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GOVERNORS MUST USE CLEMENCY POWERS TO SLOW THE PANDEMIC

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INTRODUCTION

Nearly 3 in 4 Americans have now been ordered to stay home and remain indoors, while many states have ordered non-essential businesses to shutter.¹ These steps may seem drastic, but they are being taken in order to safeguard public health during the COVID-19 pandemic. Government actors who are truly serious about protecting people must take comprehensive and coordinated action to combat the spread of the virus. This means acknowledging and explicitly considering the health risks of vulnerable populations – including people serving sentences in state prisons – when crafting and implementing gubernatorial responses to reduce the risk of transmission.

Jails and prisons are unable to comply with CDC hygiene standards and are accelerating the pandemic. People who are incarcerated are more likely to have chronic health conditions than the general public.² Likewise, the percentage of people age 55 or older in state prisons has more than tripled between 2000 and 2016.³ Incarceration also has negative “knock on” effects. Incarcerated people tend to age faster than the general population, and their physiological age outpaces their chronological age by anywhere from 7 to 10 years.⁴

In some states, local government actors have responded to the growing threat of COVID-19 by taking steps to reduce jail populations and to limit the number of people being admitted to jails.⁵ Police departments are also adjusting by issuing citation and misdemeanor summons for certain offenses.⁶ But while local government officials have begun tackling the risk that jail populations pose, little movement has occurred to reduce prison populations and the attendant risk

of transmission of COVID-19 to people serving sentences in prisons, prison employees, their families, and their communities.

If states are serious about preventing the spread of COVID-19, they must take immediate action to reduce the number of people in state prisons. While every state’s mechanisms will differ according to constitutional and statutory provisions, there are a number of actions that state actors – including governors – can take.

See [Appendix](#) for a state-by-state overview of these legal mechanisms.

CLEMENCY: COMMUTATIONS & REPRIEVES

Virtually every state constitution authorizes the governor or a board of pardons to grant clemency to incarcerated people. At least two forms of clemency – commutations and reprieves – allow for immediate or near-term release of people from jails and prisons, and could be particularly useful for limiting the spread of COVID-19 if officials act now.

Commutations

The effect of a commutation is to shorten a custodial sentence, usually to time served. Commutation recipients may be either released to community supervision or released outright. Officials should grant commutations to

individuals whose age or health makes them particularly vulnerable to COVID-19, as well as to those who are nearing the end of their custodial sentence.

Some states, like New York, permit the governor to unilaterally grant commutations, but in most states the governor must consult an independent advisory board before making a decision.⁷

There are many examples of granting commutations to a group of similarly situated people at one time. In 2016, Oklahoma released 462 people in a single day using commutation.⁸

Reprieves

A reprieve is a temporary suspension of a sentence; it does not affect the amount of time served, but rather allows recipients to resume their sentences at a later date. Governors typically grant reprieves in cases of emergency. Although most often associated with postponing death sentences, a reprieve can also postpone or suspend a sentence of incarceration. Most states allow governors to grant reprieves any time “after conviction,” before or after sentencing.

Reprieves could prove particularly effective for reducing correctional populations to limit the spread of COVID-19 in jails and prisons. Whereas many states require the governor to refer commutation applications to an advisory

board for investigation and review, governors can generally grant reprieves unilaterally, without complying with regulations or statutory procedures. This ensures that the governor can act immediately in case of an emergency, as is necessary to delay capital punishment. The Supreme Court of Pennsylvania has embraced such an understanding of the reprieve power:

“A review of the evolution of Article IV, Section 9(a) establishes that the broad grant of executive reprieve power has never been constitutionally altered or restricted, while the executive clemency powers of pardon and commutation have been significantly constrained by subsequent constitutional amendments.”⁹

Governors should work with corrections officials to identify incarcerated people who are particularly vulnerable to complications from COVID-19, such as the elderly and those with underlying health conditions. By harnessing the reprieve power, states can release vulnerable individuals within days, before facilities become overrun with life-threatening illness.

Some states in which the governor appears to have unfettered authority to grant reprieves are Colorado, Connecticut, Illinois, Louisiana, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Virginia, and Washington.¹⁰

OTHER RELEASE MECHANISMS

Furloughs

A furlough allows a person to serve a portion of his or her sentence outside a prison or jail. Although furlough programs are limited or nonexistent in some places, other states have fairly broad furlough provisions that could be useful to relieve overcrowding during the COVID-19 crisis.

One promising example is Connecticut, where the Commissioner of Correction has discretion to release an individual in 45-day periods “by authorizing the inmate under prescribed conditions to visit a specifically designated place or places, within or without the state ... and return to the same or another institution or facility. Such periods may be renewed at the discretion of the commissioner.”¹¹ The Commissioner may release individuals for the following reasons: “to permit a visit to a dying relative, attendance at the funeral of a relative, the obtaining of medical services not otherwise available, the contacting of prospective employers or **for any compelling reason consistent with rehabilitation**. Relief from overcrowding qualifies as a “compelling reason” under the statute,¹² so there is little doubt that the Commissioner has authority to release people on furlough to mitigate the spread of COVID-19.

Similarly, New Mexico’s governor may grant “conditional release” to incarcerated people “in situations of extreme personal hardship.”¹³ People granted release under this provision are released to parole supervision for the duration of the sentence. The governor may not grant conditional release to people convicted of certain firearms offenses;¹⁴ further, the governor’s own Executive Clemency Guidelines state that “[i]ndividuals convicted of a serious violent offense and/or a sexual offense will not be considered for conditional release,” but this exclusion appears to be self-imposed by the governor rather than required by statute.

Compassionate Release

Compassionate release is an umbrella term for mechanisms that release individuals “when terminal illness, advanced age, sickness, debilitation, or extreme family circumstances outweigh continued imprisonment.”¹⁵ According to the organization Families against Mandatory Minimums (FAMM), some form of compassionate release is available in 49 states and the District of Columbia, as well as in the federal prison system. Some variants of compassionate release include medical parole, medical furlough, elderly parole, and conditional medical release.¹⁶ In most jurisdictions, the parole board and/or correctional officials are responsible for making decisions regarding compassionate release.

The requirements and procedures governing compassionate release vary significantly by state. One common requirement is that an applicant must be suffering from a terminal or debilitating illness. Many states exclude from consideration people convicted of certain crimes, such as sexual assault or homicide. Some states, including New York and Indiana, require that people serve a certain portion of their sentence to be eligible for compassionate release. Texas, California, and Virginia require people to reach a certain age (either 60 or 65 years old) and serve a certain portion of their sentence before being considered for compassionate release.¹⁷

CONCLUSION

The coronavirus pandemic is a serious public health threat to the United States. As state governments take steps to guard against the risk of transmission, it is imperative that they take vulnerable populations into account when shaping policy responses. Overcrowded state prisons mean that neither incarcerated people nor corrections officers and staff can properly practice social distancing. Nor can many incarcerated people access hygienic products needed to protect against transmission. Put simply, the virus does not discriminate between those who live within the prison walls, and those who do not. If governors and state agencies do not exercise the powers available to them, detailed here, to release people from prison, it is all but certain that prison conditions will exacerbate the growing public health crisis on our hands.

Appendix: State-by-state overview

ENDNOTES

1. Holly Seycon and Aylin Woodward, *Three-Quarters of All Americans Have Been Ordered to Stay at Home. This Map Shows Which Cities and States Are Under Lockdown*, Business Insider, Mar. 30, 2020, available at <https://www.businessinsider.com/us-map-stay-at-home-orders-lockdowns-2020-3>.
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6. Alexander Mallin and Luke Barr, *Police Implement Sweeping Policy Changes To Prepare for Coronavirus Spread*, ABC News, available at <https://abcnews.go.com/US/police-implement-sweeping-policy-prepare-coronavirus-spread/story?id=69672368>.
7. McKinney's Const. Art. 4, § 4.
8. Katie Rose Quandt, *The Largest Commutation in U.S. History*, Slate (Nov. 8, 2019), available at <https://slate.com/news-and-politics/2019/11/oklahoma-clemency-drug-criminal-justice-reform.html>.
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10. See Colo. Const. art. IV, § 7; Conn. Const. art. IV, § 13; IL CONST Art. 5, § 12; La. Const. Ann. art. IV, § 5; NJ CONST Art. 5, § 2, ¶ 1; NM CONST Art. 5, § 6; NY CONST Art. 4, § 4; ND CONST Art. 5, § 7; Or. Const. art. V, § 14; Pa. Const. art. IV, § 9; Va. Const. art. V, § 12; Wash. Const. art. III, § 9.
11. Conn. Gen. Stat. Ann. § 18-101a (West).
12. 1984 Conn. Op. Atty. Gen. 119 (Conn. A.G.), 1984 WL 249190
13. N.M. Executive Clemency Guidelines, II (C)
14. Those offenses are listed in NM ST § 31-18-16.
15. Mary Price, *Everywhere and Nowhere: Compassionate Release in the States*, FAMM (June 2018).
16. *Id.* at 27.
17. *Id.* at 17.