their custody; the immediate screening and testing of people for COVID-19, based on the most up to date information available; access to the medication and equipment necessary to treat those who contract the virus; and, implementing procedures to immediately transfer sick patients to hospitals for care whenever indicated by current medical guidance. In addition, the DOC and sheriffs must implement non-punitive procedures for housing people who are potentially exposed to the virus, who are at high risk of serious illness, or who screen or test positive for COVID-19. This should *not* result in prolonged, wide-spread lock downs or solitary confinement.

⁴ See, e.g., G.L. Ch. 126, § 26 (“Removal of Prisoners in Case of Disease”).

The DOC and Sheriffs should also continue programming to the maximum extent possible, consistent with expert health assessments. Similarly, any limits on visitation should be temporary, and other forms of communication—such as emails, voice calls, and video calls—must be made free for incarcerated people and their families. Facilities should also offer alternatives to in-person legal visitation, such as confidential telephone calls.

Finally, to ensure the continuity of health care upon release, the DOC and Sheriffs should continue to work with MassHealth to provide health insurance to people getting released.

2. **Probation Officers and Parole Boards** must also exercise their authority to limit the number of people who are incarcerated or who are forced into public spaces. In particular, probation officers should cease in-person check-ins to accommodate the need for social distancing, and should allow check-ins to occur by voice or video call. Where those technologies are not accessible to a person under supervision, check-in requirements should be minimized or temporarily suspended. Additionally, probation officers should suspend enforcement of any mobility-restricting supervision conditions that impede a person's ability to seek medical care or to support loved ones who may have COVID-19. Finally, probation officers should not seek to revoke probation for technical (crimeless) violations of probation conditions.
3. **The Governor** has a uniquely powerful role to play in stopping the spread of COVID-19 and limiting the harm it inflicts on communities by decreasing incarcerated populations and creating a culture in which transparency, safety, and the health of all people are the paramount concerns. First and foremost, the Governor can take immediate action to protect public health by requiring executive agencies to implement the non-exhaustive steps outlined above. Additionally, with the advice of the Governor's Council where required, and consistent with the laws of the Commonwealth, the Governor should act as quickly as possible to grant commutations to people whose sentence would end in the next year, to anyone currently being held on a technical supervision violation, and to anyone identified by the CDC as particularly vulnerable whose sentence would end in the next two years.

Also, the Governor can mandate that corrections officials who are processing these releases are coordinating with local service providers and public health experts so that people who may not be able to return home have a safe, accessible place to be that is also close to medical facilities and services.

III. Conclusion

It is essential to remember actors within the criminal legal system must coordinate with and defer to local public health experts in limiting the risks posed by the COVID-19 pandemic to people who come into contact with the system. The urgency of deliberate and thoughtful action cannot be overstated. Countries experiencing the later stages of infection

offer proof positive that, as coronavirus spreads in the United States, minimizing the number of incarcerated people is *not optional*.

We are eager to work with anyone who is willing to discuss the steps outlined above, and we are willing to be a resource for you throughout this process. We want to ensure implementation of policies that will limit the threats presented by this public health crisis.



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