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Strategies for Emergency Release of Incarcerated People during Covid-19 Outbreak

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Date: March 23, 2020
Re: Strategies for Emergency Release of Incarcerated People during Covid-19 Outbreak

Question Presented

What are possible avenues of release for the incarcerated people vulnerable to harm from COVID-19?

Short Answer

The Mayor and Governor have substantial power to quickly release those in city and state custody.

Analysis

I. 4 types of incarcerated people:

a. Those awaiting trial in Rikers/the boat/MHC (city detention)
b. Those being held in Rikers, the boat/MHC on the basis of parole violations –based either in a new arrest or a violation of the technical conditions of parole
c. Those serving short sentences in Rikers (city year, 364 days, etc.)
d. Those serving sentences in state prisons

II. Those Awaiting Trial in City Detention

This section focuses on potential solutions to achieve mass release. Individual release is typically being pursued by institutional defenders through negotiations with ADAs and the filings of emergency writs of habeas corpus, which are beyond the scope of this memo.

a. <u>The Mayor's Office</u>

i. Mayor's Emergency Powers

The Mayor likely has the power to release people in city custody awaiting trial due to his emergency powers. The Executive Law (Exec. Law § 24) gives chief executives of counties, cities, towns, and villages (in this case, Mayor DeBlasio) broad executive powers after a declaration of disaster emergency. Section 24(1) gives the mayor the authority to issue emergency orders "to protect life and property or to bring the emergency situation under control." Although the statute then gives specific examples of authorized executive orders, which do not include orders releasing incarcerated people, it indicates that this list is non-exhaustive.

One of the examples, section 24(1)(g), gives the Mayor the power to suspend local laws for periods of five days at a time. These suspensions may be renewed every five days. This can allow the Mayor to act contrary to any local laws that limit release periods or require bureaucratic red tape. (See temporary furlough, below).

It is evident that the Mayor's Office believes that the Mayor has the authority to release people in city custody. On March 19, 2020, the Mayor Office announced that it had identified 40 people vulnerable to complications with COVID-19 who would be released from Rikers.[1]

ii. MOCJ

The Mayor's Office of Criminal Justice, led by Director Elizabeth Glazer and Deputy Director Dana Kaplan, appears to be part of the Mayor's Office directly handling mass release. MOCJ has purportedly compiled a list of 3-400 people to be released from city custody. Reports from those close to this office indicate that MOCJ was told to get approval from the NYPD and other unknown stakeholders, and that the NYPD Commissioner has been striking most people from this list. On March 22, 2020, the Mayor's Office announced that 23 more people would be released from Rikers.[2] In the same press conference, the Mayor's Office indicated another 200 people would have their cases "individually reviewed" in the next week.[3]

iii. Powers to Move Prisoners

Section 93 of the Corrections Law allows the Mayor after declaring a state of emergency to request that the Governor to move prisoners from city detention facilities to DOCCS facilities or even county jails, if DOCCS facilities are full. [4] This is a potential solution for folks who are vulnerable to COVID but who are also facing serious violent charges/convictions.

iv. Social Media and the Press

A social media and press campaign are likely necessary to move the Mayor's Office to release more people, more quickly. This is the fastest and best solution, although it will likely require a mass, coordinated effort by stakeholders.

1. Ross McDonald

Ross McDonald, Chief Medical Officer of the city's Correctional Health Services may be a potential ally to hasten release. McDonald called for help on Twitter, asking judges and prosecutors to "let as many out as you possibly can." According to McDonald, "We cannot socially distance dozens of elderly men living in a dorm, sharing a bathroom. Think of a cruise ship recklessly boarding more passengers each day… [a] storm is coming, and I know what I'll be doing when it claims my first patient. What will you be doing? What will you have done? We have told you who is at risk. Please let as many out as you possibly can."

b. <u>Mass Writs (state habeas corpus writs related to conditions of detention)</u>

On Friday, March 20, 2020, the Legal Aid Society filed a writ of habeas corpus on behalf of 116 individuals in city custody, including those awaiting trial and those detained on parole holds. The writ presented a state and federal due process claim that pretrial detainees are unconstitutionally confined

[1] Chelsia Rose Marcias, *Coronavirus forces NYC to release 40 inmates from city custody: Mayor*, NY Daily News, March 19, 2020, available at https://www.nydailynews.com/coronavirus/ny-coronavirus-20200319-h77lgcz2gvcvzlze4p4pgaty7m-story.html

[2] Craig McCarthy, *Coronavirus in NY: City to release 23 more inmates amid jail system outbreak*, NY POST, March 22, 2020, available at https://nypost.com/2020/03/22/coronavirus-in-ny-city-to-release-23-more-inmates-amid-jail-system-outbreak/

[3] Id.

[4] N.Y. Cor. L. § 93 ("Whenever a state of emergency shall be declared by the chief executive officer of a local government… the chief executive officer of the county in which such state of emergency is declared… may request the governor to remove all or any number of sentenced inmates from institutions maintained by such county or city. Upon receipt of such request, if the governor is satisfied that the public interest so requires, the governor may, in his discretion, authorize and direct the state commissioner of corrections and community supervision to remove such inmates.")

under the Due Process Clause of the Fourteenth Amendment because City Commissioner Brann was "deliberately indifferent" to the challenged conditions. It also argued that bail in these cases violates C.P.L. § 510.10 and § 510.30(1), as well as the state and federal due process clauses, because it is excessive.

c. Suits against the DOC Commissioner (Brann)

i. Based on DOC's failure to comply with the Governor's Executive Orders 202.6-8

The Governor's Executive Orders require that personnel at all non-essential businesses and services be reduced by 100 percent as of March 22nd at 8 p.m.

Pursuant to Order 202.6, the Empire State Development Corporation has issued guidance as to which businesses and services are deemed essential. Unsurprisingly, "law enforcement" is an essential service and is not required to reduce its workforce by 100 percent. However, per the guidance, "[b]usinesses and entities that provide other essential services must implement rules that help facilitate social distancing of at least six feet." It is unclear what work the term "other" is doing here, but it is arguable that the term is superfluous.

According to the Orders, only essential businesses and services are exempt from the personnel restrictions, and essentiality is determined by the Development Corporation. In order to be deemed essential, a business or service must be included in the guidance, or it can request an essential designation. Thus, there are no "other" essential businesses and services and even enumerated essential businesses and services must comply with the order to implement rules that facilitate social distancing. In order for DOC to comply with these orders they must implement such rules.

It appears that the correct mechanism to initiate this suit is mandamus, but this requires further research.

d. Activism

i. Mass Bail Out

The mass bail route is a tough and expensive one and not necessarily the most productive. The only bail fund that appears to be active is the Emergency Release Fund, which focuses on bailing out LGTBQA folks. They have reportedly received a list from DOC of ~100 people who are at Rikers who are LTBQ+. Of those 100, only about a handful are actually bailable, and the total bail for them is more than a million dollars.

Jews for Racial and Economic Justice (JFREJ) is currently running the Let My People Go campaign (https://jfrej.org/let-my-people-go/) in partnership with the New York Immigrant Freedom Fund, New Sanctuary Coalition, and Never Again Action. The goal of the campaign is to raise $180,000 before the end of Passover (this year, April 17) to release immigrants from ICE detention. This campaign is specific to detained immigrants and does not include people in the custody of NYC DOC; however, it may be worth contacting JFREJ to see if it will expand its mission to include people incarcerated for criminal contacts.

III. Sentenced Inmates in City Custody

a. Mayor's Emergency Powers

The Mayor likely has the power under his emergency powers to release people in city custody who are serving sentences. Executive Law § 24(1) gives the mayor the authority to issue emergency orders "to protect life and property or to bring the emergency situation under control." Executive Law §

24(6) specifically addresses the release of sentenced inmates from county facilities: when the chief executive of a local government declares a state of emergency, he can request that the governor remove "all or any number of sentenced inmates" from those institutions.

It is reasonable to believe that § 24(6) specifically only applies to people who have been sentenced, and the mayor can release people who are in custody without asking the governor first, since they are in city, not state, custody. Correction Law § 2(16)(a) defines "local correctional facility" as a place operated by a county or the city of New York as a facility for the confinement of, among others, people convicted of any offense and sentenced to imprisonment in that facility. The NYC jail facilities, as local correctional facilities, are under the jurisdiction of the New York City DOC, not state DOCCS (see https://www1.nyc.gov/site/doc/about/facilities.page), and therefore, theoretically, under mayoral control as DOC is a city agency.

Release could be done via an executive order, because it clearly fits within the "protect life and property" clause in (1). From a statutory construction perspective, if the Legislature intended to require the mayor to ask for the governor's consent to release non-sentenced prisoners (i.e., those being held in pretrial detention), it would have done so. As far as we can tell from Westlaw, this has never been litigated. The City Charter does not lay out the Mayor's emergency powers beyond these.

One of the examples in the statute of the powers granted to the Mayor in a state of emergency is (1)(g), the power to suspend local laws for periods of five days at a time.

b. Furlough and Leave of Absence

Furlough could also be an option allowing the wardens to release sentenced individuals, but the Mayor would need to use his emergency powers to suspend some of its requirements for release to be meaningful. The temporary furlough statute applies to institutions operated by "a department of correction" in cities with a population over one million and to such institutions in counties that have established a furlough program. Correct. Law §§ 630; 632. In order to be eligible for the program, an inmate must be "confined in a city prison or reformatory in a city having a population of one million or more or in a county jail and penitentiaries of a county" that has established a furlough program, and the inmate must be sentenced "to a definite period of six months or more or to a reformatory sentence of imprisonment" and have served a minimum of six months at the time of his/her application. Correct. Law § 631(2)

A furlough program is one in which eligible inmates are permitted to leave the premises of an institution for no more than 72 hours in order to seek employment, maintain family ties, solve family problems, or undergo surgery/receive medical or dental treatment not available in the institution. Correct. Law § 631(3)

An eligible inmate, or an inmate who will become eligible within 30 days, can apply to the furlough committee for release. Correct Law § 633(1). In exigent circumstances, an eligible inmate can bypass the furlough committee and apply directly to the warden of the institution. Correct Law. § 633(2)

If the furlough committee determines that a furlough program for a particular inmate is consistent with the safety of the community, is in the best interests of the inmate, and is consistent with the rules and regulations of the department then the committee must develop a suitable program for the inmate, which must be approved by the warden and the commissioner. Correct Law. § 633(3)-(4)

i. Implementation of Furlough and Leave of Absence

The DOCCS Guide on LAS Net suggests a distinct statutory framework for furlough and leave of absence. According to this guide "[t]he statutes governing the types and conduct of all of the various Department temporary release programs are set forth in Correct. Law §§ 851 – 861," or Article 26.

Article 26 applies to any institution under the jurisdiction of DOCCS. Correct. Law § 851(1). In order to be eligible for temporary release, an inmate must be eligible for parole or conditional release or within two years of becoming eligible, with certain exceptions based on the inmate's conviction. Correct. Law § 851(2)

A furlough program is one in which eligible inmates are permitted to leave the premises of an institution for no more than 7 days in order to seek employment, maintain family ties, solve family problems, seek post-release housing, attend an educational or vocational course, or for any matter necessary to the furtherance of such purposes. Correct. Law § 851(4)

Under Article 26, a furlough program is distinct from a leave of absence, which may be granted to any inmate, regardless of eligibility for parole or conditional release, for any period of time. Correct. Law § 851(6) A leave of absence may be granted for, among other purposes, surgery, medical, or dental treatment that is not available in the institution and is "absolutely necessary" to the inmate's health. Such leave must be granted by the commissioner. Correct. Law § 851(6)(c)

In order to secure furlough under Article 26, an inmate may apply to the temporary release committee of the institution. Correct. Law § 855(2). Leave of absence may be secured in the same manner, but in exigent circumstances an inmate may apply directly to the superintendent of the institution. Correct. Law § 855(3)

If the committee determines that a furlough or leave of absence for a particular inmate is consistent with the safety of the community and the welfare of the inmate, and is consistent with the rules and regulations of the department, then the committee must develop a suitable program for the inmate, which must be approved by the superintendent. Correct. Law § 855(4)-(5). At least three days before an eligible inmate is released, the superintendent must notify the sheriff or chief of police in writing. Correct. Law § 855(8). 7 NYCRR 1900.3 further requires that an inmate applying for a leave of absence or furlough must have a minimum score of 30 in order to participate. 7 NYCRR 1900.3(a), (c)(2); *see generally* Part 1900 of the NYCRR for more detailed information about furlough and leave procedures.

c. Work Release[5]

Article 6-a of the Corrections Law specifically provides for work release in New York City. Section 150(4) defines a "Work release program" as "a program in which the limits of place of confinement are extended for the purpose of seeking or engaging in employment or self-employment, attending an educational institution, participating in a training program, or obtaining medical treatment not otherwise available, caring for the prisoners household and family or for some other compelling reason consistent with the public interest." Section 151 empowers the DOC Commissioner to "extend the limits of the place of confinement of a prisoner" where there is "reasonable cause to believe [the prisoner] will honor his trust by authorizing him to participate in a work release program in the community on a voluntary basis while continuing as a prisoner of the institution or facility in which he is confined." Release for this purpose can exist for "such reasonable hours or reasonable periods of time as the commissioner deems necessary" and can be withdrawn at any time. § 151.

[5] City Council Members Keith Powers and Rory Lancman have publicly stated that they believe the Mayor has the authority to release vulnerable people in city detention under Article 6-a.

d. 440.20 motions

C.P.L. Article 440 is New York's primary postconviction relief statutory scheme that allows collateral attacks on convictions and sentences. *See* N.Y. Crim. Proc. Law §§ 440.10, 440.20. By enacting Article 440, the legislature largely replaced the remedy of state habeas corpus and delineated the scenarios in which a person could collaterally attack their conviction or sentence.[6] State habeas corpus is still available for New York state prisoners in some situations where the remedy is immediate release—most frequently, challenges to parole and bail decisions and conditions litigation. *Id.* However, for most post-conviction relief, including challenges to his sentence, a prisoner must file an Article 440 motion. Jailhouse Lawyers Manual, Chapter 21, "State Habeas Corpus: Florida, New York, and Michigan."

There are two types of Article 440 motions. The one that is relevant for our purposes is a motion to set aside a sentence under CPL § 440.20. Typically, 440.20 motions deal with legal defects in sentencing. The legal defects may include, in addition to an allegation that the sentence was not legally authorized for the offense of which the defendant was convicted: erroneous imposition of consecutive sentences; erroneous sentence as a second or third offender, e.g., challenge to the constitutional validity of the prior convictions or the decision to count them as predicates, improper revocation of probation or of conditional discharge; due process errors in the sentencing procedures; lack of counsel at sentencing; failure to give proper allocution, etc. The Practice Commentaries on CPL § 440.20 state that "claims of harshness or excessiveness available on direct appeal cannot be raised by this motion" but it does not then cite any authority. This is something we need to more research on.

However, prisoners have attempted to use § 440.20 motions to have their sentences set aside because, in their particular circumstances, the sentence as applied to them violates the federal and state prohibition against cruel and unusual punishment. In *People v. Escobales*, 146 Misc. 2d 573 (Sup. Ct. 1990), Escobales filed a 440.20 motion because after pleading guilty and being sentenced to a 2-4-year term, he discovered that he had AIDS and his prognosis was 12 to 18 months. He argued that the imposition of his sentence rendered it one of life imprisonment which was cruel and unusual punishment. This decision is potentially useful because: (1) the court considered the motion; (2) is noted that while typically sentences that are within the statutory limits are constitutional, "there may be exceptional circumstances which justify judicial review in exceedingly rare case"; (3) it provides us with an avenue to make a subjective evaluation of a prisoner's imprisonment. *Id.* ("Although the defendant does not ask the court to consider an objective evaluation, his argument, in effect, asks consideration of a subjective evaluation of his particular imprisonment. Such an evaluation, although not recommended, is not precluded.").

What is less helpful for us about Escobales is that the court did not find for him. However, the case can be distinguished because (1) the very fact of his incarceration was not what would cause him to become sick or die, he already had HIV/AIDS; (2) the court found that he was getting adequate medical treatment in prison, which our guys would not be; (3) the court looked to the fact that Appellate courts had already decided in appeals that AIDS in and of itself was not extraordinary enough a circumstance to warrant interference with a sentence—it can easily be argued that coronavirus and its level of contagion is at least more extraordinary.

[6] Jailhouse Lawyers Manual, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

There are very few cases of people using Article 440 for this purpose, and I found none that were successful. In *People v. Bedell*, 210 A.D.2d 922 (1994), the Fourth Department rejected Bedell's motion without an opinion, but the concurrence and dissent make it clear that it was because the court believed it lacked authority pursuant to 440.20. The dissent argued that the court did have the authority because C.P.L. 440.20 (1) provides: "At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law" and a cruel and unusual sentence is "invalid as a matter of law."

e. Governor's Commutation

Sentenced individuals in city custody also fall under the Governor's commutation power (see Individuals Serving Sentences in State Custody/the Governor's Office/Executive Clemency.

f. Suits against the DOCCS Commissioner (Annuchi)

An article 78 could be brought against the DOCCS commissioner by prisoners in city custody. Section 504 of the Corrections law requires the State Commissioner to remove prisoners from local correctional institutions, including those in the city of New York: "if a pestilential disease breaks out in the jail or in the vicinity of the jail and the physician to the jail certifies that it is likely to endanger the health of any or all of the inmates in the jail." *See* Correc. Law § 500 (applying the provision to local correctional facilities); § 2(16)(a) (defining local correctional facilities to include those within the City of New York). For more on this option, *see* Part V. Individuals Serving State Sentences/ Suits against the DOCCS Commissioner (Annuchi)/Based on Failure to Take Action Under Correction Laws.

IV. Individuals in City Custody on Parole Holds

Individuals in city custody due to parole holds may only have these holds lifted by the DOCCS Parole Supervision Unit, which falls under the purview of the Governor's Office. Like the Mayor, the Governor may also rely on his Emergency Powers to justify release of these individuals (*see* Individuals Serving Sentences in State Custody, *infra*).

V. Individuals Serving Sentences in State Custody

a. The Governor's Office

Article 4 of the New York Constitution gives Governor Cuomo broad power to release individuals from jails and prisons.[7] Cuomo can exercise this power by granting clemency, issuing executive orders, and/or invoking his emergency powers. Pursuant to Executive Law Section 15, Governor Cuomo has broad discretion to commute the sentences of incarcerated individuals who are vulnerable to COVID-19. Like the Mayor, Governor Cuomo has broad emergency powers, delineated in Executive Law art. 2-B which allow him to issue executive orders suspending state laws.[8]

[7] See N.Y. Const. art 4, § 4 ("The governor shall have the power 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…"); See also N.Y. Exec. L. art. 2-A, §15 ("The governor has power 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 may think proper, subject to the regulations provided in this article.").

[8] Executive Law 259-C also gives the Governor the power to request and receive "the facts, circumstances, criminal records and social, physical, mental and psychiatric conditions and histories of inmates under consideration [by the governor] for

i. Executive Clemency

Executive Law article 2-A § 15 authorizes the Governor to grant reprieves, commutations and pardons, and to impose on those grants such conditions, restrictions, and limitations as he deems proper.[9] In 2015, Governor Cuomo established an Executive Clemency Bureau to identify people in the state's prison system "who might be worthy of commutation." Cuomo stated that this initiative was a "critical step toward a more just, more fair, and more compassionate New York," and aimed toward "seeking to identify those deserving of a second chance and to help ensure that clemency is a more accessible and tangible reality."

Since its creation, the Bureau has been criticized as slow and ineffective. In response to criticisms, Don Kaplan, a spokesperson for Cuomo defended the Governor: "While the review process may be lengthy, this administration believes in keeping people out of prison and preventing them from serving unjust sentences if they are incarcerated."

1. Commutation

The most relevant and useful clemency power for prisoner release is the power to commute sentences. This power is broad: "[The] Governor may commute a sentence in any way that he considers appropriate. A sentence may be reduced to allow an incarcerated person to be released immediately or on a specific date."[10]

Except for extraordinary circumstances, a commutation of sentence will be considered only if the incarcerated person meets the following eligibility criteria:

- The incarcerated person's minimum period of imprisonment is more than one year;
- The incarcerated person has served at least one-half of his or her minimum prison term; and
- The incarcerated person is not eligible for parole within one year of the date of his or her application for clemency. [11]

Decisions with respect to clemency are within the Governor's sole discretion. The Governor has unfettered authority to alter the clemency process to speed it up or ease qualifications.

a. "Mass" Commutations in U.S. History

Some historical precedent exits for mass commutations, group commutations, or liberal use of the commutation power. Some examples follow:

- 1800 – Thomas Jefferson granted mass clemency to everyone convicted of opposing the government under the Sedition Act.

pardon or commutation of sentence" from the State Board of Parole, which would aid his office in identifying those most vulnerable to harm from COVID-19.

[9] See N.Y. Exec. L. art. 2-A, §15 ("The governor has power 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 may think proper, subject to the regulations provided in this article.").

[10] *Apply for Clemency*, New York State (https://www.ny.gov/services/apply-clemency).

[11] Id.

- New York**:** No New York Governor has commuted a large group of people at once; however, some examples exists of pardons that affected people who fit in specific categories.
    - 1950s – Plane crashed on Rikers Island and prisoners were instrumental in helping survivors → of the 57 incarcerated individuals who assisted with the rescue effort, 30 individuals were released, the sentences of 16 individuals were reduced by the NYC Parole Board, and Governor W. Averell Harriman **commuted the sentences of 11 men** serving definite sentences.[12]
    - 1978-1982 – The Rockefeller drug laws (mandated life sentences for a broad range of low-level drug offenses) were modified by the 1977 Marijuana Reform Act (decriminalized possession of small amounts of marijuana and reduced penalties for possession of larger amounts and for the sale of marijuana), however, the revised statute did not apply retroactively or create a right to resentencing. Thus, individuals convicted of the same crime were serving vastly different sentences based on when they were convicted. → during his tenure, Governor Hugh L. Carey **granted 155 pardons** and commutations.[13]
    - 2018 – NY – **Governor Cuomo** himself has **pardoned 22 immigrants**, although not at once.[14]
- Pennsylvania
    - 1971-1978 – during his tenure, **Governor Milton Shapp** granted clemency to 251 people serving life sentences.[15]
- Texas
    - 2005 – in Roper v. Simmons, SCOTUS prohibited states from giving the death penalty to offenders under the age of eighteen → after the Roper decision, **Governor Rick Perry** commuted the sentences for 28 seventeen-year-old juveniles on death row in the state and gave them life sentences with the possibility of parole in 40 years.[16]
- California
    - Three Strikes Law[17]

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[12] Rikers Island Air Crash, http://www.correctionhistory.org/html/chronicl/rikersaircrash/1957rikersaircrash.html ("The Department recognized the rescue efforts of 57 inmates who took part in the rescue work during the Rikers Island plane crash. Of the 46 serving penitentiary indefinite terms, 30 were released and 16 received a reduction of six months by the N.Y.C. Parole Board. Governor Averell Harriman also granted commutation of sentence to 11 men serving definite sentences: two received a six months reduction; one workhouse and eight penitentiary defines became eligible for immediate release.").

[13] *New York*, Restoration of Rights Project https://ccresourcecenter.org/state-restoration-profiles/new-york-restoration-of-rights-pardon-expungement-sealing/.

[14] John Leland, *With a Fresh Swipe at Trump, Cuomo Pardons 22 Immigrants*, NY Times (Dec. 31, 2018) https://www.nytimes.com/2018/12/31/nyregion/cuomo-pardons-immigrants-trump.html.

[15] *Commutation of Life Sentences (1971-Present)*, Pennsylvania Board of Pardons https://www.bop.pa.gov/Statistics/Pages/Commutation-of-Life-Sentences.aspx.

[16] Sarah Cate, *The Politics of Prison Reform: Juvenile Justice Policy in Texas, California and Pennsylvania*, Publicly Accessible Penn Dissertations (Jan. 2016) https://repository.upenn.edu/cgi/viewcontent.cgi?article=3425&context=edissertations.

[17] https://www.sacbee.com/news/investigations/california-prisons/article230957473.html.

- 2003 – when elected governor, **Arnold Schwarzenegger** declared an emergency on overcrowding and ordered 8,000 prisoners to be housed out of the state.[18]
- 2009 – SCOTUS ruled that CA "must release more than 30,000 prisoners, or whatever number it would take to get the population down to a reasonable and Constitutional level…"[19]
  - Justice Kennedy**:** "The court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights… A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."[20]

  → between 2011-2018 – **Governor Jerry Brown pardoned 1,322 people.**[21]
- 2018 – Governor Gavin Newsom commuted sentences of three individuals at risk of deportation.[22]
- 2019 – Under Governor Newsom granted clemency to 21 people convicted of violent offenses (most of whom were convicted under age 26).[23]
- Feb. 2020 – Governor Newsom announced that his office would be launching a new clemency initiative to pardon people who were prosecuted for being gay.[24]

- Kentucky
  - 2015 – in final act in office, **Governor Steve Beshear** used sole discretion to grant pardons and commute the sentences of over 200 individuals.[25]
  - 2019 – during his last two months in office, Governor Matt Bevin pardoned and commuted the sentences of over 670 individuals.[26]

- Oklahoma
  - 2016 – voters approved reclassification of simple drug possession as misdemeanor and Governor commuted sentences of over 30 individuals

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[18] *Cruel and Unusual: A Guide to California's Broken Prisons and the Fight to Fix Them*, ProPublica (May 28, 2019) https://www.propublica.org/article/guide-to-california-prisons.
[19] Brown v. Plata, 563 U.S. 493 (2011).
[20] Adam Liptak, *Justices, 5-4, Tell California to Cut Prisoner Population*, NY Times (May 23, 2011) https://www.nytimes.com/2011/05/24/us/24scotus.html.
[21] Ben Christopher, *Gov. Jerry Brown's Pardons Set a Record for Modern California History*, Times of San Diego (Dec. 26, 2018) https://timesofsandiego.com/politics/2018/12/26/gov-jerry-browns-pardons-set-a-record-for-modern-california-history/.
[22] Carla Marinucci, *Newsom pardons 3 immigrants at risk of deportation*, Politico (Oct. 18, 2019) https://www.politico.com/states/california/story/2019/10/18/newsom-pardons-3-immigrants-at-risk-of-deportation-1225677.
[23] Yesenia Amaro, *Man serving life for '88 Fresno double murder granted clemency by Gov. Newsom*, The Fresno Bee (Sept. 13, 2019) https://www.fresnobee.com/news/local/article235069337.html.
[24] Office of the Governor, *California Governor Newsom Launches Process for Parodning People Prosecuted for Being Gay*, YubaNet (Feb. 5, 2020) https://yubanet.com/california/california-governor-newsom-launches-process-for-pardoning-people-prosecuted-for-being-gay/.
[25] Tom Loftus, *Beshear issues 200 pardons in final action*, The Courier-Journal (last updated Dec. 8, 2015) https://www.courier-journal.com/story/news/2015/12/07/beshear-issues-200-pardons-final-action/76917228/.
[26] Jonathan Bullington, *Who did Matt Bevin pardon and why? Look up his Kentucky pardons on our exclusive database*, The Courier-Journal (last updated Jan. 9, 2020) https://www.courier-journal.com/story/news/2019/12/13/running-list-people-kentucky-former-governor-matt-bevin-pardoned/2637187001/; https://interactives.courier-journal.com/projects/bevin-pardon-map/.

- In 2018, OK legislature made the law apply retroactively, rendering over 800 people eligible for commutations.

2. Reprieves

For those who have been convicted, but not yet sentenced, the Governor has the power to grant these individuals reprieves.[27]

ii. Executive Orders & Emergency Powers

Although the Governor need not rely on his emergency powers release prisoners, these powers also permit him to release prisoners and to suspend any laws that create barriers to release. New York Executive Law art. 2-B § 28 gives the Governor the power to declare an emergency by executive order.[28] Section 29-a confers on the Governor the authority to issue, by executive order, "any directive during a state disaster emergency declared in the following instances: fire, flood, earthquake… **epidemic, disease outbreak**…"[29] During a declared emergency, the Governor can use his powers to temporarily modify or suspend state statutes and regulations, "if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster."[30]

1. Historical Uses of Emergency Powers and the Spread of Infectious Disease in Detention Centers

Although research reveals that state governors have used emergency powers to change state law requirements during natural disasters, infectious diseases, and the opioid epidemic,[31] it does not reveal any instances where governors have used their executive authority to release individuals from jails/prisons due to the outbreak of an infectious disease. However, there was ample evidence to support the particularly detrimental effect of the spread of infectious diseases within these facilities.

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[27] Exec. L. art. 2-A, § 15

[28] N.Y. Exec. L. Art. 2-B § 28 ("Whenever the governor, on his own initiative or pursuant to a request from one or more chief executives, finds that a disaster has occurred or may be imminent for which local governments are unable to respond adequately, he shall declare a disaster emergency by executive order.").

[29] Id.

[30] N.Y. Exec. L. Art. 2-B § 29-a ("Subject to the state constitution, the federal constitution and federal statutes and regulations, the governor may by executive order temporarily suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster. The governor, by executive order, may issue any directive during a state disaster emergency declared in the following instances: fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, wind, storm, wave action, volcanic activity, epidemic, disease outbreak, air contamination, terrorism, cyber event, blight, drought, infestation, explosion, radiological accident, nuclear, chemical, biological, or bacteriological release, water contamination, bridge failure or bridge collapse. Any such directive must be necessary to cope with the disaster and may provide for procedures reasonably necessary to enforce such directive.").

[31] Maxim Gakh, *Using Gubernatorial Executive Orders to Advance Public Health*, Public Health Rep. 128(2): 127–130 (Mar. 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3560871/ ("In the public health context, GEO uses include tackling public health emergencies, establishing new programs and entities, directing or reorganizing agencies, increasing the profile of an issue, and controlling state operations.").

Examples:

- 1918 Spanish Influenza, San Quentin Prison
  - "America's prisons were prime targets for influenza, which spread rapidly between overcrowded prison populations. The 1918 outbreak at San Quentin, California, where 500 of the 1900 prisoners were affected, was a notable example…"[32]
  - Prison's approach: "warn the inmates against close contact and congregating in enclosed places. All assemblages were prohibited. As soon as an inmate reported ill, he was immediately placed in the hospital and quarantined. Here he was held for at least 10 days after subsidence of symptoms."[33]
  - 1919 study[34] conclusions:
    - Close contact in crowded, poorly ventilated show rooms probably spread the infection
    - The infection spread in definite groups by close contact
    - The most effective means available for combating the spread of the diseases in this prison were hospitalization, quarantine, isolation, and closure of congregating places.

- Influenza/Disease in Prisons (generally)
  - "The penal system remains a source of diseases that spread among prisoners at rates far exceeding those in the communities from which they came. Of more than 10 million incarcerated people in the U.S. alone, 4 percent have HIV, 15 percent have hepatitis C, and 3 percent have active tuberculosis."[35]
    - "The penal system is also a primary reason that these diseases can't be eliminated globally," according to Chris Beyrer, the Desmond Tutu Professor of Public Health and Human Rights at Johns Hopkins.
  - "With low vaccination rates in jails and prisons, it is only a matter of time before an influenza outbreak causes a public health disaster, echoing the pandemic that occurred in 1918. In the words of philosopher and essayist George Santayana, 'Those who cannot remember the past are condemned to repeat it.'"[36]

- COVID-19[37]
  - "Since early 2020, COVID-19 outbreaks have been documented worldwide, including Iran, where 70,000 prisoners have been released in an effort to reduce in-custody transmission."

iii. Movement of Prisoners to Other Facilities

For those who have been sentenced, but whom the Governor will not release, Governor Cuomo has both the resources and the authority to find other accommodations to prevent dangerous overcrowding

[32] Catherine Arnold, Pandemic 1918: Eyewitness Accounts from the Greatest Medical Holocaust in History.
[33] Id.
[34] *Public Health Reports (1896-1970)*, Vol. 34, No. 19 (May 9, 1919), pp. 996-1008 https://www.jstor.org/stable/4575142?seq=13#metadata_info_tab_contents.
[35] Mass Incarceration Is Making Infectious Disease Worse, The Atlantic (2016).
[36] Greg Dober, *Influenza Season Hits Nation's Prisons and Jails* (2018).
[37] *Prisons and custodial settings are part of a comprehensive response to COVID-19*, Lancet Public Health (March 17, 2020).

and to provide the standard of medical care that detained individuals need and that is afforded to the rest of the community.

Corrections Law art. 5, § 93 authorizes the Governor (upon request of the Mayor, after a state of emergency has been declared) to move prisoners from city detention facilities to DOCCS facilities or even county jails, if DOCCS facilities are full. [38]

In addition, Exec. L., art. 2-B § 29 law authorizes the Governor to use the "equipment, supplies, facilities, services of state personnel, and other resources" to facilitate emergency actions. Section 29-a authorizes the Governor to temporarily suspend state laws during a declared state of emergency, "if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster" for renewable 30-day periods.[39]

When Governor Cuomo issued Executive Orders 202.6-202.8, he vacated the facilities of non-essential state agencies or essential state agencies where work from home was possible all over the City/State, making plenty of room for alternative accommodations for prisoners.

b. <u>The Parole Board: Compassionate Release</u>

According to Vera's 2018 report on medical parole in New York State, there are three forms of "compassionate release" in New York State. These remedies are all limited and lengthy, so to be effective, they would have to be used in combination with the Governor's emergency power to temporarily suspect some of their requirements. (see Governor's Office, Emergency Powers, *supra*).

i. Medical Parole

Medical parole is the most commonly used form of medical release. It allows for eligible people to be considered for parole on the basis of their medical condition before they would otherwise be eligible. Medical parole is codified in Exec. Law §§ 259-r and 259-s and is covered by DOCCS Directive No. 4304.

1. Eligibility Requirements.

Directive 4304 lists out the eligibility requirements for medical parole. They are:

1. The prisoner has:
    a. A terminal health condition; or
    b. A significant and permanent non-terminal condition, disease, or syndrome.
2. The prisoner is so physically or cognitively debilitated or incapacitated that there is a reasonable probability that they no longer present any danger to society;
3. The prisoner is not serving a sentence for Murder in the First Degree, or an Attempt to or Conspiracy to Commit Murder in the First Degree; and

[38] N.Y. Cor. L. § 93 ("Whenever a state of emergency shall be declared by the chief executive officer of a local government… the chief executive officer of the county in which such state of emergency is declared… may request the governor to remove all or any number of sentenced inmates from institutions maintained by such county or city. Upon receipt of such request, if the governor is satisfied that the public interest so requires, the governor may, in his discretion, authorize and direct the state commissioner of corrections and community supervision to remove such inmates.")

[39] N.Y. Exec. L., art. 2-B § 29-A ("Subject to the state constitution, the federal constitution and federal statutes and regulations, the governor may by executive order temporarily suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster…").

4. If the prisoner is serving a sentence for Murder in the Second Degree, Manslaughter in the First Degree, any offense defined in Article 130 of the Penal Law or an attempt to commit any of these offenses, the prisoner shall have served at least one-half of the minimum period of the sentence and in the case of a determinate sentence they have served at least one-half of their sentence.

2. Procedure.

Medical Parole involves several steps, which are also outlined in Directive No. 4304:

1. Request.

Anyone—the prisoner, someone acting on their behalf, a Department employee—may make a request to the Commissioner or to the Division of Health Services that a prisoner be considered for medical parole. The Division of Health Services then, for medically appropriate cases, notifies the Office of Classification and Movement which will determine the prisoner's eligibility based on their conviction and sentence. If the prisoner is not disqualified, the Commissioner may, in their discretion, order a medical evaluation and discharge plan.

2. Medical Evaluation.

A Department physician, a physician acting at the request of the department, or a physician employed at a hospital or facility used by the Department will perform a medical evaluation. Included in the evaluation is a prognosis concerning the likelihood that the prisoner will not recover from the condition, disease or syndrome.

3. Certification of Eligibility.

The medical evaluation gets forwarded to the Deputy Commissioner/Chief Medical Officer or his or her designee. That person, within 7 working days will advise the Commissioner if the prisoner's medical status conforms to the criteria for medical parole and the Commissioner either will or will not refer the prisoner to the Parole Board.

4. Referral to the Office of Victim Assistance.

The Medical Parole Coordinator notifies the Office of Victim Assistance of all cases being sent to the Deputy Commissioner/Chief Medical Officer and the Commissioner for review and approval. OVA will tell the Medical Parole Coordinator if there is a victim associated with the case. If the Commissioner approves the case to proceed to the Board of Parole, the Medical Parole Coordinator will inform OVA that the case was approved and sent to the Board.

5. Referral to Parole Board.

If the Commissioner certifies the prisoner as eligible for Medical Parole, the prisoner will be referred to the Parole Board for consideration for release. Pursuant to N.Y. Exec. Law § 259-r(2)(c), the Board must send notice to the court, the DA, and the prisoner's defender that the prisoner is being considered for release. They have 15 days to comment, and release on medical parole shall not be granted until the expiration of the comment period.

6. Medical Discharge Plan.

As soon as the prisoner is referred to the Board, staff will start making a medical discharge plan.

3. Analysis

The process looks cumbersome, but seemingly could be done quickly if the Commissioner automatically approved the medical evaluations by the physicians and the Parole Board automatically approved the referrals made to it by the Commissioner. The biggest problem with medical parole (in addition to the fact that it requires a great deal of political will by the Commissioner and the Parole Board), is the 15-day comment period that is statutorily required by N.Y. Exec. Law § 259-r(2)(c). However, it likely takes two weeks to fully enact the discharge plan that is mentioned in step 6, so perhaps if the parties were willing to send the required notice inviting comments early on in the process, by the time the prisoner was actually ready to be released, the comment period will have elapsed.

2. Parole Board case review for extraordinary medical circumstances

This form of release allows people who have completed their minimum sentence and have been denied parole release to be reconsidered by the Board of Parole before their next parole review date, based on a change in their medical condition (or, arguably, a change in circumstances that renders a once chronic but manageable condition a major risk factor for dying of COVID19?). The medical certification process is the same as for medical parole. This type of release is governed by DOCCS Directive 4044.

Unlike medical parole, there is no requirement that the prisoner be so physically or cognitively debilitated or incapacitated that there is a reasonable probability that they no longer present any danger to society.

3. Commissioner Discretion

Finally, a prisoner can be released on medical parole at the discretion of the DOCCS Commissioner. This form of release applies only to people who are terminally ill and serving a sentence for nonviolent offenses. N.Y. Exec. Law § 259-r(10).

c. <u>Suits against the DOCCS Commissioner (Annuchi)</u>

i. Based on DOC's failure to comply with the Governor's Executive Orders 202.6-8

The Governor's Executive Orders require that personnel at all non-essential businesses and services be reduced by 100% as of March 22nd at 8 p.m.

Pursuant to Order 202.6, the Empire State Development Corporation has issued guidance as to which businesses and services are deemed essential. Unsurprisingly, "law enforcement" is an essential service and is not required to reduce its workforce by 100 percent. However, per the guidance, "[b]usinesses and entities that provide other essential services must implement rules that help facilitate social distancing of at least six feet." It is unclear what work the term "other" is doing here, but it is arguable that the term is superfluous.

According to the Orders, only essential businesses and services are exempt from the personnel restrictions, and essentiality is determined by the Development Corporation. In order to be deemed essential, a business or service must be included in the guidance, or it can request an essential

designation. Thus, there are no "other" essential businesses and services and even enumerated essential businesses and services must comply with the order to implement rules that facilitate social distancing. In order for DOCCS to comply with these orders, they must implement such rules.

It appears that the correct mechanism to initiate this suit is mandamus,[40] but this requires further research.

i. Based on Failure to Take Action Under the Correction Law

Incarcerated individuals could bring an Article 78[41] action for injunctive relief against the DOCCS commissioner for failure to comply with relevant provisions of the Corrections Law. Section 141 of the Corrections law permits removal of inmates to a place of security "in 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."[42] The Commissioner may remove inmates to "some suitable place of security where such of them as may be sick shall receive all necessary care and medical assistance." *See also* Correct. Law § 23(1)-(2) ("The commissioner shall have the power to transfer inmates from one correctional facility to another [and] may by written order permit inmates to receive medical diagnosis and treatment in outside hospitals, upon the recommendation of the superintendent or director that such outside treatment or diagnosis is necessary by reason of inadequate facilities within the institution"); Correct. Law § 70(3)(a) ("The commissioner . . . may establish and maintain new correctional facilities, in accordance with the needs of the department and provided expenditures for such purposes are within amounts made available therefor by appropriation"); N.Y. Cons. art. XVII, § 3 (requiring the State to make laws to promote and protect the health of State residents).[43]

The above Orders, taken together with Correct. Law § 70(2)(c), which requires that correctional facilities be used for "programs of treatment" suited to the object of "assisting sentenced persons to live as law abiding citizens" and with due regard to "[t]he health and safety of every person in the custody of the department," and N.Y. Cons. art. I, § 5, which prohibits cruel and unusual punishment, mandate that the Commissioners exercise their authority under § 141 to quarantine infected inmates and reduce crowding in penal institutions statewide.

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[40] "'Mandamus is a drastic remedy and is granted only where the duty to be performed is positive and not discretionary, and the right to its performance is so clear as not to admit reasonable doubt or controversy.' *Burr v. Voorhis*, 229 N.Y. 382, 128 N.E. 220. 'The official conduct sought to be compelled must be ministerial in nature, non-discretionary and non-judgmental, and based upon a specific statute mandating performance in a specific manner.' *Matter of Grisi v. Shainswit*, 119 A.D.2d 418, 420, 507 N.Y.S.2d 155." *George v. Goldrick*, 136 Misc. 2d 258, 261, 518 N.Y.S.2d 582, 585 (Sup. Ct. 1987)

[41] *See LaRocca v. Dalsheim*, 120 Misc. 2d 697, 467 N.Y.S.2d 302 (Sup. Ct. 1983).

[42] N.Y. Correct. Law § 504 is an analogue of this statute that applies to city and county jails including those in New York City: "[I]f a pestilential disease breaks out in the jail or in the vicinity of the jail and the physician to the jail certifies that it is likely to endanger the health of any or all of the inmates in the jail, the state commission of correction, upon application, must, by an instrument in writing, filed with the clerk of the county, designate another suitable place within the county, or the jail of any other county, for the confinement of some or all of the inmates, as the case requires." *See* Correc. Law § 500 (applying the provision to local correctional facilities); § 2(16)(a) (defining local correctional facilities to include those within the City of New York).

[43] For a discussion of these laws, see Claire Fortin, *A Breeding Ground for Communicable Disease: What to Do About Public Health Hazards in New York Prisons*, 29 Buff. Pub. Int. L.J. 153, 166 (2011)