

COVID-19 and Mass Incarceration
Innovations and Solutions at a Glance
Revised August 28, 2020

*FJP’s COVID-19 and Mass Incarceration resources offer insights into trends and promising practices among reform-minded prosecutors responding to COVID-19, as well as answers to frequently asked questions. This “**Innovations and Solutions at a Glance**” document highlights lifesaving policies implemented by elected prosecutors across the United States, with a focus on decarceration.*

Why do elected prosecutors need to take action in response to COVID-19?

Elected prosecutors have an obligation to protect the safety and wellbeing of *everyone* in their community, including those behind bars. The crisis created by overcrowded prisons, jails, and detention facilities poses a grave threat to the health of not only people who are incarcerated, but also the staff who come and go from these facilities, their families, and the broader community.

As gatekeepers to the criminal justice system who have broad discretion over who comes into the system, how cases are disposed of, who is incarcerated, and for how long people will remain behind bars, prosecutors can play a critical role in shrinking the number of people currently incarcerated and thereby minimize the threat of rapid infection in densely populated prisons and jails. And as elected leaders in their communities, prosecutors can use their “bully pulpit” to advocate for more holistic and effective system-wide responses by calling on – and working with – other elected officials and policymakers to take action.

How have reform-minded prosecutors been responding to COVID-19 so far?

Reform-minded prosecutors are working to reduce the number of people entering the justice system, reduce the number of individuals behind bars, and improve conditions for people who remain incarcerated.

Narrowing the Front Door

Prosecutors are working to stem the flow of people entering the criminal justice system right now, by declining or deferring new prosecutions and working with police to limit arrests. For example:

- **King County (Seattle), WA Prosecuting Attorney Dan Satterberg** is [only filing charges](#) for serious felonies.
- **Baltimore City, MD State’s Attorney Marilyn Mosby** ordered her prosecutors to dismiss charges against, and immediately release, all individuals charged with drug

offenses and [several enumerated less serious offenses](#) that pose no threat to public safety. She also recently announced that her office eliminated nearly 600 open warrants and dismissed the underlying cases which involved violations such as drug possession, paraphernalia possession, prostitution, trespassing, minor traffic offenses, and urinating/defecating in public.

- **Cook County (Chicago), IL State’s Attorney Kim Foxx** [stopped prosecuting](#) low-level narcotics cases and recently released an official policy outlining the Office's decision not to prosecute individuals charged with minor offenses related to peaceful protests.
- **20th Judicial District (Boulder), CO District Attorney Michael Dougherty** is [working with police](#) to limit arrests for low-level property and drug crimes.
- **Washington, D.C. Attorney General Karl Racine** [supported the Metropolitan Police Department’s move](#) to use citation and release processes for most misdemeanors and worked with the court and police to limit the circumstances under which young people are taken into custody.
- **Kings County (Brooklyn), NY District Attorney Eric Gonzalez** has consented to the release of 275 people held in the local jail system and [declined to prosecute](#) about 400 cases which would have been otherwise filed. He also announced that his office would decline to prosecute low-level offenses that do not threaten public safety.
- **Philadelphia, PA District Attorney Larry Krasner** [called on](#) the Philadelphia Police Department to limit arrests; shortly thereafter Commissioner Danielle Outlaw instructed officers to delay arrests for low-level offenses.
- **Bexar County District Attorney Joe Gonzales** worked to reduce the jail population by expanding the use of cite and release practices. In an 8-month period, [1,900 people](#) have avoided arrest through cite and release responses.

Reducing the Jail Population

Prosecutors are reducing the number of people who are incarcerated. To do so, they have focused on **reducing the number of people detained as they await trial** in local jails due to an inability to afford bail and **identifying other groups of people who can be safely released**. These efforts are having a significant effect on jail populations. The average jail has reduced its population by more than 30%, with some jurisdictions reducing their jail populations by as much as 63%.¹ For example:

- **San Francisco, CA District Attorney Chesa Boudin** implemented a variety of responses, including immediately releasing those with 60 days or less left on their sentence in certain kinds of cases, reviewing cases of all detained people over age 65 for possible sentence modifications, and only filing new cases where immediate intervention is required. As a result, the jail population [declined nearly 25%](#) during the month of March, and [40%](#) since January.
- **Ingham County (Lansing), MI Prosecuting Attorney Carol Siemon** worked with stakeholders to [release people](#) held pretrial, as well those held on civil non-payment of child support, serving weekends, and on work release. These efforts resulted in a **36%**

¹ As reported by the [Prison Policy Initiative](#) as of May 14, 2020.

reduction in the jail population in three weeks, and the jail is at its lowest capacity since the 1980s.

- **Ramsey County (St. Paul), MN County Attorney John Choi** worked with local stakeholders to obtain court orders [enabling the release](#) of all those considered medically vulnerable or serving certain low-level offenses from jail, resulting in a **52% reduction** in the local jail population in two weeks.
- **Durham County, NC District Attorney Satana Deberry** is [working with defense attorneys and judges](#) to identify and evaluate for possible release people who are held pre-trial and do not pose a public safety risk, are over the age of 60, or have health conditions. As a result, the local jail population **dropped by approximately 10%** in one week and Durham County has experienced a 28% total jail population decrease.
- **Albemarle County (Charlottesville), VA's jail population is down 28%** – and to the lowest point in two decades – after **Commonwealth's Attorney Jim Hingeley** worked with local stakeholders, including **Charlottesville, VA Commonwealth's Attorney Joe Platania**, to identify people held in jail who have completed the majority of their sentences and can be safely released.
- **20th Judicial District (Boulder), CO District Attorney Michael Dougherty** is [filing motions](#) to release those who are medically vulnerable, have 45 days left in their sentence, who are held pretrial on bond, and who are on work-release. With these efforts as well as those of law enforcement, public defenders, and courts, the county's jail population has decreased from **435 to 240**.
- **Loudoun County, VA's** jail population has decreased by **31%** due to decreased admissions, increased use of electronic monitoring, increased efforts at bond release, and **Loudoun County Commonwealth's Attorney Buta Biberaj's** [review](#) of cases for early release where individuals have six months or less to serve on their sentences.
- **Kaua'i County, HI Prosecuting Attorney Justin Kollar** [filed motions](#) to release individuals from the Kaua'i Community Correctional Center, contributing to a decline in jail population from **143 to 85**.
- **Fairfax County, VA Commonwealth's Attorney Steve Descano** reduced his county's jail population by **28%** by [reviewing](#) the cases of all individuals in jail for early release and reviewing all pretrial decisions.
- In addition to efforts to reduce the number of individuals entering the justice system, **King County (Seattle), WA Prosecuting Attorney Dan Satterberg** worked with local stakeholders to identify people who can be safely released from jail, resulting in a **26% decrease** in jail population.
- **Cook County (Chicago), IL State's Attorney Kim Foxx's office** [collaborated](#) with the sheriff, public defender, and the Bail Project to reduce the jail population by releasing individuals who are not a threat to public safety; prosecutors reviewed more than 1,200 cases in a two-day period. The office has also stopped prosecuting low-level, non-violent narcotics offenses. As a result, the jail population declined by 20% between March 16 and April 3, with a total **27% reduction** by May 5.
- **13th Judicial Circuit (Tampa), FL State Attorney Andrew Warren** worked with police to minimize arrests for non-violent misdemeanors, released individuals held pretrial who did not pose a public safety threat, and suspended prosecution of certain misdemeanors that do not pose a public safety threat while dismissing others, resulting in a **25%** decrease in incarceration.

- **Milwaukee (WI) District Attorney John Chisholm** worked with local stakeholders, including the public defender, sheriff, and heads of the local correctional facility and the state Department Of Corrections to reduce the total jail population to [1,373 from 1,809](#) in December 2019, allowing for single-occupant cells at the jail.
- **Denver** has reduced its jail population by [nearly half](#) and **District Attorney Beth McCann** secured the release of pregnant women, individuals over sixty, and other high-risk individuals.
- **Fourth Judicial Circuit (FL) State Attorney Melissa Nelson's** office created a plan in March to [release individuals from jail](#); since then, the Duval County Jail's population has been reduced by 17 percent.
- **Prince George's County, MD State's Attorney Aisha Braveboy** implemented 'Operation Safe Release' to mitigate the spread of COVID-19 in the local detention facility resulting in a nearly 40% reduction of the jail population over months.

Promoting Prison Decarceration

Prosecutors are also **playing a role in reducing prison populations** through their own actions and by encouraging their governors and state correctional departments to take action. For example:

- **Baltimore City, MD State's Attorney Marilyn Mosby** and **Kauai County, HI Prosecuting Attorney Justin Kollar** [sent letters](#) to their governors petitioning for release of specified categories of individuals from state prisons, such as those who are over 60 or have health vulnerabilities.
- **Durham County, NC District Attorney Satana Deberry** is [working with local organizations](#) to identify people who were convicted and are currently serving sentences who can be safely released from prison, including those at high risk of illness because of age, those who were convicted of certain types of crimes, and those who are scheduled to be released in the near future. In appropriate cases, her office is consenting to sentence modifications and is also reviewing modification petitions filed prior to the pandemic to identify more candidates for release.
- **King County (Seattle), WA Prosecuting Attorney Dan Satterberg** supported a recently passed [bill](#) that will allow prosecutors in Washington State to petition a court for review of past sentences and resentencing in the interests of justice.
- Several Virginia Commonwealth's Attorneys, including **Buta Biberaj (Loudon County)**, **Steve Descano (Fairfax County)**, **Parisa Dehghani-Tafti (Arlington County and the City of Fairfax)**, **James Hingeley (Albemarle County)**, **Stephanie Morales (City of Portsmouth)**, and **Joe Platania (City of Charlottesville)**, sent an [open letter](#) to Virginia's Secretary of Public Safety and Homeland Security asking for the safe release of incarcerated youth who pose no safety risk to the community.
- In July, **35 elected prosecutors** representing more than 31 million people across the country issued an [open letter to governors, calling upon them](#) to dramatically reduce state prison populations to mitigate the spread of COVID-19 and save lives.

How are these prosecutors working to protect the safety and rights of people who remain incarcerated?

Promoting Humane Conditions of Confinement

Although prosecutors generally do not have direct control over conditions in jails and prisons, many reform-minded prosecutors are influential criminal justice stakeholders and are using their elected position to advocate for the humane treatment of people who remain incarcerated during this crisis. They are advocating for access to quality healthcare, adequate cleaning supplies, and a humane plan for housing those behind bars who do become ill. They are opposing facility-wide lockdowns, which simply exacerbate trauma, anxiety, and tension. And, importantly, when visitation must be limited, they are calling for facilities to provide free and frequent phone call and videoconferencing opportunities.

Reform-minded prosecutors are also working to ensure that constitutional rights are not sacrificed in this time of crisis. As courts close, these prosecutors recognize the need to ensure that speedy trial guarantees are not eroded and that a defendant's right to counsel and to be present at critical stages of the case are protected. For example:

- **Suffolk County (Boston), MA District Attorney Rachael Rollins** is [working with the defense bar](#) to ensure they have appropriate access to their clients, and with members of the community to ensure that they are able to connect with their loved ones.
- The **California Judicial Council** [issued a rule](#) preserving the right of criminal defendants to appear in person, when they wish to do so, at critical stages of their proceedings.

What should all prosecutors be doing to respond to COVID-19?

Fair and Just Prosecution published a [joint statement, signed by over 30 elected prosecutors around the country](#), outlining key actions that prosecutors can take – either to change their own practices, or by working in collaboration with other justice system stakeholders – to respond to COVID-19. Key recommendations include:

- Adopting cite and release policies for any offense that poses no physical threat to the community.
- Releasing individuals who are being held because they cannot afford cash bail, unless they pose a risk to public safety.
- Identifying and releasing elderly people, those with medical conditions that make them more vulnerable to infection, and people within six months of completing their sentence or incarcerated on technical violations of probation and parole, unless doing so would pose a serious public safety risk.
- Ensuring humane conditions of confinement – including good medical care and maintaining access to and connections with counsel as well as family and loved ones.
- Preserving the constitutional rights of individuals involved in the criminal justice system, including access to counsel and the right to a speedy trial.

What are some challenges prosecutors face in responding to COVID-19?

While prosecutors have discretion to change how their offices charge and prosecute new crimes, identifying and releasing people who are already incarcerated generally requires cooperation and collaboration with other stakeholders such as the judiciary, police, public defenders, and corrections departments.

Some criminal justice stakeholders have argued that vulnerable people are safer in jail. It was clear at the start of the pandemic that this simply was [not the case](#), and is even more evident now, as the [top ten COVID-19 hotspots](#) in the country are in correctional facilities. Jails and prisons struggle to provide sufficient care in the best of times, and they are not equipped to deal with a major public health crisis, particularly one that is exacerbated by close quarters and unsanitary conditions. These and other pockets of resistance will need to be overcome if efforts by elected prosecutors to address the pending crisis are fully to take hold.

Does public opinion support changing criminal justice system responses in response to COVID-19?

Yes. A national [survey](#) found that 66% of likely voters, including 59% of those who identify as “very conservative,” said that elected officials should be considering measures to reduce overcrowding in prisons and jails as a response to coronavirus. It also found that a majority of voters supported releasing people who are within six months of completing their sentence, releasing at-risk populations, and reducing unnecessary jail admissions.

What role should electronic monitoring play in decarceration efforts?

In order to rapidly reduce jail populations, many jurisdictions have turned to electronic monitoring as a way to release individuals into the community while addressing fears about public safety. In the context of COVID-19, electronic monitoring in the community is preferable to incarceration in jails or prisons; however, the increasingly widespread use of electronic monitoring or “e-incarceration” presents its own risks. Electronic monitoring can [interfere with getting groceries or needed medical care](#), particularly in the context of social distancing when individuals may be unable to rely on others bringing needed supplies to their home. Individuals are also often required to cover the costs of their own electronic supervision, which can reach hundreds of dollars per month – creating [cycles of debt, poverty, and reincarceration](#) for unpaid fines and fees. Prior to COVID-19, research on the efficacy of electronic monitoring was [limited](#) and in practice electronic monitoring was often used on people who presented little public safety risk, thus providing [minimal public safety benefit](#) but raising the risk of reincarceration for technical violations. Therefore, electronic monitoring should be used sparingly and at *no cost* to the individual under supervision. Instead, many individuals can be safely returned to the community without supervision or with far less invasive forms of supervision.

What role should risk assessments play in pandemic decarceration efforts?

Risk assessments – formulas that measure the “risk” that a person will be rearrested or fail to appear in court – are widely used in the justice system when making pre-trial detention decisions. They are now being used by many jurisdictions, including the [federal government](#), as a way to determine or prioritize who will be released in response to COVID-19. However, even facially race-neutral risk assessments have been shown to [perpetuate racial disparities](#) because the factors that risk assessments consider, like prior criminal records and arrests, themselves [reflect societal racial disparities and bias](#). As such, it is critical that jurisdictions make release the *default* for offenses that pose little public safety risk, [limit](#) their use of risk assessments to serious cases, and also review cases holistically rather than solely relying on risk instruments.

What impact have these reform efforts had on public safety?

Reform efforts have improved public safety by protecting the health and lives of countless individuals who would otherwise be behind bars facing near-certain infection with COVID-19. Crime rates have fluctuated since the beginning of the pandemic. Crime [declined in several major US cities in March and April](#), including San Francisco, where it dropped 42% the week that a shelter-in-place order was issued, even while the local jail population declined [nearly 25%](#) in March. Meanwhile, violent crime increased in many US cities in the early summer of 2020. This increase may be attributable to several factors which all have a well-established impact on crime such as: widespread economic hardship, a rise in domestic violence as individuals quarantine in close quarters, an increase in young people who are not working or in school, and a crisis of confidence in the police. And while isolated examples of reoffending may arise as individuals are released from confinement, they must be weighed against the dire public health and safety threat resulting from maintaining the status quo and exposing millions of individuals living and working in prisons and jails to the rapid spread of COVID-19 in those facilities.

How have prosecutors responded to the surges in overdoses during the pandemic?

Prior to the pandemic, many reform-minded prosecutors were already pursuing responses to the overdose epidemic that emphasized harm reduction and decriminalization. Those policies remain vital in the wake of [the increase in overdoses](#) during COVID-19, and many leaders have continued to advocate for much-needed harm reduction services in their communities. For example, **85** current and former prosecutors, along with law enforcement officials and other leaders, [filed an amicus brief](#) arguing that overdose prevention sites (OPSs) are proven harm reduction tools that save lives, promote community trust in the justice system, and help alleviate the adverse impact of substance use disorder.

How have prosecutors responded to protests and civil unrest in the wake of the pandemic?

In the wake of George Floyd’s death at the hands of the police, millions protested nationwide demanding police reform and accountability. Many reform-minded prosecutors affirmed their commitment to police accountability and also used their discretion to ensure that arrests during

the protests did not lead to increases in prison and jail populations during the pandemic or violate the First Amendment rights of protestors.

- **San Francisco District Attorney Chesa Boudin** announced that he would not file charges of resisting arrest until video footage (both from police officers' body-worn cameras and bystanders) [had been reviewed](#) and also [would not prosecute curfew](#) or stay at home violations or peaceful protests.
- **Ingham County (Lansing), MI Prosecutor Carol Siemon** [announced](#) that her office will not charge anyone with resisting and obstructing until all body camera footage is reviewed.
- **DC Attorney General Karl Racine** stated that he would [not prosecute](#) curfew violations.
- **Kings County (Brooklyn), NY District Attorney Eric Gonzalez** stated that he would [decline to prosecute](#) cases where an individual was charged with only unlawful assembly or curfew violation.
- **13th Judicial Circuit (Tampa), FL State's Attorney Andrew Warren** stated that he [would not prosecute](#) unlawful assembly cases.
- **Seattle City Attorney Pete Holmes** stated that he would [drop all charges](#) against peaceful protestors and that those arrested for misdemeanors and some lower-level assaults would be referred to a diversionary workshop.
- **Kauai County, HI Prosecuting Attorney Justin Kollar** stated that he [would decline to prosecute](#) peaceful protestors as well as disorderly conduct, failure to disperse, unlawful assembly, criminal trespass on state lands, criminal trespass onto public parks and recreational grounds, simple trespass, obstructing and, curfew violations. Additionally, he would [presume dismissal or declination](#) of the charges of resisting arrest and assault against a law enforcement officer in the second degree unless body worn camera footage is available.
- **Multnomah County (Portland), OR District Attorney Mike Schmidt** [announced](#) that he would only pursue charges against protestors who engaged in deliberate property damage, theft or force against another person or threats of force.