



WHEN EVERY SENTENCE IS A POSSIBLE DEATH SENTENCE: PUBLIC DEFENDERS SPEAK FROM THE FRONT LINES ABOUT COVID-19

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EXECUTIVE SUMMARY

Public defenders are tasked with the unenviable job of representing some of the most vulnerable people in society when they are accused of crimes. At the same time, public defenders receive little thanks for protecting the marginalized and instead face insurmountable odds with insufficient resources and limited public support. Premal Dharia, founder and director of the Defender Impact Initiative, said, “Public defenders are on the front lines of the devastation wrought by our system of mass criminalization and they are guided by an unwavering dedication to the very people being devastated.”

As the coronavirus ravages communities, courtrooms, jails, and prisons, public defenders are now indispensable to confronting the epidemic. While not medical professionals, public defenders are the front line, often the only line, between their clients and incarceration. Since jails and prisons have become hotbeds of COVID-19, with infection rates exponentially larger than the general population, public defenders have the added task of not just protecting their clients’ rights, but also, in many cases, their lives. Dan Engelberg, the chief of the trial division for the Orleans Parish Public Defender in Louisiana, aptly characterized the efforts of public defenders nationwide over the last few weeks as “heroic and tireless” as they strive to protect the health, humanity, and lives of their clients.

The Justice Collaborative Institute asked nearly 200 public defenders from across the country how the COVID-19 pandemic has impacted their work and personal lives. The responses are revealing. Nearly half, as of April 2, 2020, reported clients incarcerated in correctional facilities with at least one confirmed case of COVID-19. Over 80%

did not think their local court systems were doing enough to protect the health and safety of their clients. (See Appendix for results from the questionnaire). Their concerns went beyond the spread of disease. Public defenders expressed anger over the perceived lack of empathy for their clients’ health, frustration with the many officials who treat their clients’ rights as disposable, and mental distress over the impact the virus is having on their clients, their loved ones, and themselves.

Taken together, their responses form a powerful argument in support of policies, also popular among voters, to dramatically and urgently reduce jail and prison populations in response to COVID-19. The frontline accounts of public defenders reveal that far too many people in positions of authority continue to undermine public health and safety by processing far too many people daily into the criminal legal system, while at the same time failing to protect the millions of people behind bars. By doing so, they continue to place the lives of millions—people incarcerated at correctional facilities, people who go to work there, and people who live in surrounding communities—at grave risk.

Law enforcement, prosecutors, judges, and politicians should work with public defenders and urgently adopt policies to limit arrests, expand the use of cite and release, end cash bail, dismiss cases instead of needlessly dragging them out, and release as many people as possible from incarceration who do not reasonably pose a risk to public safety. Such steps can all be taken right now and are options public defenders across the country are advocating for, placing their personal health at risk in many cases, to do so.

BACKGROUND

“I’ve never handled capital cases but now I feel like every incarcerated client is potentially a capital case.”

For decades, public defenders have been underfunded, understaffed, and overworked in nearly every jurisdiction. In many states, public defenders have two to three times the recommended workload. Over 80% of criminal defendants in America rely on a public defender, making public defenders the main touchstone for a variety of social, economic, and personal struggles for many people. Jonathan Rapping, the founder of Gideon’s Promise—an organization that seeks to transform indigent defense—remarked that public defenders fight every day for their clients without the resources “necessary to do the job well.”

Now, public defenders are grappling with the dual threats facing their clients: a criminal legal system with little regard for individual circumstances and a life-threatening virus that has found fertile ground in that system. “[W]hile much of the country worried about toilet paper, soap, and hand sanitizer,” wrote Amalia Beckner, a public defender in Harris County, Texas, public defenders “braced for the crisis looming in the criminal justice system.” Jennifer Burrill, a public defender in Santa Fe, New Mexico, told a local reporter, “[W]e are the first responders” in the criminal legal system. Hours earlier, tests had confirmed she was positive for COVID-19.

Public defenders play such a vital role in combating the COVID-19 emergency because they are frequently the loudest, if not often only, voice for the millions of people arrested each year. This is especially true for the 2.3 million

people incarcerated in jails and prisons where a deadly virus like COVID-19 can spread like “wildfire.” These facilities are “so stuffed that it’s become a public-health danger,” wrote Zak Cheney-Rice in New York Magazine, and suffer from an utter lack of proper health care. Basic sanitary products such as hand sanitizer and soap are either forbidden or difficult to access. The social distancing recommended by the CDC as the best way to prevent the spread of COVID-19 is impossible in jails and prisons. Public defenders have taken up the mantle to fight for the life of every person incarcerated in particularly harmful environments.

COVID-19 HAS EXPOSED AMERICA’S UNJUST CRIMINAL LEGAL SYSTEM.

“It should be abundantly clear that the criminal justice system is not about making the community whole or rehabilitation. It’s about punishing people, specifically poor people.”

Public defenders were consistent in agreeing that the COVID-19 pandemic, indifference shown by many towards their clients, and overall lagging response confirmed their beliefs that the current criminal legal system is bloated, locking up too many people with no real benefit. For example, one public defender said that COVID-19 “magnifies all the inadequacies I have spent my career screaming about.” Many public defenders noted that large numbers of people were locked

up before the pandemic with no benefit to public safety. “That the jails released a significant percentage of their population in response to the COVID-19 crisis should make us all question why they were there in the first place,” noted one public defender.

Besides amplifying how far too many people are incarcerated, COVID-19 has also shined a light on the deplorable conditions inside jails and prisons. Prisons and jails are filthy. They lack basic sanitary products. Said one public defender, “[M]ost people don’t care about the conditions of our jails and prisons until something like this, that affects them and their community, happens.”

Many public defenders also described the weight of being responsible for their clients’ lives in a very real way. As one public defender said, the job has become “literally arguing with prosecutors and judges about how my clients’ lives matter.” And they hope that the judges, prosecutors, and law enforcement who actually are agreeing to arrest, prosecute, and incarcerate fewer people remember that they should continue to do the same when the epidemic ends. If we can have fewer people arrested and incarcerated during this epidemic, the same must hold true for when the epidemic ends. One public defender said she looks forward to “reminding judges that it has never been necessary” to lock up so many for so long.

THE PHYSICAL, EMOTIONAL, AND MENTAL TOLL OF BEING A PUBLIC DEFENDER DURING THE COVID-19 CRISIS.

“I feel a sense of hopelessness and powerlessness, as those who hold power are not taking this moment to show grace and compassion, but instead treat our clients and their rights as secondary and disposable.”

When asked, 85% of public defenders responded that they think their work has put them or their family at a heightened risk of developing COVID-19. Yet, they still do the job.

Most were concerned first for their clients and families. One public defender said, “I am just concerned about being exposed and then transmitting the virus to someone I care about. If something were to happen to that person, that would devastate me.” Many others expressed concerns that if they became infected, they would no longer be able to help their clients: “I am most concerned about contracting the virus and becoming very ill. If I am ill, I cannot do anything for my clients.”

For many public defenders, their commitment to the job and their clients precluded social distancing. As one public defender said, “I’ve had to push aside my own concerns about exposure to the virus.” They understood the risks involved. “It’s extremely stressful to know that I am the weak link in my loved one’s self-isolation.” A different public defender expressed a similar sentiment: “I’m worried about my clients,... but I’m also worried about my family. I’m the only person leaving my house and bringing germs back home.”

Besides physical risk, many public defenders were very aware of the mental toll that working during this emergency is having on them. One public defender said, “This job is stressful every day. Adding the worry about catching this [virus] and taking it home to my children is too much. I can’t sleep. I’m not taking care of myself. It’s all too much.”

THEIR CLIENTS LIVES ARE ON THE LINE EVERY DAY.

“I am worried my clients are going to contract the virus and die in jail and it will be on my shoulders because I couldn’t successfully convince the judge to release them.”

Public defender offices across the country, including in D.C., Maryland, Massachusetts, Rhode Island, Kentucky, Georgia, and Missouri, have urged courts, governors, mayors, and other leaders to immediately act to release large numbers of people from jails and prisons. Public defender offices everywhere recognize that no one should be subjected to a possible death sentence from COVID-19. Brendon Woods, the Public Defender for Alameda County, Calif, said, “Until we get a handle on this public health crisis, any jail sentence right now could be a death sentence.”

In addition to seeking systemic relief, public defenders described racing against time to protect their clients’ lives. Most reported spending a significant portion of their time either directly or indirectly dealing with COVID-19’s impact on the criminal legal system, with one public defender saying, “Most of my clients are not concerned about their cases anymore, they’re concerned about their lives.”

They find themselves confronting the growing realization that many judges, prosecutors, and law enforcement officers “do not worry about our clients or value their lives.” Rather, too many prosecutors and judges are prioritizing “business as usual over concern for the vulnerable.” This has added to the toll on their mental health. One public defender remarked, “[M]entally, it is very discouraging to deal with a system that does not have any empathy or compassion for our clients.” Another public defender said, “I’m just angry all of the time” at judges who ignore an order to

treat bond hearings as emergency procedures and prosecutors who reflexively oppose all motions to release.

A public defender admitted to crying alone “in my office before I even got to court” after a local prosecutor opposed every single motion filed to get clients released—even those for people with no criminal history or charged with low-level, non-violent offenses. Another public defender described sending the local district attorney’s office a list of all the people in the jail who had less than sixty days remaining on their sentences. The district attorney, however, responded that he did not think “a single one of those clients ‘deserves’ to be released. . . . Even typing this is making me tear up from anger, frustration, and grief.”

Some public defenders found the stress overwhelming. As one public defender said, “I’m in a vicious cycle of fear, loneliness, and suffocating guilt that I am not doing more.” Another said, “I have never worked this hard and I feel like I can never do enough.”

EFFECTIVE COMMUNICATION WITH CLIENTS IS NEAR IMPOSSIBLE.

“It makes it much harder to humanize our clients when they’re just a face on a video screen.”

Maintain social distancing. Shelter-in-place. Only essential work may continue. All of these orders, required to slow the spread of COVID-19, prevent public defenders from giving their clients adequate representation. Many courts have replaced in-person visits with video or phone

visits, which makes it hard to build trust. It has “proven incredibly difficult” to talk to new clients right now. A public defender said of trying to meet with a new client, “He doesn’t have anyone he trusts to talk to, and I couldn’t be there in person to talk with him and sit with him and see his face and let him see mine.” This public defender added, “I worry about [clients] every single day and feel as if there is nothing I can do.”

Some states and courts, including in [California](#), have responded to the pandemic by eliminating or reducing court proceedings. While that may appear to be sensible it also tosses aside the constitutional rights of people charged with a crime. But the impact on constitutional rights does not appear to have been factored into any decisions. Said one public defender, either dismiss cases and release people, or “honor their constitutional rights. You can’t have it both ways.” But government actions to suspend court proceedings, said one public defender, “strip us of the tools that we often use to assure our clients are not being held in custody longer than they should.” Clients and their families frequently look to their public defender to explain courtroom proceedings and give them a sense of what they might expect at each stage. In many instances, those answers are now unknown, leaving families frantic and distressed. One public defender expressed the sentiment of many by stating: “I have no answers” for clients and families who have questions about court dates, speedy trial rights, or about the dangers of COVID-19 within a facility.

The movement from in-person hearings to video has drastically changed the job of a public defender, and an overwhelming number said they feared courts, jails, and prisons might permanently resort to video hearings and visits after the pandemic ends. A public defender said, “We already struggle to get judges and prosecutors

to view our clients as human beings. I’m afraid that if we become complacent and comfortable with video court, that it may be overused in the future. That will seriously undermine our efforts to have our clients truly seen.”

Similarly, stay-at-home and shelter in place orders for the safety of the community also mean that case work cannot be pursued. “[E]verything is an obstacle and far from best practices,” one defender said. For example, public defenders conduct independent, immediate investigations critical to providing effective representation. With stay-at-home orders, this is impossible. A public defender noted, “I cannot send my investigator to speak to witnesses or pick up records. Instead, my days are now spent begging for legal calls.” The inability to investigate cases and do other necessary case work impacts not just ongoing cases, but also cases set for a future time when courts reopen. One public defender said, “Things are getting forgotten and balls are being dropped,” and many others were deeply concerned with what happens when courts return to regular business. “There will be a tidal wave of work pressure coming” after this crisis, but public defenders will have lost weeks—if not months—in their pursuit to provide effective legal representation.

CONCLUSION

The COVID-19 crisis has proven that public defenders are not just on the front lines of the criminal legal system; they are essential for a truly just nation. COVID-19 has shown the commitment and devotion public defenders across this country have to fighting for those who otherwise would not be heard or properly valued—people that are far too easy for others to neglect. A time like this exemplifies why their voices need to be heard by people in positions of power throughout this country. One public defender summed up the role of public defenders now and every day: “We are emergency responders, and we are here for members of our community even when other members of the criminal justice system have turned their backs on us and our clients.”

The takeaway from the consistent message from public defenders is that law enforcement, prosecutors, judges, and politicians must do more to protect both the rights and lives of people accused and convicted of crimes during this crisis. We must slow-down the number of new cases being brought into a system that right now cannot handle them. When public defenders, and all defense attorneys, cannot investigate new cases, cannot effectively meet with clients to establish a meaningful client-attorney relationship, cannot

have their clients brought to court for hearings, and cannot protect their clients’ rights to confrontation and a speedy, fair trial, any notion of justice is an impossibility. And for the people already behind bars, we must speed up efforts to lower the incarcerated populations of the thousands of jails and prisons in this country. But continuing with a “business as usual” approach to how we treat people accused and convicted of crimes will only transform the “public health crisis” from COVID-19 into a “humanitarian crisis.” Public defenders are showing up every day to do their part. They need the other actors in the system to join them.