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Linked Fate: Justice and the Criminal Legal System During the COVID-19 Pandemic

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LEGAL AND SOCIAL RESOURCES FOR PEOPLE AFFECTED BY INCARCERATION, available at
<https://change-center.law.columbia.edu/node/58>*

Introduction

The concept of “linked fate” has taken on new meaning in the face of the COVID-19 pandemic.¹ People all over the world—from every walk of life, spanning class, race, gender, and nationality—face a potentially deadly threat requiring cooperation and sacrifice. The plight of the most vulnerable among us affects the capacity of the larger community to cope with, recover, and learn from COVID-19’s devastating impact. COVID-19 makes visible and urgent the need to embrace our linked fate, “develop a sense of commonality and shared circumstances,”² and unstick dysfunctional and inequitable political and legal systems.

Nowhere is the hazard of failing to recognize linked fate more urgent than in the criminal legal system. COVID-19 pandemic has hit people who live and work in correctional institutions particularly hard. The government bears legal and moral responsibility for people incarcerated in prisons, jails, and juvenile detention facilities, who cannot leave and must depend for their survival of the pandemic on the state. The movement in and out of correctional facilities by those employed to fulfill government’s responsibility also ensures the spread of infection. One study,

¹ Michael C. Dawson, *Behind the Mule: Race, Class and African American Politics*. Princeton, NJ: Princeton University Press; 1994.

² *Id.*

for example, found that “increases in a county’s jail incarceration rate were associated with significant increases in county rates of infectious disease deaths.³ The collective failure to attend to the circumstances that enmesh people in the criminal legal system—poverty, racial discrimination, poor health and mental health care—also make prisons and jails a ground zero of the pandemic’s spread.

COVID-19’s spread shows the futility of efforts to treat incarceration as affecting only those behind the prison walls, or to avoid the government’s responsibility for failure to take action. The imminent public health catastrophe—and the undeniable relationship between the health of incarcerated individuals and public health—has produced unlikely alliances and collective mobilization of community members, advocates, public health experts, academics, lawyers, and artists. These advocacy efforts have included some currently in public office, such as the [Brooklyn and Manhattan District Attorneys](#) and the [Board of Correction of the City of New York](#). They have focused attention on convincing less responsive public officials to exercise their existing power to release people from institutions wherever possible, and to provide adequate safety precautions and treatment for those who will not be released. They also create the potential for learning from the pandemic about how to address the systemic failures that have contributed to mass incarceration.

These coalitions face the daunting challenge of garnering public and governmental support for a stigmatized group at a time of universal fear and seemingly scarce resources. Flawed and inequitable definitions of risk, sometimes based on discriminatory measures and offenses occurring decades ago, have fueled resistance to compassionate release from a subset of government officials. The punitive and dehumanizing impulse that produced mass incarceration is showing up in some public responses to the crisis. Some public officials have yet to respond to pleas for action to forestall disaster. Some have taken the position that supporting the health of people in prison and jail should take a back seat to the health concerns of more “worthy”

³ Sandhya Kajeepeta & Seth J. Prins, Why Coronavirus in Jails Should Concern All of Us, *The Appeal* (March 24, 2020), at <https://theappeal.org/coronavirus-jails-public-health/>

citizens.⁴ Some public responses have taken a more punitive tone, such as President Trump's refusal to allow people with a criminal record to receive benefits for their small businesses under the CARE act.⁵ Given our linked fates, the larger community will pay the price along with the communities more directly tied to those who are incarcerated, if we continue this deliberate indifference.

Deliberate indifference is not the only obstacle to stepping up to the challenges accompanying COVID 19 in an era of mass incarceration. Byzantine, politically deadlocked, and fragmented bureaucracies have also hampered the governmental response. Reports suggest that some public officials have responded only after a death or spread of COVID-19 in their facilities. There is [evidence](#) that public officials have erected cumbersome processes for releasing people at high risk of serious illness or death, and that crucial health and safety measures within corrections institutions have not been implemented. There is also a dearth of information provided to incarcerated individuals and their family members, making it harder for them to take steps to minimize harm that might be within their control. There is much to be learned about the need to reimagine the criminal justice system from the government's inability to react nimbly and humanely when people's lives are so clearly on the line.

In the wake of governments' limited response, community based organizations, mutual aid societies, foundations, and other parts of civic society have [stepped up their efforts](#) to support communities affected by mass incarceration. This response has underscored the wisdom of the idea that "those closest to the problem are closest to the solution." Coalitions and community-based organizations populated by those who have experienced incarceration have emerged as

⁴ Jacob Meisner, *Federal judge orders testing measures at Cook County Jail, but rejects request to order immediate releases due to coronavirus*, CHICAGO TRIBUNE, April 10, 2020, available at <https://www.chicagotribune.com/coronavirus/ct-cook-county-jail-coronavirus-lawsuit-ruling-20200409-sjwieu2sujhwhacvulsuzwhc54-story.html>

⁵ SBA's bumpy guidance on criminal history requirements for stimulus loans, available at <http://ccresourcecenter.org/2020/04/03/sbas-bumpy-guidance-on-criminal-history-requirements-for-stimulus-loans/>

the bulwark of efforts to support people inside prisons and jails. These efforts, heroic though they may be, cannot substitute for an effective, humane, and just governmental response.

These perspectives about the paradox of linked fate alongside deliberate indifference emerged as part of the process of assembling the legal and social resources available to support incarcerated individuals and their families and communities during the COVID-19 crisis. The authors of this essay—faculty and students at Columbia Law School—undertook to gather and update the resources available online, in an effort to fill a perceived need for a resource targeting current and formerly incarcerated people with urgent and immediate needs, along with those in a position to advocate for them. That complete resource is available on the website of the Center for Institutional and Social Change: <https://change-center.law.columbia.edu/content/covid-19-legal-and-social-resources-people-affected-incarceration>.

The remainder of this essay shares highlights from that Report, which includes legal and social resources concerning: (1) release of people currently incarcerated or threatened with incarceration, (2) health and safety resources for people in and after incarceration, (3) benefits and the social safety net, and (4) domestic violence.

We quickly learned that, to be concretely useful, the resource would have to focus on the local community—the legal and social resources available in New York City—and at the same time, convey information linking those local actors with statewide and national mobilization. We also learned that, to be effective in stemming the impact of the pandemic, efforts to support the community affected by incarceration had to extend beyond the remedy of release. People coming home required a place to live, health and mental health resources, means to support themselves, and protection from domestic violence. Our hope is that the information provided here will increase understanding of how the fate of the larger community is bound up with how we respond to the public health nightmare unfolding in prisons, jails, and juvenile detention facilities.

Understanding the extent of the public health crisis in corrections institutions

A growing group of individuals and organizations have been compiling information and resources related to the impact of COVID-19 on incarcerated individuals. Much of that information has focused on efforts to influence public officials to release people from prisons and jails, and avoid incarceration in the first place. That information, summarized below and more fully in the companion online Report, builds the case for demanding that public officials take necessary action to avoid a public health disaster. It will also lay the foundation for longer term efforts to build a more humane, equitable, and just criminal legal system.

The COVID-19 crisis poses an imminent risk of serious illness or death for people incarcerated or working in correctional facilities. According to [data gathered by the Legal Aid Society](#), “the infection rate at local jails is more than seven times higher than the rate citywide and 87 times higher than the country at large.” Based on this analysis, “New York City’s jails have become the epicenter of COVID-19.” Federal prisons and prisons across the country are reporting exponential increases in rates of infection among incarcerated individuals and employees working in these institutions. High rates of infection in New York City’s jails are a bellwether for other corrections facilities.

Prisons and jails “contain high concentrations of people in close proximity and are breeding grounds for uncontrolled transmission [of infection.” This situation puts anyone who is currently incarcerated at a heightened risk of exposure. Moreover, many incarcerated people are [elderly](#) and [have chronic health conditions](#) that put them at an [increased risk](#) of serious illness or death from COVID-19. [Inadequate health care in jails and prisons](#) compounds these risks even further. According to a [report issued by the Osborne Association](#), New York alone has 10,337 incarcerated older people and is among five states in the union with an incarcerated older population in excess of 10,000 people, including Texas (28,502), California (27,806), Florida (21,620), and Pennsylvania (10,214). According to [data from the Marshall Project](#), in 2016 nearly 150,000 people incarcerated in state facilities were 55 or older. Similarly, 11 percent of the federal prison

population—more than 20,000 people—is 56 or older. A [letter on behalf of Federal Defenders](#) reports approximately 10,000 individuals over the age of 60 presently in federal custody, with one third of all individuals in federal custody exhibiting preexisting conditions. Additionally, jails and prisons often have a higher prevalence of underlying health conditions than the non-incarcerated population, as shown by the chart below:

Health condition	Prevalence of health condition by population			
	Jails	State prisons	Federal prisons	United States
Ever tested positive for Tuberculosis	2.5%		6.0%	0.5%
Asthma	20.1%		14.9%	10.2%
Cigarette smoking	n/a	64.7%	45.2%	21.2%
HIV positive	1.3%		1.3%	0.4%
High blood pressure/hypertension	30.2%		26.3%	18.1%
Diabetes/high blood sugar	7.2%		9.0%	6.5%
Heart-related problems	10.4%		9.8%	2.9%
Pregnancy	5.0%	4.0%	3.0%	3.9%

Source: [Prison Policy Initiative](#)

While there are ways to reduce the risk of COVID-19 exposure, much of the recommended hygienic and protective equipment is unavailable or difficult to obtain for those who are currently incarcerated. [Reports](#) indicate a shortage of toilet paper as well as a lack of alcohol wipes, [hand sanitizer](#), and [soap](#) in jails and prisons. According to the [CDC](#), “many facilities restrict access to soap and paper towels and prohibit alcohol-based hand sanitizer and many disinfectants.” Additionally, protective measures like social distancing and self-quarantining are difficult or [impossible to follow](#) while incarcerated.

The public health crisis in corrections institutions is both predictable and lethal, leading the Board of Corrections and chief medical officers to beg city and state officials to release as many vulnerable inmates as possible. Prominent public officials have called prisons and jails “[death traps](#),” “[petri dishes](#),” “[ticking time bombs](#)” and “[death sentences](#).” March 28, 2020, marked a grim milestone. Patrick Estell Jones, 49, became the first individual in BOP custody to die of COVID-19. He was serving a sentence in a low-security facility for a non-violent crack cocaine

offense. April 5 marked the first COVID-19 related death of a person incarcerated in a New York City jail—a person who was held on a parole violation for which the Legal Aid Society had requested immediate release.

Advocacy and avenues for redress

The exigencies of this situation require public officials to respond with uncharacteristic speed, decisiveness, and humanity under conditions of uncertainty. Correctional institutions, public officials, advocates, and community based organizations must respond quickly and courageously if they are to minimize the devastating impact of COVID-19 on individuals, families, and communities affected by incarceration.

A remarkable coalition of advocates, public health experts, religious leaders, academics, artists, and public officials has emerged. They are marshaling data, scientific evidence, and personal stories to pressure public officials to head off a disaster of catastrophic proportion. [Public defender offices](#), [prosecutors](#), and other [legal service and advocacy groups](#) have been pushing for the release of large numbers of incarcerated individuals, especially those who are older and have pre-existing medical conditions. They are also advocating for immediate action to provide greater protection and access to health care for those who contract COVID-19 while incarcerated.

Advocates, community leaders, public health experts, and many public officials have called for immediate action to reduce the spread of the virus to those who are incarcerated and their families, to those who work in correctional and detention facilities, and to the community at large. Vendors, staff, corrections health care workers, and corrections officers coming into and leaving the facilities face considerable risks of infection themselves, and of spreading the infection to others they come in contact with outside the facilities. People released from incarceration are more likely to be homeless or housed in shelters or transitional facilities that themselves pose serious risks of infection.

Legal remedies for reducing incarceration are key, many falling within the discretion of executive officials and judges. The United States Attorney General has the authority, under the CARES Act, to allow the Bureau of Prisons “to transfer many more people to the relative safety of home confinement.”⁶ Corrections Commissioners have the power to remove incarcerated individuals from their place of confinement in case of contagious disease.⁷ Courts have the power to (1) order the release of anyone who does not present a greater danger to themselves or others than they would if they were infected,⁸ and (2) radically decrease the number of people being sent into incarceration who don’t require immediate confinement. They can also intervene by enforcing the Eighth Amendment prohibition against cruel and unusual punishment.⁹ Prosecutors can exercise their power by not seeking incarceration of people who do not present an imminent threat. Governors and mayors can exercise their power to grant release or clemency.¹⁰

Although some public officials have taken steps to respond to the crisis in time to minimize these extreme harms, many have yet to take the steps necessary to avoid irreparable harm to individuals and families, including death.

⁶ The United States Attorney General has the authority, under the CARES Act, See H.R. 748 § 6002 at Div. B, Tit. II, Sec. 12003(b)(2), to allow the Bureau of Prisons “to transfer many more people to the relative safety of home confinement.”

⁷ N.Y. Correct. Law § 141 provides the Commissioner of DOCCS with the authority to temporarily remove incarcerated persons from their place of confinement “[i]n case any pestilence or contagious disease shall break out among the inmates in any of the correctional facilities, or in the vicinity of such facilities.”

⁸ A federal court may modify a person’s sentence because of “extraordinary and compelling reasons,” under a statutory provision known colloquially as “compassionate release.” 18 U.S.C. sec. 3582(c)(1)(A)(i).

⁹ For an overview of Eighth Amendment jurisprudence relating to the failure to provide medical care or release people in imminent danger, see Gregory Bernstein et al, *COVID-19 and Prisoners’ Rights*, this volume.

¹⁰ The Constitution of the State of New York vests the governor with authority “to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he or she may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons.” N.Y. Const. art. IV, § 4. A Report by <https://www.law.nyu.edu/sites/default/files/Reprieve%20Power%20%28to%20post%29%20.pdf>

Social and economic supports during and after incarceration

In addition to those legal remedies, services and supports are necessary for people when they do get released from prison. People impacted by the criminal justice system—including individuals who have experienced incarceration and their families—require tailored support to meet their unique challenges.

Coming home after decades behind bars is always disorienting. But for the people being released in the time of coronavirus, the experience is particularly jarring—trading the fear of getting sick in captivity for a curtailed, isolated kind of freedom. Nonprofits and social service agencies that support them are overwhelmed, short-staffed or moving most of their programs online. Family members they've waited years to reunite with are huddled at home. Food service and other industries that might hire a formerly incarcerated applicant have been decimated. And many small, everyday liberties are now a public health risk.

Non-profit organizations supporting people upon reentry now play a critical role in providing this kind of assistance. After release, individuals need access to information that they trust about COVID-19 and the protective measures minimizing its spread. They need a safe place where they can be sheltered, consistent with the requirements of their release. They need medical support, benefits, and services to sustain themselves, and to avoid spread of the infection. They need resources enabling them to survive.

Many nonprofit organizations continue providing [services despite the COVID-19 interruption](#), sometimes as the only organizations in a position to provide any direct support in the community. Community re-entry and support organizations operate on the frontlines of supporting the formerly incarcerated population transition back into society. These organizations serve as a lifeline to services and information for people after release, and have been hard at work during the pandemic to continue serving both current and new clients. Although many are

struggling with limited resources and mobility, they continue to provide crucial day-to-day support for people who have experienced incarceration, as well as leadership in advocating for policy change.

The crisis has led government agencies to substitute online or telephone interactions for in-person interactions. To cope with the crisis, agencies are using methods to maintain access to benefits or meet community supervision requirements that do not require people to come into the office, and that could hold promise as a way to minimize the negative impact of bureaucratic requirements on people's ability to pursue employment and education. Reentry organizations, advocacy groups, public health sources, law schools, public agencies, and other sources also must rely on on-line communication, counseling, and provision of public resources. As a result, those who do not have access to the internet are likely to struggle even further to obtain the resources they need to survive.

Institutions charged with providing the social safety net, both public and private, are straining to respond to the increased demand. The current patchwork of legal and social responses and the reliance on an under-funded network of nonprofit advocacy groups and service providers. In addition, some social supports provided to help people cope with the financial hardships of COVID-19 have specifically excluded people with criminal records.

The COVID-19 crisis thus highlights the inadequacy of the social safety net, the need for greater levels of funding and support for these services, and better coordination between government, communities, and the public and private sector. Organizations and coalitions with "inside-out" leadership by people who have experienced incarceration play a crucial role in providing information, knowledge, and ability to respond quickly and effectively to urgent needs. Hopefully the mobilization of concern and response needed to address the COVID-19 crisis will be sustained after the direct crisis has subsided, and will lay the foundation for more fundamental systemic change needed to address the inequities and injustices that are contributing to the devastating impact of COVID-19.