



# PROPOSED PUBLIC HEALTH AND PUBLIC SAFETY PATHWAYS FOR CRIMINAL JUSTICE SYSTEM RESPONSES TO COVID-19

May 2020

A wide array of criminal justice stakeholders<sup>1</sup> have come together to call for a public health-oriented approach to the COVID-19 crisis. The key recommendations are as follows:

1. Release of people who are incarcerated, based on clear public health recommendations and release criteria, is a critical intervention to limit the spread of disease.
2. Limiting new admissions to closed correctional settings is an equally critical component of reducing disease transmission for the protection of our communities.
3. Violations of COVID-19-related directives and orders should be addressed with a public health approach, rather than with criminalization and law enforcement surveillance.
4. Innovations that promote integration of public health priorities into the justice system already exist and may help local jurisdictions in their responses, including specialty courts, evidence-based models of correctional health care, and dedicated re-entry services.
5. Connections among public health organizations, researchers, and criminal justice stakeholders are necessary to manage health crises in custodial settings and should endure beyond the COVID-19 pandemic.

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<sup>1</sup> Authoring organizations are the Association of Prosecuting Attorneys, The Center for HIV Law and Policy, Community Oriented Correctional Health Services, National Association of Criminal Defense Lawyers, The Williams Institute at UCLA School of Law, UCLA School of Law's Criminal Justice Program.

## INTRODUCTION

Incarceration carries inherent, increased risks to the health of people who are incarcerated and corrections staff that can frustrate management of the COVID-19 pandemic. COVID-19 is having a significant impact on every aspect of the criminal justice system, and it is impossible to overstate the level of fear that people in custody and their families feel in view of their isolation and sense of invisibility and the unprecedented risk to their health. In response, corrections officials across the U.S. are releasing people based on a variety of criteria. From the perspective of law enforcement and criminal justice, correctional health, public health, and infectious disease professionals and advocates, it is important to consider lessons learned from these recent efforts as well as past measures to manage dangerous conditions within correctional facilities. The principles below represent pathways for institutionalizing approaches that maintain high levels of health and safety during this unprecedented public health crisis and beyond.

***Release of people who are incarcerated, based on clear public health recommendations and release criteria, is a critical intervention to limit the spread of disease.***

As of May 2020, jail and prison systems across the country are releasing people in response to COVID-19. Tens of thousands of individuals have been released from jails, with justice stakeholders working towards jail population reduction goals from 7 to 30 percent and more.<sup>2</sup> Releases from state prisons have been slower but started to increase in April, including in Oklahoma, Colorado, and Ohio.<sup>3</sup>

Even in the best of circumstances, national guidelines and public health research demonstrate that overcrowding undermines the health of staff and people who are incarcerated.<sup>4</sup> Because social distancing is the most effective way to prevent the rapid spread of the virus in any setting, this must remain the focus of custodial facilities. This requires significant reductions in the numbers of people incarcerated, both pre- and post-conviction. While there will be broader public safety concerns with regards to the release of people from custody, it is important to note that past court-ordered and executive-ordered staged releases of people who are incarcerated to reduce dangerous overcrowding have been accomplished without increased crime rates or risks to public safety.<sup>5</sup> The considerations here must be guided by the epidemiological projections that look grim for people who are incarcerated, staff at these facilities, and the larger community if jails and prisons remain at their current populations.<sup>6</sup>

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<sup>2</sup> COVID-19: Criminal Justice Responses to the Coronavirus Pandemic, <https://www.vera.org/projects/covid-19-criminal-justice-responses/covid-19-data>

<sup>3</sup> See, e.g., <https://www.prisonpolicy.org/virus/virusresponse.html>

<sup>4</sup> Dora M. Dumont et al., *Public Health and the Epidemic of Incarceration*, 33 Ann Rev. Pub. Health 325, 329 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3329888/>

<sup>5</sup> See, e.g., Mauer M. and Ghandnoosh N., *Fewer Prisoners, Less Crime: A Tale of Three States*, <https://sentencingproject.org/wp-content/uploads/2015/11/Fewer-Prisoners-Less-Crime-A-Tale-of-Three-States.pdf>; Schrantz D. et al., *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions* (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/08/Decarceration-Strategies.pdf?eType=EmailBlastContent&eld=a761a9fc-178d-4700-8421-c1e0b3047a5>

<sup>6</sup> COVID-19 Model Finds Nearly 100,000 More Deaths Than Current Estimates, Due to Failures to Reduce Jails, [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_covid19-jail-report\\_2020-8\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_covid19-jail-report_2020-8_1.pdf)

While recognizing that public health goals in combating the spread of COVID-19 are best achieved through swift action, the implications of re-entry on the health of people who are released, and public health more generally must be considered. When individuals are released from confinement, all recommended public health precautions should be in place, e.g., ensuring individuals have a place to quarantine for 14 days if they have been exposed to COVID-19 and ensuring access to necessary medical care. In evaluating the impact of release programs, public health and public safety outcomes should be assessed in the aggregate, rather than based on anxieties over a potential bad outcome in an individual case. Public health officials routinely make policy decisions based on epidemiologic risk, understanding that elimination of all risk is impossible. Similarly, justice system professionals who consider the high risk to the health and safety of those incarcerated when making release decisions deserve assurances that the success of their decisions do not hinge on a small number of potential negative outcomes.

This is a moment to create and expand connections among jurisdictions' justice system stakeholders, local public health experts, and community-based supports to ensure that people being released are aware of and can access available services. For example, in Los Angeles County, in order to effectively transition youth out of custodial facilities, community members collaborated with the Department of Health Services' Youth Development and Diversion Program on a survey of youth-serving organizations that were ready and willing to provide services and placements for youth upon release. They then made sure that criminal defense attorneys were aware of these resources for their clients.

***Limiting new admissions to closed correctional settings is an equally critical component of reducing disease transmission for the protection of our communities.***

Protecting communities in the time of an infectious disease epidemic requires both a limit on new admissions and release of those already in custody. Jails are unequipped to set up the type of quarantining required for new admissions. The high rates of "jail churn," people cycling in and out of the jails, will undoubtedly heighten the risk of COVID-19 entering these facilities. Respected law enforcement officials have offered examples of offenses that can be managed effectively without incarceration.<sup>7</sup> Many agencies have begun to issue civil citations for a large swath of offenses.<sup>8</sup> Law enforcement should use their discretion to "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."<sup>9</sup> During this time, law enforcement should also refrain from arresting people on outstanding warrants or for technical violations of probation or parole.

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<sup>7</sup> See joint letter from NYC top prosecutors to Mayor De Blasio and Commissioner Brann, <http://www.ny1.com/content/dam/News/static/nyc/pdfs/6%20DA%20Letter.pdf>. See also <https://nacdl.org/getattachment/668c045f-3a9e-44e7-b8c4-920641ef528c/nacdl-covid-19-statement-march192020.pdf>

<sup>8</sup> Miami-Dade Police Department is using promises to appear or civil citations for all misdemeanors, <https://theappeal.org/miami-covid-19-arrests/>; Law Enforcement Action Partnership recommends the maximization of cite and release, <https://docs.google.com/document/d/1ZIKPUpunr3-cMYrVpFACCHO-WxI7E4Q-BqvalW7vILM/edit#>

<sup>9</sup> Averting an Imminent Catastrophe: Recommendations to US Local, State and Federal Officials on Covid-19 in Jails and Prisons, [https://www.hrw.org/news/2020/04/29/averting-imminent-catastrophe-recommendations-us-local-state-and-federal-officials#\\_Toc38913289](https://www.hrw.org/news/2020/04/29/averting-imminent-catastrophe-recommendations-us-local-state-and-federal-officials#_Toc38913289)

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***Violations of COVID-19-related laws and ordinances should be addressed with a public health approach, rather than with criminalization and law enforcement surveillance.***

The first response to violations of public health orders related to COVID-19 should remain within the enforcement mechanisms of public health departments. Arresting individuals for failing to observe the rapidly-changing directives from federal, state, and local officials on the use of protective gear or social distancing puts one part of the criminal justice system at direct odds with corrections officials struggling to reduce jail populations. History has taught us that criminalization of infectious diseases does not reduce transmission or increase disclosure, and in fact can discourage people from getting tested or seeking appropriate medical care. Accordingly, over the past several years, law enforcement, public health, medical, and legal organizations have called for an end to the use of the criminal law as a response to infectious disease exposure, particularly HIV.<sup>10</sup>

For many years, members of a vast array of criminal justice system stakeholders have called for a reconsideration of the extent to which society relies on criminal justice solutions to complex social issues. That reconsideration is imperative to effectively reduce exposure, sickness, long-term loss of health, or even death as a result of COVID-19.

***Innovations that promote integration of public health priorities into the justice system already exist and may help local jurisdictions in their responses, including specialty courts, evidence-based models of correctional health care, and dedicated re-entry services.***

Multiple jurisdictions have incorporated a public health perspective to inform alternatives to incarceration or re-entry. These programs have begun to serve critical roles in promoting a public health response to COVID-19 for people with justice involvement. One of the most complicated features of the COVID-19 response in city and county governance has been the need to expand access to safe housing models that slow the spread of COVID-19, including for people recently released from incarceration. Some of the programs that have applied an existing public health approach to the COVID-19 response for people with justice involvement include:

- **Seattle's LEAD Program:** Law Enforcement Assisted Diversion (LEAD) is a pre-booking diversion program that diverts people who have committed low-level, nonviolent offenses to services as an alternative to incarceration. Police officers exercise discretionary authority at the point of contact to divert individuals to a harm-reduction intervention that addresses unmet behavioral health needs. Many of the target individuals for this program have a substance use disorder, mental illness, or both; are housing insecure; or are struggling with other social stressors. LEAD provides housing placement, mental health care, and substance

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<sup>10</sup> <https://www.hivlawandpolicy.org/resources/collection-statements-leading-organizations-urging-end-Criminalization-hiv-and-other>. See, e.g., National Association of County & City Health Officials (NACCHO), [Statement of Policy: Opposing Stigma and Discrimination Against Persons with Communicable Diseases](#) (2013); U.S. Conference of Mayors, [Resolution on HIV Discrimination and Criminalization](#) (2013); U.S. Department of Justice, [Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors](#) (2014); National Association of Criminal Defense Lawyers (NACDL), [Resolution of the Board of Directors of the NACDL Concerning HIV Criminalization](#) (2016); American Medical Association (AMA), [Modernization of HIV Specific Criminal Laws](#) (2014); The Association of Nurses in AIDS Care (ANAC), [HIV Criminalization Laws and Policies Promote Discrimination and Must Be Reformed](#) (2014); Infectious Diseases of America (IDSA) and HIV Medicine Association (HIVMA), [Position on the Criminalization of HIV, Sexually Transmitted Infections and Other Communicable Diseases](#) (2015); American Academy of HIV Medicine (AAHIVM), [Policy Position Statement on HIV Criminalization](#) (2015); National Alliance of State and Territorial AIDS Directors (NASTAD), [National HIV/AIDS Strategy Imperative: Fighting Stigma and Discrimination by Repealing HIV-Specific Criminal Statutes](#) (2011).

use disorder treatment to help these individuals stabilize and flourish.<sup>11</sup> In response to the coronavirus outbreak, LEAD has partnered with local motels to find additional bed space for 200 individuals as an alternative to incarceration.

- **Pennington County, SD Care Campus:** Pennington County has built an all-in-one social services complex with a single point of entry that houses the detox treatment, Safe Solutions program, Crisis Care Center, Quality of Life Unit, and Pennington County Health and Human Services under one roof. This complex houses residential alcohol and drug treatment services as well. This centralized, co-located campus streamlines services and allows individuals to immediately get the help they need. Also, individuals facing a crisis can walk in and do not need to wait for police to intervene. A recent study showed that 64 percent of admitted individuals were self-referred.<sup>12</sup> This facility reduces the burden on the justice system and does not saddle people who need help with a criminal record.
- **Deschutes County, OR Clean Slate Program:** If an individual is arrested or cited with possession of a controlled substance, they can enter the Clean Slate pre-charge diversion program, which will give them the opportunity to remove the arrest from their record and receive access to a variety of community resources including medical care and drug treatment. Participants also have the opportunity to meet with defense counsel privately to discuss their case and determine if they want to participate. The goal of this program is to identify the best intervention for each individual and shift the response strategy, providing a direct connection to health care and substance abuse treatment that could generate better sobriety and health outcomes.<sup>13</sup>

***Connections among public health organizations, researchers, and criminal justice stakeholders are necessary to manage health crises in custodial settings and should endure beyond the COVID-19 pandemic.***

Public health experts are best suited to lead responses to public health issues regardless of where they arise. At the same time, public health responses to crises in correctional systems must recognize larger public safety issues on which criminal justice professionals have experience and expertise. Health care providers, legal professionals, researchers, formerly-incarcerated people and community service organizations with direct, broad understanding of the way in which individuals experience public health and criminal law interventions can inform and help calibrate systems that respect individual rights and therefore are effective, long-term interventions.<sup>14</sup> What is needed, now and going forward, are productive, lasting connections between health and justice systems that recognize the real experiences of those under criminal justice system supervision and control as well as the

<sup>11</sup> LEAD National Support Bureau; Crime and Delinquency, *Seattle's Law Enforcement Assisted Diversion (LEAD) Program: Within-Subjects Changes on Housing, Employment, and Income/ Benefits Outcomes and Associations With Recidivism* (2017); <https://www.crimesolutions.gov/ProgramDetails.aspx?ID=477>

<sup>12</sup> Pennington County, South Dakota Behavioral Health Continuum of Care <https://sdlegislature.gov/docs/interim/2019/documents/DTF210212019-A.pdf>

<sup>13</sup> Lessons on Front-End Diversion from Deschutes County, Oregon, and Summit County, Ohio [https://www.urban.org/sites/default/files/publication/99172/lessons\\_on\\_front-end\\_diversion\\_0.pdf](https://www.urban.org/sites/default/files/publication/99172/lessons_on_front-end_diversion_0.pdf)

<sup>14</sup> E.g., One such example of a successful collaboration is the fact sheet, *Spit Does Not Transmit: A Fact Sheet for Law Enforcement Personnel*, <https://www.hivlawandpolicy.org/resources/spit-does-not-transmit-a-fact-sheet-law-enforcement-personnel-center-hiv-law-and-policy>; See also, *Los Angeles County's Alternatives to Incarceration Workgroup*, which brought together a broad range of community, law enforcement, and health stakeholders (to name a few) to create a comprehensive proposal for diversion and alternatives to incarceration. Their report can be found here: <https://lacialternatives.org/reports/>

challenges facing those charged with management of these systems.

There are several barriers — and concomitant opportunities — to incorporating public health organizations and agencies more fully into criminal justice pathways, each of which also presents an opportunity to make long-lasting policy improvements in this realm. Correctional healthcare infrastructure operates largely independently from community health care systems and health department oversight. As a result, the level and quality of data required to make evidence-based decisions about public health and alternatives to incarceration is often lacking. The COVID-19 pandemic presents an opportunity for public health organizations to address that disconnect and to offer counsel to correctional health entities on their tracking and management of COVID-19. A critical step in this direction would be to leverage public health resources and staff currently dedicated to COVID-19 responses in justice settings for more routine engagement in correctional health coordination. State Departments of Health can and should ensure that community standards for patient care and privacy extend to jail and prison systems.

Another way to develop long-term partnerships between public health and justice systems is to routinize communication between justice system stakeholders and public health experts. In order to support decision makers in the justice realm, public health experts should provide evidence-based or designed public health tools that law enforcement professionals can rely on. For example, when a judge is provided with a plan that includes an alternative to incarceration for a health-related reason, it would be helpful to present data on the improved health outcomes associated with the plan for prior and similar cases, rather than rely on the relative strengths of a single set of arguments. This approach is especially meaningful during COVID-19 responses as judges and prosecutors seek to understand how release can affect the risks to individual petitioners, staff, and detained people inside correctional settings, as well as their local communities.