Disease Outbreak & Corrections in the United States: [Existing] Statutory Options

Sarah L. Cooper
Birmingham City University[1]

Michael Bayham
Sandra Day O'Connor College of Law, Arizona State |University[2]

Thomas Nicklin
Birmingham City University[3]

Keywords: *COVID-19; corrections; disease outbreak; removal of inmates*

1. Introduction

Correctional facilities quickly emerged as large COVID-19 clusters — places with the largest number of known infections — in the United States (US).[4] Noting calls for state (and federal) authorities to 'slow the spread' through *inter alia* reducing correctional populations,[5] we investigated what, if any, statutory mechanisms exist to support such efforts. Within the

[1]Reader in Interdisciplinary Legal Studies, Birmingham City University, UK. Many thanks to Michael and Thomas for their tenacious research and thoughtful observations throughout this (continuing) project, and to Professor Lissa Griffin and Dr Tara Lai Quinlan for discussing our initial findings and ideas for next steps with us.
[2] JD Candidate (Class of 2022), Sandra Day O'Connor College of Law, Arizona State University, USA.
[3] PhD Candidate, Birmingham City University, UK.
[4] Alexandria Macmadu *et al*, *COVID-19 and mass incarceration: a call for urgent action*, The Lancet (Comment), October 09, 2020 ("In the USA, more than 40 of the 50 largest clustered outbreaks in the country have occurred in jails and prisons." https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30231-0/fulltext. (last visited Nov. 11, 2021).
[5] Peter Wagner & Emily Widra, *Five ways the criminal justice system could slow the pandemic*, Prison Policy Initiative (March 27, 2020), https://www.prisonpolicy.org/blog/2020/03/27/slowpandemic/ (last visited Nov. 11, 2021).

broader context of the relationship between health and incarceration in the US, this short article shares on overview of our investigation with some broad, provisional findings.[6]

2. Part I: Health, Incarceration and COVID-19

Over 2 million people are incarcerated in the US.[7] Following *Estelle v. Gamble*,[8] federal law provides that — because a prisoner must rely on the authorities for treatment — the state has an "obligation to provide [adequate] medical care for those whom it is punishing by incarceration."[9] A "deliberate indifference"[10] to a prisoner's serious illness or injury violates the Eighth Amendment's prohibition of cruel and unusual punishment, although inadvertent and/or negligent failures to provide adequate care will not.[11]

Delivering adequate healthcare in correctional facilities can be challenging, however. For one, the US' incarcerated population is not only large, but is also ageing.[12] The stresses of incarceration can accelerate the ageing process,[13] and ageing prisoners (generally recognized as those aged 50+)[14] are "relatively more likely to suffer from a variety of medical conditions and require more contacts with healthcare providers."[15] More broadly, evidence shows that the US' incarcerated population as a whole has "a high burden of disease…."[16] Members of the incarcerated population are more likely than those in the general US population to be part of

[6] All data is on file with the authors. Please note this is an ongoing project and our analysis of the data collated is provisional at this stage, following our presentation to the 2021 Law and Society Association Conference. Given the scope of this article, we provide a selection of examples only.
[7] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative (March 24, 2020), https://www.prisonpolicy.org/reports/pie2019.html (last visited Nov. 11, 2021) ("The American criminal justice system holds almost 2.3 million people…").
[8] *Estelle v. Gamble*, 429 U.S. 97 (1976).
[9] *Id* at 103.
[10] *Id* at 104.
[11] *Id* at 105-6.
[12] American Civil Liberties Union, *At America's Expense: The Mass Incarceration of the Elderly,* (June 2012) (noting one third of prisoners are expected to be aged fifty-five years or older by 2030).
[13] *Id* at v. ("The lack of appropriate healthcare and access to healthy living prior to incarceration, added to the heavy stresses of life behind bars, accelerates the aging process of prisoners so that they are actually physically older than average individuals.").
[14] *Id* at i. ("According to the National Institute of Corrections, prisoners age 50 and older are considered "elderly" or "aging" due to unhealthy conditions prior to and during incarceration.").
[15] *Id* at 28.
[16] National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 202 (Jeremy Travis et al. eds., 2014) https://doi.org/10.17226/18613 [hereinafter, NRC].

"social variable[s]"[17] categories — such as the unemployed, poor and homeless — "strongly associated with poor health."[18] As such, they can enter correctional facilities with compromised physical and/or mental health. These conditions can then be exacerbated by factors that have accompanied increased incarceration rates, namely overcrowding, reduced rehabilitation programs, and stretched medical and mental health services.[19] Through providing opportunities for structure, screening, prevention, diagnosis, and treatment, correctional institutions can have an important role in promoting and safeguarding prisoner (and, thus, public) health,[20] yet they "too often serve as ill-equipped treatment providers of last resort for medically underserved, marginalized people."[21] COVID-19 spotlighted these issues.

In 2014, the US National Research Council reported, "Contagious diseases … have traditionally been a major health problem in correctional facilities."[22] COVID-19 has been no exception. In the US, correctional facilities quickly emerged as "COVID-19 clusters" — places with the largest number of known infections. [23] This was unsurprising. With health-compromised populations; finite supplies of personal protective equipment and cleaning products; limited screening and treatment programs; and architecture that frustrates social distancing and isolation practices, correctional facilities present ideal transmission environments. Concerned, stakeholders called upon state and federal authorities to 'slow the spread.'[24] Across the US, policy responses included facilitating early release, reducing admissions to correctional facilities, and widening healthcare access and social support for inmates.[25] Concern remains, however, that "Lawmakers failed to reduce prison and jail populations enough to slow down the spread…"[26] Noting the states incarcerate more people than the federal government,[27] our investigation focused on what statutory mechanisms existed to support state efforts to reduce incarceration when the COVID-19 pandemic struck.

---

[17] *Id* at 203.
[18] *Id*.
[19] *Id* at 6.
[20] *Id* at 204.
[21] David Cloud, *On Life Support: Public Health in the Age of Mass Incarceration*, 5 (Vera Institute of Justice ed., 2014) https://www.vera.org/downloads/Publications/on-life-support-public-health-in-the-age-of-mass-incarceration/legacy_downloads/on-life-support-public-health-mass-incarceration-report.pdf.
[22]NRC, *supra* note 16, at 208.
[23] Macmadu *et al*, *supra* note 4.
[24] Wagner & Widra, *supra* note 5.
[25] Prison Policy Initiative, *The most significant criminal justice policy changes from the COVID-19 pandemic*, (Nov. 10, 2021). https://www.prisonpolicy.org/virus/virusresponse.html (last visited Nov. 12, 2021).
[26] *Id*.
[27] *See* Sawyer & Wagner, *supra* note 7.

3. Part II: Our Investigation

A literature review focused on incarceration, release and systemic health crises, led us to the *UCLA Law COVID-19 Behind Bars Data Project*,[28] and, specifically, Littman's catalogue of *Statutory Release Powers* for all 50 states and D.C.[29] We harnessed this catalogue to identify statutes, in each state and D.C., relating to removal powers within the scope of our investigation, employing standard legal research methods on Westlaw and Lexis. For each statute we identified the following information: title; citation; year of first derivative/enactment; language pertaining to removal/disease/emergencies necessitating removal; criteria for procedural initiation; and decision-makers. This exercise produced the following provisional findings.

Procedures, Enactment, Categorization and Labelling

Our review identified 84 statutes across all US states and D.C., with all states having at least one statute. A provisional typology emerged, with statutes falling across three categories, namely: (1) the removal of inmates specifically due to disease outbreak (*Removal for Disease*);[30] (2) the removal of prisoners during an emergency, including explicitly or implicitly a disease outbreak (*Emergency Removal*);[31] and (3) the executive's ability to modify or suspend laws that could frustrate dealing with an emergency, which could effectively be used to remove

[28] *See* Sharon Dolovich et al., *UCLA Law COVID Behind Bars Data Project: Prison/Jail Cases and Deaths Dataset*, (Dec. 5, 2020). UCLA School of Law, https://uclacovidbehindbars.org. (last visited Nov. 12, 2021).
[29] *See* Aaron Littman et al., *UCLA Law COVID-19 Behind Bars Data Project: Statutory Release Powers Spreadsheet*, [Dec. 5, 2020]. UCLA School of Law. (last visited Nov. 12, 2021).
[30] For example, Ariz. Rev. Stat. Ann. § 31-106 ("When a pestilence or contagious disease occurs in or near a jail and the physician in attendance certifies that it is liable to endanger the health of the inmates, the judge of the superior court may, by an order in writing, designate a safe and convenient place in the county, or the jail in a contiguous county, as the place of confinement.")
[31] ERP statutes are typically worded similar to RFD statutes, however they do not specifically address a disease or infection within the prison. Instead, ERP procedures will state that when an emergency situation exists then removal may be necessary to avoid the harm to the inmates. ERP statutes vary in type of language that allows for removal. We sub-categorized these as positive and negative statutes as one grants the authority to remove, while the latter does not allow for removal unless dealing with a specifically stated emergency. An example of the former is Mont. Code Ann. § 7-32-2222 ("When there is good reason to believe that the inmates may be injured or endangered, the detention center administrator shall remove them to a safe and convenient place and confine them there as long as necessary to avoid the danger."). An example of the latter is Colo. Rev. Stat. Ann. §13-45-111 ("Any person committed to any prison or in the custody… shall not be removed from the prison or custody into any other prison or custody, unless it is by habeas corpus or some other legal writ; or where the prisoner is delivered to some common jail; or is removed from one place to another within the county, in order to effect his discharge or trial in due course of law; or in case of sudden fire, infection, or other necessity.").

inmates on safety grounds (*Executive Emergency*).[32] The final category is the largest grouping by far (50+). Our review of first enactment information, suggests (in the data-set) the earliest statute was a Massachusetts *Removal for Disease* statute in 1816,[33] and the most recent came in 2015 in the form of an Ohio *Emergency Removal* statute.[34]

No overall uniform label emerged, but similarities across categories are evident. Many statutes categorized under *Removal for Disease* are a variant that includes '*Removal of Inmates*' and '*Disease.*'[35] *Executive Emergency* statutes also share a common variant referring to 'Governors Emergency Powers'[36] or some sort of executive branch powers during a state of emergency. The *Emergency Removal* category offers the least consistency, with examples ranging from "Emergency Rules and Regulations"[37] to "Plans for Emergency Evacuations of Inmates."[38]

Decision-makers

The decision-maker refers to the individual granted the authority to make release decisions. We found 24 different decision-makers across the 84 statutes. A provisional analysis suggests that, across the three categories, decision-makers fall across six groups: Corrections Executives, State Executives, State Judiciary, Sheriff, State Legislature, and State Health

[32] EEP statutes are the most distinguishable from the other two categories as these statutes broadly address "in the event of an emergency." There is an EEP statute in place for every state, except for Ohio, who includes EEP procedures within their state constitution.
[33] *See* Mass. Gen. Laws Ann. ch. 111, § 108.
[34] *See* Ohio Sup. R. 14.01.
[35] For example, Minn. Stat. Ann. § 243.57 ("In case of an epidemic of any infectious or contagious disease in any state correctional facility under control of the commissioner of corrections, by which the health or lives of the inmates may be endangered, the chief executive officer thereof, with the approval of the commissioner of corrections may cause the inmates so affected to be removed to some other secure and suitable place or places for care and treatment; and, if the facility is destroyed, in whole or in part, by fire or other casualty and becomes unsuitable for proper detention and custody of the inmates, the chief executive officer, with the approval of the commissioner, may remove them, or any number of inmates, to another safe and appropriate place as may be provided.")
[36] For example, Mich. Comp. Laws Ann. § 10.31 ("Sec. 1. (1) During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control…")
[37] *See* Va. Code Ann. § 32.1-42.
[38] *See* Alaska Admin. Code tit. 22, § 05.050

Department. Unsurprisingly, given *Executive Emergency* statutes form the largest category, decision-making authority is most commonly vested in the Governor or State Executive.

Pre-conditions for Procedural Initiation

Pre-conditions for procedural initiation refers to any statutory requirements that must occur for the removal process to begin. These are steps that must, or can, be taken should a relevant scenario arise. Pre-conditions vary by procedure, however similarities exist between categories. *Removal For Disease* statutes contain similar language that requires a physician to certify that the disease is likely to endanger other inmates or the community surrounding the prison.[39] *Emergency Removal Power* statutes do not require a physician to certify the potential for danger, and allow for the relevant decision-maker to make the determination as they see fit.[40] *Executive Emergency* statutes have fewer pre-conditions, if any, as these statutes are discretionary powers granted to the Governor, and solely require that an emergency declaration be issued by the Governor which in turns grants the Governor the power to remove inmates as they see fit in response with the emergency.[41]

4. Conclusion

Our investigation has produced a rich data-set to both refine and explore. We now have a basis for understanding state-based statutory powers that could be used to remove inmates from correctional facilities in events such as COVID-19. Interestingly, our first pass review suggests *Removal for Disease* statutes— arguably the most relevant mechanisms — have not been not utilized during COVID-19. Correctional facilities are not closed communities — they play a role in promoting and safeguarding public health.[42] As the National Research Council has concluded, "There is need for systematic study of ways to capitalize on public health opportunities associated with incarceration, particularly for infectious diseases…"[43] We can harness our study to support such efforts, particularly as there is so much to learn from

[39] *See* Mass. Gen. Laws Ann. ch. 111, § 108.
[40] *See* Mont. Code Ann. § 7-32-2222.
[41] *See* Neb. Rev. Stat. Ann. § 81-829.40.
[42] Claire Fortin, *A Breeding Ground For Communicable Disease: What to Do About Public Health Hazards in New York Prisons*, 29 Buff. Pub. Int. Lj. 153 (2011).
[43] NRC, *supra* note 16, at 229.

experiences had by all stakeholders during COVID-19. Initial ideas include producing state-based case studies, tracking use of statutes and judicial interpretation of provisions, and the development of model statutes.