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Alexandra Harrington, COVID and Prisons: Grappling with the Effects of the Pandemic on Incarceration



Blog Author: Alexandra Harrington, Associate Professor; Director, Criminal Justice Advocacy Clinic, UB School of Law

Introduction: In the last year, roughly 10% of the U.S. population has tested positive for COVID-19. In that same period, about 28% of people incarcerated in U.S. prisons tested positive for the virus. More than 2,500 incarcerated people have died of COVID-related causes. Trapped in congregate settings with little to no ability to socially distance or protect themselves from COVID, people in prisons are particularly vulnerable in the midst of a global pandemic.

COVID and Prisons: Grappling with the Effects of the Pandemic on Incarceration

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Keywords: Covid, Covid-19, Coronavirus, Prisons, Quarantine, Social distancing, Pandemic, Health, Justice, Incarceration, Home confinement, Release, Punishment, Prison system, Remedies, Compassionate release.

In the last year, roughly 10% of the U.S. population has tested positive for COVID-19. In that same period, about 28% of people incarcerated in U.S. prisons tested positive for the virus. More than 2,500 incarcerated people have died of COVID-related causes. Trapped in congregate settings with little to no ability to socially distance or protect themselves from COVID, people in prisons are particularly vulnerable in the midst of a global pandemic.

The vulnerability of the incarcerated population is a product of many factors, not least of which is, the inability to take the precautions we all have grown accustomed to over the past year. People in prison cannot choose to self-isolate or quarantine if they are concerned about catching the virus. They cannot stop others from coming into the spaces in which they sleep, eat, or bathe. They cannot control what PPE they obtain or how often the areas they share with dozens of other people are cleaned. They cannot access testing without the facility providing it to them. They cannot ensure they will see a doctor when they start to feel symptoms emerging. They cannot control how long they are medically isolated or quarantined nor in what conditions.

This vulnerability is compounded by the fact that incarcerated people are more likely than the general population to suffer from any number of serious or chronic medical conditions. These include conditions like obesity, high blood pressure, heart disease and asthma—all conditions that increase the risk of severe illness from COVID-19.

One of the ways to address the vulnerability of incarcerated populations in the time of COVID has been the use of home confinement and compassionate release. Home confinement is the discretionary authority of prison officials to allow someone to serve the remainder of their sentence in the community. Compassionate release can actually reduce the sentence so the person is released on time-served. During the last year, decision-makers using both release mechanisms have considered applicants' unique medical vulnerabilities and susceptibilities to severe illness throughout the pandemic.

Since last April I've been part of a team litigating against a federal prison in Danbury, Connecticut over its response to COVID. In enforcing the settlement agreement in that case, the judge ruled that review for home confinement was not necessarily bound by typical sentencing considerations like the seriousness of the offense, the need for punishment, or the impact of the crime. Rather, the court decided, the releasing authority ought to balance the medical vulnerability of the individual against any danger the person poses to public safety. Taking traditional considerations of the nature of the offense off the table—except as they relate to public safety risk—places the focus uniquely on the individual and their future, their vulnerability and their risk, rather than on the crime and its consequences. While such focus has not always been executed in practice (many clients have been denied home confinement because of the seriousness of their crime) it does suggest an alternate method for determining how long people ought to spend in prison. It also raises the question: what happens when we return to the status quo?

If we are able to safely release people who otherwise would have spent months or years more in prison, what does that say about the continued need to incarcerate? As people are reunited with their friends, parents, children, and other loved ones, as they return to work and their communities, do we learn anything about the utility and justice of long prison terms?

Advocates have been urging a re-conception of policing, criminalization, and punishment long before COVID. But the lessons of COVID may contribute something powerful and concrete to those debates. They point a way forward that recognizes the humanity of people who have been sentenced to incarceration.

It would be naïve to think that the pandemic has broadly or lastingly changed our system of punishment. When the world starts to return to “normal” the vast majority of people who were in prison at the beginning of the pandemic will remain there. Our prisons will not have emptied, and more people will continue to be sentenced to spend months, years, and decades behind bars. The home confinement and compassionate release measures that have been invoked during the pandemic are considered extraordinary remedies exercised during an extraordinary moment in time. Even now as vaccine availability increases and case numbers decrease in some areas, decisions to grant release are dwindling.

Yet, perhaps the return to normalcy need not mean a return to the status quo ante. Perhaps we could learn something from the ways in which we’ve considered incarceration differently in the past year. Perhaps some of the lessons from the pandemic might remain—about the inhumanity and dangerousness of prisons and about the ability to safely return people to their communities. Having learned during a crisis to rethink why and for how long people need to be incarcerated, we ought to reconsider, as life returns to normal, why we thought we needed to keep people in cages in the first place.