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INSIGHT: Protecting Prisoners in Pandemics Is a Constitutional Must
By Judith Resnik
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Judith Resnik, Arthur Liman Professor of Law at Yale Law School, says putting constitutional obligations into practice for the prison population—for Covid-19 and other diseases—is daunting. Yet there are ways to lower the risks, and we have guideposts.

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Recently, Walter Ogrod, a Pennsylvania prisoner, exhibited the high fever and troubled breathing that are signatures of Covid-19. That news is, sad to say, not surprising. Within days, lawyers ran to court. He won, lost, and is trying again to get emergency relief for testing and treatment.

Ogrod’s case is not a one-off. In New York, as of March 26, 116 people held in that city’s jails have asked for release because they are particularly vulnerable to getting the virus. Similar cases are being filed across the country. Instead of fighting them, prison officials ought to acknowledge they have a constitutional obligation to help mitigate the risks.
Protecting prisoners from pandemics is not just a “should” or an “ought” but a
“must”—as a matter of U.S. constitutional law. That proposition was established
more than 40 years ago when another prisoner (J.W. Gamble) told Texas staff that
he had been injured by a falling 600-bale of cotton. Responding to his claim that the
prison had ignored his pleas for care, the U.S. Supreme Court ruled in his favor.
Ignoring serious medical needs violated the prohibition on “cruel and unusual
punishments.”

The trigger is knowledge. That's what the court's key phrase—“deliberate
indifference to serious medical needs”—means.

What about infectious diseases? In 1993, the court explained that prisons cannot
knowingly expose people to “a serious, communicable disease.” Rather than wait
for a “tragic event,” prisons had to try to keep people away from “unsafe, life-
threatening” conditions.

Even as the law is clear, putting these constitutional obligations into practice—for
Covid-19 and other diseases—is daunting. Yet there are ways to lower the risks, and
we have guideposts.

Lowering the Risks

Proximity is a source of transmission, and spacing people out helps. “Dedensifying”
prisons is the new buzz word. Directors of prison systems generally have the power
to decide placement, including assigning people to community programs.

Other resources are the authority of governors to pardon people and to order
compassionate release. We need vocal governors like New York's Andrew Cuomo
(D), already out in front on Covid-19, to step up.

And courts cannot be left out of the picture. In the past, judges have issued
population reduction orders because of unconstitutional health care. California’s
severe density pushed the prison health system into collapse. In its 2011 opinion
approving the mandate to lower the numbers incarcerated, the U.S. Supreme Court
showed pictures of the cages where mentally-ill people spent hours awaiting
attention.
Other remedies require new policies that rethink how space is used inside prisons. Here an example comes from a 1993 Supreme Court decision about William McKinney, who argued that it was unconstitutional for Nevada to bunk him with man who smoked five packs a day. A part of the fix was moving McKinney to a dorm, and the other was a ban on smoking. The beneficiaries were prisoners and staff alike, all harmed by second-hand smoke.

Terrible infra-structures are challenging, and not only for Covid-19. In Texas, a federal judge ruled in 2017 that, because extreme heat put people with heart conditions and diabetes at heightened risks of strokes and death, Houston's failure to lower severe summer temperatures inside its jails violated the Constitution. That year, another federal judge found Florida in violation of the Constitution because it did not test for and treat Hep-C. By 2019, Houston had tried to make jails a bit cooler, and Florida had screened more than 55,000 prisoners, identified some 7,000 with chronic Hep-C, and treated 4,900.

**Improvements Are Possible**

As these lawsuits exemplify, no rosy picture of prison health care can be painted. But look at what has changed. When J.W. Gamble filed his claim in the 1970s, Texas had one full-time doctor for 17,000 prisoners. And in both the 1970s and the 1990s, prison officials argued to courts that they had no constitutional obligation to provide more care than they were.

Today, every prison system has health care staff, and no one thinks they don't have an obligation to do all they can. Indeed, directors of prisons around the country are responding to Covid-19. But so far, too much of the focus has been on closing off prisons to outsiders.

Departments of correction cannot alone figure out responses to this health emergency. Every state and local department of public health must be part of a team effort to reduce the spread of infection, in and outside of prison. Also needed are architects and engineers, tasked with designing new patterns of movement, hand-washing stations, and much more.
None of us can afford to be indifferent to this serious and known medical need. Failing to do so not only violates the constitutional mandate to try to protect prisoners but also puts at risk the people who work in prison and the communities to which they return.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

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