



COVID-19 and Pretrial Detention

Chris W. Surprenant

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Major crises like the ongoing and future one connected to the SARS-CoV-2 virus have a way of exposing current public-policy approaches as being woefully inefficient and insufficient at accomplishing their stated aims. While programs connected to public health and the economy will receive the most attention in the coming months, the impact of COVID-19 on America's criminal justice system, and specifically its approach to pretrial detention, should receive significant attention as well.

As most Americans are now aware, the United States incarcerates more individuals per capita than any developed country in the world. But what most Americans do not know is that 20 percent of people incarcerated in the United States—462,000 out of 2.3 million—are locked up in local jails just waiting for their day in court.¹ They have not been convicted of anything.

COVID-19 has made this already-bad situation worse, as courts have shut down. Overcrowded jails act as hotbeds for infections. Even as local law enforcement is acting to ameliorate the situation in the short term, reforms such as reducing the number of crimes requiring jail booking, eliminating cash bail, and encouraging alternatives to jail are necessary in the medium term.

THE EFFECT OF COVID-19 ON THE JUSTICE SYSTEM

Before the recent virus outbreak and response, someone who was arrested, denied bail, or unable to post bail could expect to spend between 5 and 200 days in jail waiting to appear in court.² The average was around 35 days. Thirty-five days is a long time to sit, and most people removed from the community for that amount of time would lose their jobs, lose custody of their children, fail to make payments on their car or home, or otherwise find themselves with significant obstacles to overcome upon release, even if they did nothing wrong.

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The ongoing shutdown of much of US community interaction includes a significant slowdown of the justice system.³ In most cities across the country, courts are now postponing nearly all civil and criminal trials. Pretrial delays will increase significantly as a result. These delays, combined with overcrowded state prisons and their inability to process more inmates, will continue to create dangerous situations in our local jails. Currently, the state prison systems in both Florida and California have stopped accepting inmates owing to COVID-19 concerns,⁴ causing a bottleneck at the level of county jails. As a result, the Pinellas County jail in the Tampa–St. Petersburg–Clearwater metropolitan area has more than 200 inmates currently sleeping on the floor because the jail has run out of beds.⁵

Jail conditions were a problem before COVID-19. The situation now is far worse. Jails are severely overcrowded, are unsanitary, and provide inmates with limited access to medical care. In short, conditions in American jails are far more conducive to spreading communicable diseases than are the conditions on cruise ships. These conditions, combined with the relatively high inmate turnover in local jails (54 percent per week on average),⁶ create the concern that jails will become incubators for diseases like COVID-19.⁷ And this nightmare scenario is already starting to play out. In the past few days, inmates or staff in jails in California,⁸ Illinois,⁹ Louisiana,¹⁰ New York,¹¹ Ohio,¹² and Texas have all tested positive for COVID-19,¹³ and the number of cases in US jails and prisons is growing rapidly.

In response to these concerns, sheriffs and district attorneys across the country are acting on the fly to try to limit the likelihood of SARS-CoV-2 outbreaks in local jails. Many police departments have adopted “cite and release” policies for offenses that would have previously resulted in a jail booking.¹⁴ Prosecutors in Baltimore, Los Angeles, Nashville, Philadelphia, Portland, and other cities across the country have issued statements that they will no longer be arresting and prosecuting people who commit low-level offenses.¹⁵ Most dramatically, many states and counties have been releasing thousands of “low-level offenders” from their jails in hopes of reducing their inmate numbers to prevent an outbreak.¹⁶ That district attorneys and police chiefs are halting prosecutions of low-level offenses, that county and state authorities are releasing people already being held because of these offenses, and that these officials say their actions do not jeopardize public safety should raise questions as to why these people were being held in jail to begin with.

POLICY SOLUTIONS IN THE SHORT AND MEDIUM TERMS

The short-, medium-, and long-term solutions to addressing the current challenges related to the spread of COVID-19 and future infectious diseases all center on reducing the number of people being held in local jails. There are a number of important steps policymakers can take to accomplish this goal, all of which are politically viable now and as the twofold public health and economic crisis continues to unfold.

Reduce the Number of Crimes That Result in Jail Bookings

The vast majority of people being held in local jails are there for a narrow range of common offenses: violent crime, property crime, public-order crime, and parole and probation violations. The numbers related to parole and probation violations are especially surprising, comprising 45 percent of all local jail admissions. More than half of these are for so-called technical violations, such as missing appointments with supervision officers or failing drug tests. This means that more than 25 percent of all jail admissions are for these technical violations, a staggeringly high figure.¹⁷

For low-level offenses, public interest is better served through “cite and release” than it is through booking and temporarily imprisoning an offender. If public safety is not being jeopardized now by issuing citations instead of jail bookings, or by releasing people who are currently being held, it will not be jeopardized once the COVID-19 emergency has passed. Practicing cite and release does not mean that society is treating these infractions less seriously. Rather, it reflects a conscious decision that the added burden placed on police departments and local jails is not necessary to respond to these low-level infractions. Other approaches such as home confinement or monitoring programs can accomplish the desired results.

Eliminate Cash Bail

Another approach to reducing the population in local jails is by eliminating cash bail. Of the 462,000 people sitting in local jails awaiting trial, more than half could get out if they had the financial means to do so.¹⁸ For most of them, all they would need is a couple hundred dollars, but they are simply too poor even to afford that. It is hard to imagine that anyone poses a threat to public safety if he or she only needs a few hundred dollars to get out of jail.

District attorneys have argued that cash bail is necessary to keep dangerous people off the streets and to make sure that defendants return for their court dates. But the relevant data do not support this claim, and in fact, the use of cash bail makes communities less safe. People who are unable to bail themselves out are more likely to become and remain unemployed, as well as more likely to have other arrests down the road as a result.¹⁹ Further, releasing people on their own recognizance does not make it more likely that they will fail to appear for their court date as compared to releasing them on cash bail.²⁰

Some progressive district attorneys have taken matters into their own hands. Larry Krasner, the district attorney of Philadelphia, and Chesa Boudin, the district attorney of San Francisco, have effectively ended the use of cash bail in these two cities by no longer asking for it as a condition of release.²¹ But the long-term solution is to change laws at the state level by having states adopt the federal release guidelines.²² For federal cases, per 18 U.S.C. § 3142, all defendants must be released pending trial unless they are a flight risk or pose a danger to the community. If the court believes

there is a risk, it can require a defendant to sign an unsecured appearance bond or provide some other condition for release (house arrest, surrender of passport, etc.)—there is no cash bail.

Provide Incentives for Alternatives to Jail

A third approach to reducing the size of the US jail population is to appropriately incentivize alternatives. State prisons currently house the majority of US inmates. These inmates have been arrested by local police and sentenced by local judges, but they do their time at a facility paid for by the state and often subsidized by the federal government. As a result, local municipalities do not bear the cost of sending people to state prison—the state pays for it. But if a municipality opts for a rehabilitation program or alternative punishment arrangement, in most cases those costs are paid by the municipality, not by the state. Given these incentives, it's no surprise that for many municipalities, the first and only option to punish offenders is sending them to state prison.

If policymakers want to reduce the jail population at both the county and state level, they must change the financial incentives. Local municipalities should bear the costs—or at least a higher portion of the costs—connected to incarcerating people from their jurisdiction. At the same time, states should subsidize preventative measures (e.g., more police on the streets) or alternatives to incarceration that have shown success (e.g., diversion programs). Not only are these alternatives more successful than jail at preventing future bad behavior, but they often cost less. A 2016 report from the Brennan Center for Justice showed that the United States could save more than \$20 billion nationwide by moving from jail to these more effective alternatives.²³ State-level studies have shown similar effects.²⁴

ACHIEVING BETTER PUBLIC HEALTH AND PUBLIC SAFETY

In response to the current public health crisis connected to SARS-CoV-2, police departments, district attorneys, and sheriffs have all taken steps to reduce local jail populations, steps they acknowledge do not jeopardize public safety. But all of these measures have been ad hoc. The interests of justice, maintaining public health, and economic efficiency are all served by implementing more formal changes that aim to reduce the number of people being held in local jails. The three changes proposed would each accomplish this goal and, taken together, would go a long way toward preventing an outbreak similar to COVID-19 from compounding problems down the road.

ABOUT THE AUTHOR

Chris W. Surprenant is a professor of philosophy, director of the University Honors Program, and director of the Urban Entrepreneurship and Policy Institute at the University of New Orleans. He is a coauthor of *Injustice for All: How Financial Incentives Have Corrupted and Can Fix the US Criminal Justice System*.

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