

**Vulnerable Populations in a Pandemic
Law in the Time of COVID-19 Series Part 3
A Talk with Alexis Hoag, Olatunde Johnson, and Jane Spinak**

- Prisoners' rights
 - COVID-19's effect in jails and prisons
 - Spread more likely
 - Communal and shared spaces, including bathrooms, cafeterias, and recreational areas.
 - Sleeping quarters are also often shared.
 - Social distancing not possible
 - Unable to avoid crowds
 - Lack of sufficient hand washing stations and cleaning and sanitation supplies
 - Spread already happening
 - By March 24, 2020, Rikers Island Correctional Facility in New York had 52 confirmed COVID-19 cases.¹
 - Cook County Jail in Chicago reported one of the highest concentrations of infections earlier on in the pandemic. More than 500 people had tested positive by April 13, 2020.²
 - Danger not limited to inmates
 - Prison conditions make spread of COVID more likely among inmates and also employees.
 - Probability of employees and visitors who enter the exit the prison who unknowingly bring in and out the virus and help spread infection within the prison and outside to the community can be high.
 - Prisoners' constitutional legal rights under the Eight Amendment
 - May challenge conditions of confinement under the Eight Amendment right to be free of cruel and unusual punishment.
 - Petitioner must show that "prison officials, acting with deliberate indifference, exposed a prisoner to sufficiently substantial 'risk of serious damage to his future health.'" *Farmer v. Brennan*, 511 U.S. 825, 843 (1994) (quoting *Helling v. McKinney*, 509 U.S. 25, 35 (1993)).
 - Subjective
 - Prison officials were deliberately indifferent.
 - Objective

¹ Julia Craver, Rikers Island Has 52 Confirmed COVID-19 Cases, Slate. March 25, 2020: <https://slate.com/news-and-politics/2020/03/coronavirus-is-spreading-on-rikers-island.html>

² Cheryl Corley, *The COVID-19 Struggle In Chicago's Cook County Jail*, NPR. April 13, 2020: <https://www.npr.org/2020/04/13/833440047/the-covid-19-struggle-in-chicagos-cook-county-jail>

- Deprivation is sufficiently serious.
 - Types of sufficiently serious harms
 - Serious medical need not addressed, e.g. infectious disease, appendicitis, tooth cavity, etc.
 - In the current pandemic, prisoner may satisfy this prong by showing substantial risk of serious harm in the future, by demonstrating exposure to an unreasonable risk of serious harm.
 - Precedence indicates that courts recognize a host of communicable diseases that may present a substantial risk of serious harm.
 - Deliberate indifference
 - Official must have knowledge of risks. Courts may require actual knowledge.
 - Denial or delay of medical treatment or failure to follow medical standards. *See, e.g. Estelle v. Gamble*, 429 U.S. 97, 105 (1976); *Hernandez v. County of Monterey*, 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015). A pattern of such conduct may establish deliberate indifference. *See DeGidio v. Pung*, 920 F.2d 525, 533 (8th Cir. 1990).
 - Pre-trial detainees
 - Pre-trial detainees may challenge the conditions of their confinement under the Fourteenth Amendment Due Process Clause, and the test for constitutionality of conditions of confinement are the same as objective requirements of the Eighth Amendment.
 - Remedies
 - Courts may order the release of prisoners for an Eight Amendment violation. Generally not available in habeas proceedings.
 - In the COVID pandemic, some courts have ordered the release of detainees in some prisons in some states like New York, New Jersey, and California.
 - Another remedy is compassionate release under 18 U.S.C. § 3582 for “extraordinary and compelling reasons.” Generally applicable to detainees who may be considered high risk because of their age or health status.
- Gig workers in the pandemic
 - Lack of social infrastructure becoming more apparent in the pandemic for gig workers
 - Gig workers are some of the hardest hit financially as a result of the pandemic.
 - Lack of ability to bargain for work conditions
 - Lack of access to sufficient health care benefits
 - Lack of financial safety net

- Coronavirus Aid, Relief, and Economic Security Act (CARES Act)³
 - Federally mandated paid sick leave
 - Covers gig and contract workers
 - Exempts companies with more than 500 employees
 - Does not cover employees who have been furloughed or whose workplaces have been closed
 - Exemption for businesses with less than 50 employees where requirements who “jeopardize the viability of the business as a going concern.
 - Pandemic Unemployment Assistance
 - Expanded unemployment benefits to self-employed workers, people seeking part-time work, among others. Gig and independent workers qualify.
 - Patchwork of states’ unemployment benefits for gig and contract workers
- Access to utilities and broadband
 - Access to water, electricity, and gas
 - Some state and local government have issued orders against shut-offs for nonpayment. E.g. Michigan governor issued state order to restore water service.
 - Other companies have elected to temporarily suspend shut-offs of their own accord.
 - Access to broadband
 - As more businesses and schools have gone remote and online, access to reliable broadband and internet connections has become a more crucial service.
 - Some municipalities have responded by setting up public WiFi hotspots. Select companies have also stated that they would suspend service disruptions and terminations for nonpayment.
- Child Welfare
 - Children’s Bureau (CB) guidance⁴
 - March 27, 2020, the Children’s Bureau of the Office of the Administration for Children & Families issued guidance advising states to not delay in delivering services and providing judicial oversight in child welfare cases and cautioning against sweeping orders to delay court proceedings.

³ CARES Act: <https://www.congress.gov/bill/116th-congress/house-bill/748/text>

⁴ Children’s Bureau Associates Commissioner Jerry Milner Letter to Child Welfare Legal and Judicial Leaders, March 27, 2020: https://www.acf.hhs.gov/sites/default/files/cb/covid_19_childlegalandjudicial.pdf

- Recommendations include access to counsel for parents and children, access to free technological assistance, creative solutions for visits, and maintaining access to courts.
- Reporting
 - States have different mechanisms and requirements for reporting abuse and neglect.
 - Mandatory reporters like doctors, social workers, and teachers are required to report any signs of potential abuse or neglect.
- Reasonable efforts to keep families together
 - Before children can be separated from their families, child protective services must make reasonable efforts to keep children safely at home.
 - Secondary prevention measures to keep children safely at home include proactive monitoring, using technology at no or low cost for treatment and services, and helping families to access virtual arrangements.
 - Visitation or family time in the pandemic can be a challenge. The CB advises figuring out solutions to best manage, including meeting in person outdoors, having relatives facilitate contact instead of staff, and using virtual tools to meet online.
 - The CB has recognized and stressed the importance of maintaining family time and the detrimental impact the lack of it can have on children.
 - Lawyers and agencies for families have a vital role to play in ensuring family time.

Additional Resources:

Pistor, Katharina, "Law in the Time of COVID-19" (2020). *Books*. 240.
<https://scholarship.law.columbia.edu/books/240>