



# Emergency Release of Prisoners Due to COVID-19

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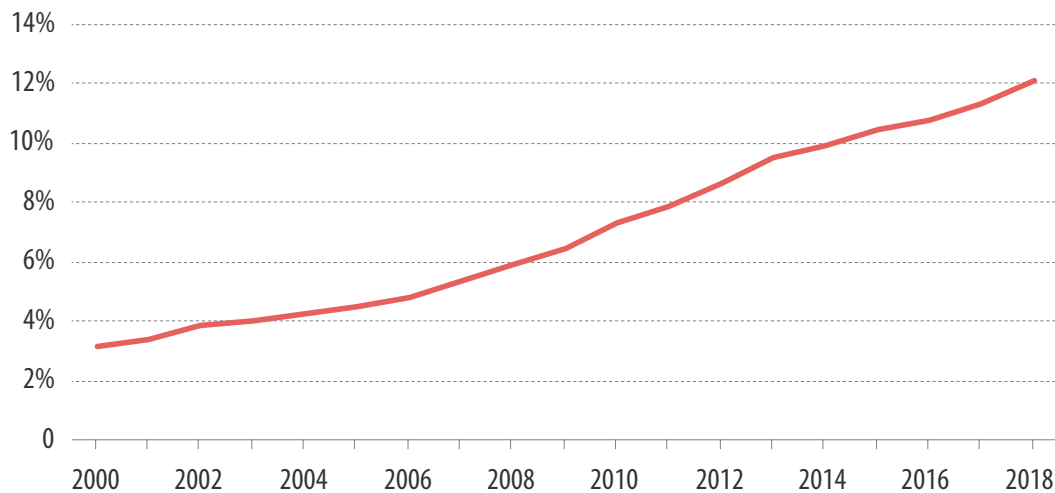
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## Introduction

The COVID-19 pandemic poses a unique challenge to state corrections authorities. Compared to the general population, incarcerated Americans suffer disproportionately from chronic disease, including pulmonary conditions such as tuberculosis (TB), tobacco use disorder, asthma, lung cancer, and pulmonary complications caused by the human immunodeficiency virus (HIV).<sup>1</sup> Prisoners have also aged significantly in recent years.<sup>2</sup> Together, these factors make prison populations especially vulnerable to COVID-19, which causes more severe illness among the elderly and those with existing lung conditions.<sup>3</sup> While inmate movement may be restricted, the flow of staff, visitors, volunteers, and new inmates increases risks of exposure to infectious diseases within correctional facilities.<sup>4</sup> Compounding these problems is the fact that correctional institutions are confined spaces by design; therefore, adherence to social distancing guidelines may be difficult at best, or impossible at worst.

### Percent of Wisconsin state correctional facilities inmates over age 54



Source: Wisconsin Department of Corrections

In Wisconsin, the Department of Corrections (DOC) has taken various steps to stop the disease from entering or spreading within state correctional facilities. But confirmed cases of COVID-19 among staff and inmates at several facilities have raised the question of whether the state should release certain high-risk individuals, either pretrial or

1. Elizabeth M. Viglianti, Theodore J. Iwashyna, and Tyler N. A. Winkelman, “[Mass Incarceration and Pulmonary Health: Guidance for Clinicians](#),” *Annals of the American Thoracic Society* 15 (April 2018), 409–412.

2. E. Ann Caron and William J. Sabol, “[Aging of the State Prison Population, 1993–2013](#)” U.S. Department of Justice–Bureau of Justice Statistics (May 2016).

3. U.S. Centers for Disease Control and Prevention, “[Groups at Higher Risk for Severe Illness](#),” accessed April 10, 2020, <http://www.cdc.gov>.

4. U.S. Centers for Disease Control and Prevention, “[Receipt of A\(H1N1\)pdm09 Vaccine by Prisons and Jails—United States, 2009–10 Influenza Season](#),” January 6, 2012.

postsentencing. Several other states—such as California and Ohio—have taken steps in this direction.<sup>5</sup> Additionally, U.S. Attorney General William Barr has directed the federal Bureau of Prisons to facilitate early release of inmates at federal facilities in Louisiana, Connecticut, and Ohio.<sup>6</sup>

This report contextualizes discussions about early release in response to the COVID-19 pandemic. It begins by outlining the actions taken in Wisconsin thus far to address the spread of the disease into and within state facilities. It then describes the authorities and duties of the governor, DOC, and individual facilities with respect to releasing prisoners to relieve overcrowding, respond to specific threats, or address the health and safety of individual inmates.

## Wisconsin DOC response to COVID-19

Individual states and the federal government have adopted some of the following general strategies in an effort to prevent COVID-19 from entering or spreading among prison populations:

- Reducing admissions
- Granting early release
- Limiting in-person contact with corrections staff for persons on parole or probation
- Suspending prison visits
- Suspending volunteer and education programs
- Suspending inmate work programs within and outside prisons
- Suspending medical co-pays for inmates experiencing symptoms of COVID-19
- Suspending all medical co-pays for inmates
- Incorporating enhanced cleaning and sanitation measures
- Distributing soap and alcohol-based sanitizers
- Facilitating alternatives to in-person visiting, such as waiving or reducing costs associated with phone calls and providing access to video calls
- Facilitating remote parole and probation hearings
- Implementing lockdowns

In some states, these measures have been implemented at the direction of the governor by executive or emergency order.<sup>7</sup> Elsewhere, they have been implemented by state corrections agencies under existing statutory and administrative authority. In Wisconsin,

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5. California is expediting release of prisoners due for discharge within the next 60 days. See Paige St. John, “[California to Release 3,500 Inmates Early as Coronavirus Spreads Inside Prisons](#),” *Los Angeles Times*, March 31, 2020. Ohio Governor Mike DeWine announced similar measures for prisoners due for discharge within the next 90 days. Ben Axelrod, “[Ohio Gov. Mike DeWine Approves Release of 105 Inmates Due to Coronavirus Concerns](#),” *WKYC Studios*, April 15, 2020.

6. Katie Benner, “[Barr Expands Early Release of Inmates at Prisons Seeing More Coronavirus Cases](#),” *New York Times*, April 3, 2020.

7. See, for example, [Executive Order N-36-20](#) (California); [Executive Order 2020-13](#) and [Executive Order 2020-21](#) (Illinois); [Executive Order 2020-06](#) and [Executive Order 2020-29](#) (Michigan); [Executive Order 2020-021](#) (New Mexico); and [Proclamation 20-35](#) (Washington).

DOC has taken action in response to COVID-19 both at the direction of the governor and under its existing statutory and administrative authority.

As of May 5, wardens at seven DOC institutions have suspended administrative rules pursuant to Wis. Admin. Code DOC § [306.22](#), which permits the warden of each DOC institution to suspend certain rules during an emergency that prevents the normal functioning of the institution.<sup>8</sup> These suspensions help limit inmate movement by requiring that meals be eaten in cells and limiting the number of inmate workers.<sup>9</sup> All but one suspension directly followed a confirmed case of COVID-19 among staff or inmates, as detailed below.<sup>10</sup>

- Waupun Correctional Institution (March 19)—Staff<sup>11</sup>
- Columbia Correctional Institution (March 21)—Staff<sup>12</sup>
- Milwaukee Secure Detention Facility (March 26)—Staff<sup>13</sup>
- Oshkosh Correctional Institution (April 6)—Inmates<sup>14</sup>
- Felmer O. Chaney Correctional Center (April 17)—Staff<sup>15</sup>
- Marshall E. Sherrer Correctional Center (April 17)—Inmates<sup>16</sup>
- Green Bay Correctional Institution (April 24)—Staff<sup>17</sup>

In addition to these rule suspensions, Governor Tony Evers issued Emergency Order 9 on March 20, directing DOC to implement a moratorium on admissions to state prisons and juvenile facilities under its operations.<sup>18</sup> A day earlier, DOC had announced to inmates that it would no longer be scheduling transfers into or out of county jails.<sup>19</sup>

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8. Under Wis. Admin. Code DOC § [302.04](#), the secretary of corrections may also suspend certain administrative rules during an emergency that prevents the normal functioning of the institution. Such emergencies are not tied to a declared state of emergency under Wis. Stat. § [323.12 \(4\)](#).

9. The announcement of rule suspensions at Waupun is the only announcement of such kind to enumerate the effects of rule suspensions. Warden Brian Foster, Waupun Correctional Institution, "[WCI Limited Inmate Movement](#)," March 19, 2020, <http://www.doc.wi.gov>.

10. Please note that DOC relies on staff to self-report positive test results for COVID-19.

11. Warden Brian Foster, *WCI Limited Inmate Movement*.

12. Warden Sue Novak, Columbia Correctional Institution, "[Suspension of Administrative Rules](#)," March 21, 2020, <http://www.doc.wi.gov>.

13. Warden Steven R. Johnson, Milwaukee Secure Detention Facility, "[Suspension of Administrative Rules](#)," March 26, 2020, <http://www.doc.wi.gov>.

14. Wisconsin Department of Corrections, "[COVID-19 \(Coronavirus\) Information Home](#)," <http://www.doc.wi.gov>; Warden Cathy A. Jess, Oshkosh Correctional Institution, "[Suspension of Administrative Rules](#)," April 6, 2020, <http://www.doc.wi.gov>.

15. Warden Quala Champagne, Wisconsin Correctional Center System, "[Suspension of Administrative Rules \[at FCCC\]](#)," April 17, 2020, <http://www.doc.wi.gov>.

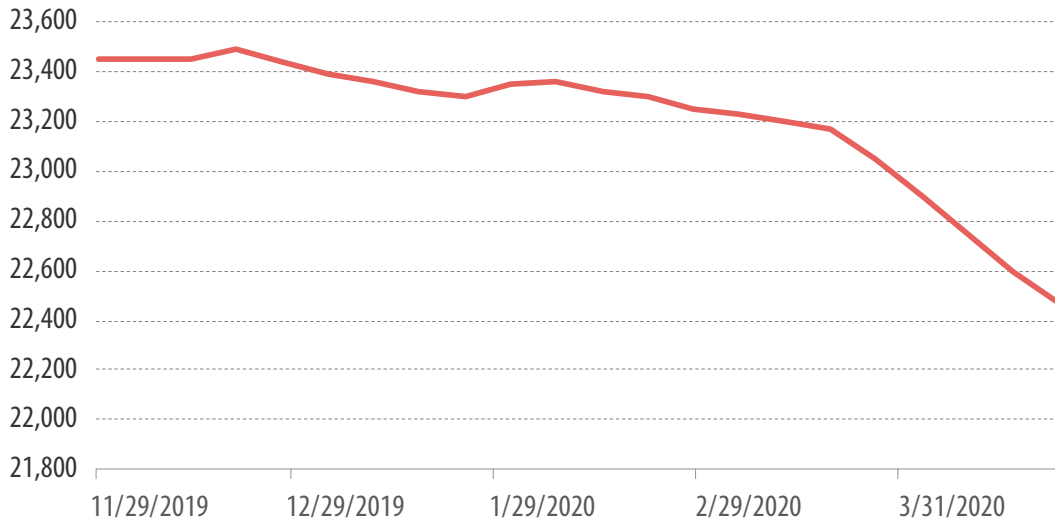
16. Warden Quala Champagne, Wisconsin Correctional Center System, "[Suspension of Administrative Rules \[at MSCC\]](#)," April 17, 2020, <http://www.doc.wi.gov>.

17. Warden Dylon Radtke, Green Bay Correctional Institution, "[Suspension of Administrative Rules](#)," April 24, 2020, <http://www.doc.wi.gov>.

18. The order was issued under the authority of Wis. Stat. § [323.12 \(4\) \(d\)](#), which authorizes the governor to "suspend the provisions of any administrative rule if the strict compliance with that rule would prevent, hinder, or delay necessary actions to respond to the disaster," and Wis. Stat. § [323.12 \(4\) \(b\)](#), under which the governor may "issue such orders as he or she deems necessary for the security of persons and property." Under the order, the secretary of corrections may order the ban on admissions lifted, in full or in part, and may also rescind a prior order to lift the ban, in full or in part.

19. Wisconsin Department of Corrections, "[Attention All DOC State Inmates](#)" (notice), March 19, 2020, <http://www.doc.wi.gov>.

## Wisconsin state correctional facilities inmate population



Source: Wisconsin Department of Corrections

Following issuance of the order, DOC specified that the moratorium would be made effective Monday, March 23, with some exceptions for “essential transfers.”<sup>20</sup>

Apart from rule suspensions and its response to [Emergency Order 9](#), DOC has taken various actions to prevent the spread of COVID-19. Above all, DOC has limited movement into its facilities.<sup>21</sup> On March 12, DOC prohibited entry to any persons who are experiencing symptoms or who have been in contact in the last 14 days with persons experiencing symptoms of COVID-19 or who in the last 14 days have been to certain countries with high levels of COVID-19 exposure.<sup>22</sup> The following day, DOC announced it would suspend visits entirely, excluding professional visits from lawyers and social workers.<sup>23</sup> In light of these restrictions, DOC made available two free 15-minute phone calls to each inmate per week and raised canteen spending limits.<sup>24</sup>

Additionally, DOC has taken steps to prevent or slow the spread of COVID-19 with-

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wi.gov.

20. Wisconsin Department of Corrections, “[Suspension of Admissions to the State Prisons and Juvenile Facilities Operated by the Department of Corrections](#),” March 21, 2020, <http://www.doc.wi.gov>.

21. Corrections authorities in all 50 states have limited visits, although a majority of states still allow legal visits. See “[Coronavirus Tracker: How Justice Systems Are Responding in Each State](#),” The Marshall Project, last updated April 14, 2020, <http://www.themarshallproject.org>.

22. Wisconsin Department of Corrections, “[Health Alert: Notice to All Visitors](#)” (advisory), March 12, 2020, <http://www.doc.wi.gov>.

23. Wisconsin Department of Corrections, “[Suspension of All Visiting at Department of Corrections Institutions](#)” (press release), March 13, 2020, <http://www.doc.wi.gov>. See also Hannah Haynes, “[Wisconsin Prisons Limiting Visits in Response to COVID-19](#),” *WPR*, March 16, 2020.

24. Free phone calls began on March 16. Memo from Makda Fessahaye to DAI Adults in Custody, “[RE: Phone Calls during Temporary Suspension of Visits](#)” and “[Llamadas Telefónicas durante la Suspensión Temporal de Visitas](#),” Wisconsin Department of Corrections, March 19, 2020, <http://www.doc.wi.gov>; Memo from Makda Fessahaye to DAI Staff and Adults in Custody, “[Update to DAI Inmate Canteen Policy](#)” and “[Actualización de la Política de la Tienda](#),” Wisconsin Department of Corrections, March 19, 2020, <http://www.doc.wi.gov>.

in its facilities. Newly implemented sanitation and hygiene protocols include routine cleaning of “high touch surfaces” and distribution of hand soap. The department has also encouraged inmates to seek medical care and undergo testing for the virus. On March 12, the department announced that it would suspend certain medical co-pays to encourage inmates experiencing symptoms of COVID-19 to alert staff and seek medical attention.<sup>25</sup> Under testing criteria announced on March 27, certain individuals receive priority for testing, including those with respiratory conditions and residents of long-term care facilities.<sup>26</sup> Any staff member or inmate who tests positive for COVID-19 must quarantine for 14 days, during which time DOC identifies any exposed inmates or staff and directs them to quarantine for 14 days as well.<sup>27</sup>

Finally, DOC has taken various release-related measures, announced by Secretary of Corrections Kevin Carr in a letter to family and friends of incarcerated individuals on April 2. Those measures include releasing supervision holds on nonviolent misdemeanants; releasing certain nonviolent offenders who qualify for earned release to community supervision; and releasing persons involved in the Alternative for Revocation program at the Milwaukee Secure Detention Facility.<sup>28</sup>

Generally, actions taken by DOC thus far conform to actions taken by other corrections authorities in the Midwest, which have suspended visiting, facilitated alternatives to in-person visits, implemented new cleaning and hygiene protocols, waived certain medical co-pays, and distributed hand sanitizer and soap to inmates and staff.<sup>29</sup>

## Release of prisoners in Wisconsin

In some states, governors and courts have issued orders to release certain prisoners to address the threat of the COVID-19 pandemic. Governor Evers has not taken such action to date. However, state legal authority and case law precedent point to some avenues that

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25. Wisconsin Department of Corrections, “[Health Alert: Notice to Adults in Custody](#)” (advisory), March 12, 2020, <http://www.doc.wi.gov>.

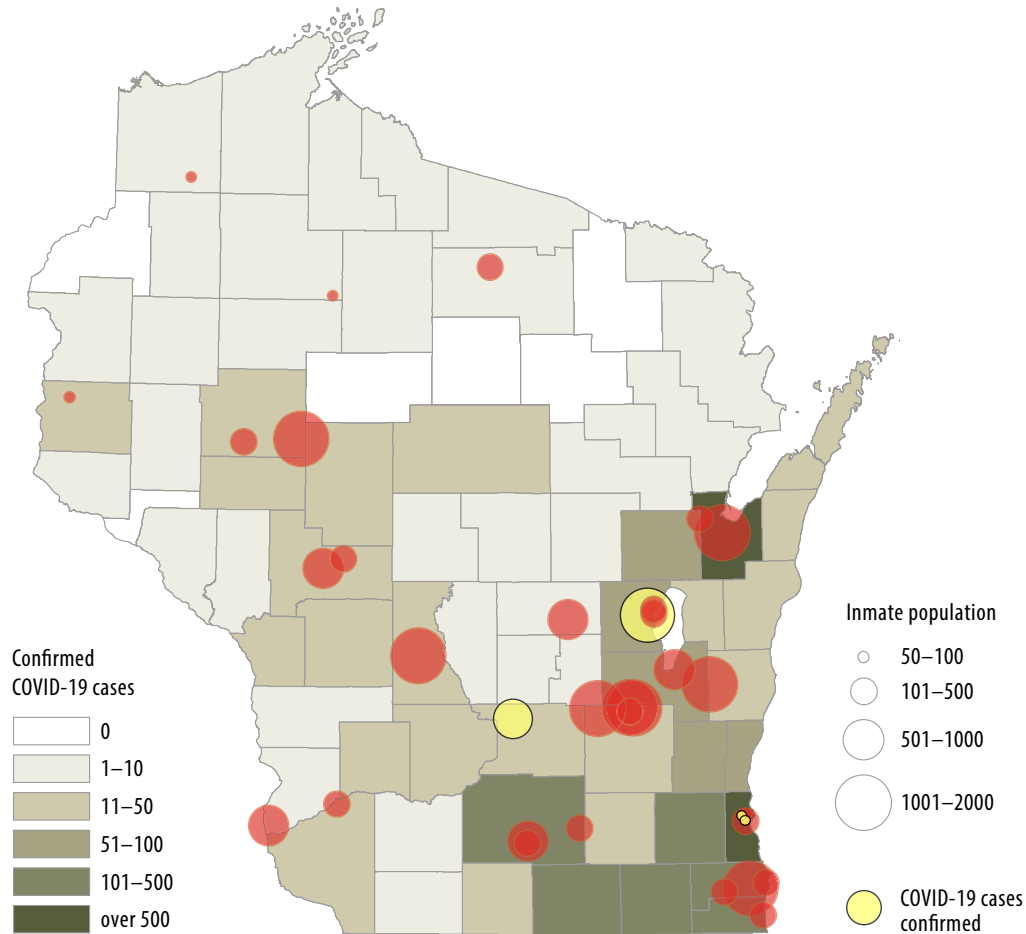
26. Wisconsin Department of Corrections, “[COVID-19 \(Coronavirus\) Announcements: DHS Updates Priority Testing Criteria](#),” March 27, 2020, <http://www.doc.wi.gov>. Although it began tracking testing earlier, DOC began publicly posting information about testing at each facility on April 6. Wisconsin Department of Corrections, “[COVID-19 \(Coronavirus\): Persons in our Care Testing Dashboard](#),” accessed April 6, 2020, <http://www.doc.wi.gov>.

27. Wisconsin Department of Corrections, “[Frequently Asked Questions](#),” n.d., <http://www.doc.wi.gov>.

28. The letter specified that a total of 1,148 nonviolent misdemeanants were released, an unspecified number of persons who qualify for earned release were released, and 65 participants in Alternative for Revocation would be released that day. Secretary Kevin Carr, “[COVID-19 Response](#),” April 2, 2020, <http://www.doc.wi.gov>.

29. See, for example, the Indiana Department of Correction response plan, which waives co-pays for inmates with flu-like symptoms and implements new hygiene protocols. Indiana Department of Correction, “[Preparedness and Response Plan](#),” March 3, 2020. The Iowa Department of Corrections suspended volunteer activities, visiting, and off-site work, granted inmates free offender mail and phone communications, and implemented new screening measures for incoming staff. Iowa Legislative Services Agency, “[Department of Corrections—COVID-19 Response: March 2020](#),” March 20, 2020, <http://doc.iowa.gov/>; Iowa Department of Corrections, “[Iowa Corrections COVID-19 Information](#),” <http://www.doc.iowa.gov>. The Minnesota Department of Corrections suspended in-person visits, distributed extra bars of soap, and waved all medical co-pays, regardless of whether inmates showed symptoms of COVID-19. Minnesota Department of Corrections, “[Coronavirus and Visiting](#),” March 9, 2020, <http://www.mn.gov/doc/>; Deputy Commissioner Michelle Smith, Minnesota Department of Corrections, “[Memo to All Incarcerated Men and Women](#),” March 11, 2020, <http://www.mn.gov/doc/>.

## Wisconsin Department of Corrections facilities, April 30, 2020



Notes: Data from Wisconsin Department of Corrections and Wisconsin Department of Health, accessed on April 30, 2020.

may allow the governor, DOC, or the courts to require the release of certain prisoners or the implementation of additional precautionary measures to ensure the health and safety of prisoners in Wisconsin correctional institutions. The following sections discuss the various authorities under which prisoners could be released from state facilities.

### Gubernatorial authority

The governor's authority to release inmates from state correctional facilities derives from both the Wisconsin Constitution and the Wisconsin Statutes.

**Constitutional powers of clemency.** Article V, [section 6](#), of the Wisconsin Constitution provides the governor with the power to grant clemency to individuals who have been convicted of a crime except in cases of treason or impeachment, subject to certain statutory limitations. This clemency can take one of three forms: a reprieve, a commutation, or a pardon. A reprieve is a temporary delay of punishment, in which case a pris-



oner could be released and punishment delayed for some period before being reinstated. A commutation is a reduction in punishment and could take the form of shortening a prison term and releasing an offender early. Finally, a pardon is an official act of forgiveness for a crime after the sentence has been completed that restores certain civil rights, but does not erase the record of the crime.

The governor's use of this authority is wholly discretionary. For example, Governor Scott Walker did not grant clemency in any form during his two terms as governor.<sup>30</sup> Governor Evers has reinstated a pardons board to handle clemency applications. The governor has set criteria for obtaining clemency such that only pardons are available; reprieves and commutations are not currently included in the administration's application criteria. Rather, a person must have completed his or her sentence at least five years before applying. Under the current policy of the Evers administration, any clemency application by a person who has not completed his or her sentence will be denied.<sup>31</sup> Thus, while the Wisconsin Constitution provides that the governor may use his or her clemency power to shorten prison terms and release inmates, the current administration's policy suggests that this is unlikely.

**Statutory authority.** Under Wis. Stat. § [323.12 \(4\)](#), during an emergency, the governor may “[i]ssue such orders as he or she deems necessary for the security of persons and property” and “[s]uspend the provisions of any administrative rule if the strict compliance with that rule would prevent, hinder, or delay necessary actions to respond to the disaster.” This statutory provision may allow the governor to use other means to release prisoners, which will be discussed below.

## DOC authority

The authority of DOC to release prisoners varies according to several factors relating to the status of the prisoner in question: (1) the type of sentence being served; (2) whether the crime was committed before or after December 31, 1999; (3) eligibility for compassionate release; (4) eligibility for temporary emergency removal; and (5) status as a juvenile.

**Prisoners serving bifurcated sentences.** A person sentenced for a crime committed on or after December 31, 1999, other than a crime that is punishable by life sentence, receives a bifurcated sentence with a term of incarceration followed by a period of extended supervision.<sup>32</sup> With very few exceptions, DOC lacks the authority to release current inmates who have not served the entire terms of the incarceration portions of their

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30. Scott Bauer, “[Wisconsin Gov. Tony Evers Plans to Issue the State's First Pardons in Nine Years](#),” *Milwaukee Journal Sentinel*, October 6, 2019.

31. Wisconsin Governor Tony Evers, “[Pardon Information](#),” last accessed April 10, 2020, <http://www.evers.wi.gov>.

32. Life sentences are not bifurcated sentences. There are two types of life sentences: life sentences with a date of eligibility for release to extended supervision, which is set by the sentencing court, and life sentences without the possibility of release to extended supervision. None of the early release programs discussed in this section apply to life sentences.

bifurcated sentences.<sup>33</sup> The sentencing court may adjust a bifurcated sentence, but only under statutorily specified circumstances.<sup>34</sup>

**Prisoners subject to parole.** Within DOC, the Parole Commission paroles—or releases from prison—individuals serving a sentence for a felony committed before December 31, 1999. Under the parole model, an inmate may apply for release to parole after serving at least 25 percent of the sentence imposed for the offense or six months, whichever is greater.<sup>35</sup> Absent an application, an inmate is presumed to be eligible for mandatory release to parole after serving two-thirds of the sentence imposed.<sup>36</sup> Either way, the Parole Commission must review the application or the presumptive mandatory release and determine whether to parole or deny parole.

Most of the criteria for parole are set by administrative rule; however, the statutes provide that no prisoner may be paroled “until the parole commission is satisfied that the prisoner has adequate plans for suitable employment or to otherwise sustain himself or herself.”<sup>37</sup> Neither the rules nor statutes address an unsafe condition within the state prisons as a reason for releasing an inmate to parole.<sup>38</sup> Additionally, extensive procedural requirements related to considering and granting parole make it unlikely that DOC would use traditional parole to release inmates during the COVID-19 public health emergency.<sup>39</sup>

However, the statutes outline a separate parole system intended to relieve crowding.<sup>40</sup> Under Wis. Stat. § [304.02 \(1\)](#), DOC must “use a special action parole program to relieve crowding in state prisons by releasing certain prisoners to parole supervision,” using a procedure other than the traditional parole procedure. Wis. Stat. § [304.02 \(2\)](#) requires DOC to promulgate rules for the program, including eligibility criteria and procedures for determining whether to grant release to parole supervision. Notwithstanding the criteria to be established by rule, a person may be eligible for release to parole under this program if the prisoner population meets or exceeds the statewide population limit promulgated by rule under Wis. Stat. § [301.055](#), the person is within 18 months of mandatory release, and the person meets other statutory eligibility requirements.<sup>41</sup>

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33. DOC has the authority to release a very narrow subset of the prison population that falls under Wis. Stat. § [302.113 \(9h\)](#) (2009 Stats.).

34. For example, the programs under Wis. Stat. §§ [302.043](#), [302.045](#) and [302.05](#) allow qualifying prisoners to complete specific programs to qualify for a reduction in the term of incarceration portion of a bifurcated sentence. These programs require DOC to certify to the sentencing court that the prisoner has completed the applicable requirements, after which the sentencing court adjusts the bifurcated sentence to include less time in incarceration and more time on extended supervision, but the court generally does not have the authority to reduce the overall sentence. Other sentence modifications are authorized in the statutes by petition to the sentencing court under Wis. Stat. § [973.195](#).

35. Wis. Stat. § [304.06 \(1\) \(b\)](#).

36. Wis. Stat. § [302.11 \(1\)](#).

37. Wis. Stat. § [304.06 \(2\)](#).

38. Wis. Admin. Code PAC § [1.06 \(16\) \(a\)](#) to [\(h\)](#).

39. Those procedural requirements include notifying the sentencing court and the crime victim and allowing input from those entities. Wis. Stat. § [304.06](#).

40. Wis. Stat. § [304.02](#).

41. Wis. Stat. § [304.02 \(3\)](#). This limit is promulgated by rule, per Wis. Stat. § [301.055](#).

The department's rules implementing the special action parole release program<sup>42</sup> outline detailed criteria for eligibility, including that the person be within 18 months of mandatory release, that the person does not have a history of assaultive behavior, that the person has an approved parole plan in place, and that the person agrees to intensive supervision and any other special conditions the parole agent or secretary may impose.<sup>43</sup> The rules also provide a second, shorter list of criteria that mirrors the statutory eligibility criteria for release if the prisoner population meets or exceeds the statewide population limit.<sup>44</sup> The rules go on to provide a procedure for referral for special action parole release and review by the secretary of corrections.<sup>45</sup> When reviewing the application for special action parole release, the secretary may consider population pressures and the risk to public safety,<sup>46</sup> which could be relevant during COVID-19.

Notably, the eligibility criteria do not address health concerns as a reason for release. As such, the special action parole release program is unlikely to be used in its current form to release prisoners for reasons specifically related to COVID-19. While the statute and rules do address prison overcrowding in terms of the general prisoner population limits, the current pandemic has reshaped what "overcrowding" could mean. To use this program for COVID-19 prisoner releases, it is possible that the governor could use his authority under Wis. Stat. § [323.12 \(4\)](#) to suspend the current administrative rules to allow DOC to use a special action parole release program with new eligibility criteria that address the public health emergency.

**Prisoners eligible for compassionate release.** Wisconsin Statutes allow for compassionate release of a prisoner who is serving a bifurcated sentence for a crime that is a Class C felony or lower.<sup>47</sup> Under the Compassionate Release Program, if a prisoner is of an advanced age or has an extraordinary health condition, meaning infirmity, disability, or a need for medical treatment or services not available within a correctional institution, the prisoner may petition the program review committee at that correctional institution for early release. If the program review committee recommends release, DOC petitions the sentencing court for a sentence modification for that individual, and the sentencing court may modify the individual's sentence if, after a hearing, the court finds that such a modification would serve the public interest. If such a modification is made, the inmate may be released to extended supervision. Under this program, a prisoner's sentence is adjusted by increasing the extended supervision so that the total length of the bifurcated sentence remains the same.

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42. Wis. Admin. Code § DOC [302.34](#).

43. Wis. Admin. Code § DOC [302.34 \(2\) \(f\), \(h\), \(j\), and \(L\)](#).

44. Wis. Admin. Code § DOC [302.34 \(3\)](#).

45. Wis. Admin. Code § DOC [302.34 \(5\)](#) and [\(6\)](#).

46. Wis. Admin. Code § DOC [302.34 \(6\) \(e\)](#) and [\(f\)](#).

47. Wis. Stat. § [302.113 \(9g\)](#).

**Prisoners eligible for temporary emergency release.** Wisconsin Statutes provide under § [304.115](#) that “[w]hen an emergency exists which in the opinion of the secretary [of corrections] makes it advisable, the secretary may permit the temporary removal of a convicted person for such period and upon such conditions as the secretary determines.”<sup>48</sup> The DOC administrative rules that implement the emergency release provision also implement a provision relating to off-site rehabilitative and educational activities.<sup>49</sup> The rules that appear to relate to temporary emergency release provide that acceptable purposes of temporary release include permitting an inmate in a minimum security facility to visit a seriously ill close family member or attend a funeral,<sup>50</sup> or to “permit the temporary removal of an inmate [of any security level] from an institution when an emergency exists.”<sup>51</sup> No further detail is provided on what kind of emergency would allow for such release. The rules do not delineate the release of large numbers of inmates under this provision at one time, but rather the release of individuals on a case-by-case basis, to be determined by the warden of the prison at which an individual in need of emergency release is housed. An inmate released under Wis. Stat. § 304.115 is temporarily released for a finite period of time to the supervision of staff or an approved sponsor,<sup>52</sup> and remains in the legal custody of DOC.<sup>53</sup>

**Juveniles.** Similar to bifurcated sentences in the adult criminal system, juvenile correctional placements under Wis. Stat. ch. 938 require two components: a disposition placing the juvenile with DOC in a Type I juvenile correctional facility,<sup>54</sup> and a disposition designating DOC to provide community supervision or the county department to provide aftercare supervision upon the release of the juvenile. However, unlike a bifurcated sentence, DOC has the authority to make changes to a correctional placement, such as the length of time during which a juvenile remains in secured custody or on aftercare supervision. Indeed, DOC may take several actions relating to the placement of the juvenile that do not require a court order, as described below.

First, DOC has the authority to transfer or discharge juveniles under its supervision. When a juvenile is assigned to DOC supervision under a correctional placement, DOC has the authority to release the juvenile to community supervision or aftercare supervision, either immediately or after a period of detention in secured custody. This change in placement may take place without a hearing.<sup>55</sup>

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48. Wis. Stat. § [304.115](#).

49. Wis. Stat. § [302.15](#).

50. Wis. Admin. Code DOC § [325.01 \(1\) \(b\)](#).

51. Wis. Admin. Code DOC § [325.01 \(1\) \(c\)](#).

52. Wis. Admin. Code DOC § [325.04](#).

53. Wis. Admin. Code DOC § [325.05](#).

54. Pending changes to the law due to [2017 Wisconsin Act 185](#) will affect supervision of juveniles in a correctional placement, but as of the writing of this publication, those changes have not taken effect. Under Wis. Stat. § [938.34 \(4m\)](#) or [\(4h\)](#), a juvenile may be placed in a Type I juvenile correctional facility under the supervision of DOC, with community supervision or aftercare provided under Wis. Stat. § [938.34 \(4n\)](#) upon release. This publication covers only juveniles who are placed with DOC, and does not cover the authority of county departments to release juveniles from other types of secured facilities.

55. Wis. Stat. § [938.357 \(4\) \(am\)](#).

Second, DOC may make a change in placement on an emergency basis without a hearing.<sup>56</sup> If DOC makes such a change, it must notify the juvenile, as well as various persons enumerated in Wis. Stat. § [938.357 \(1\) \(am\) 1.](#), any of whom may request a hearing on the change of placement and may contest the new placement.<sup>57</sup> Under an emergency change in placement, DOC may place the juvenile in a licensed public or private shelter care facility as a transitional placement for not more than 20 days or in any placement authorized under Wis. Stat. § [938.34 \(3\).](#)

Finally, DOC must discharge a juvenile from supervision “as soon as that department determines that there is a reasonable probability that departmental supervision is no longer necessary for the rehabilitation and treatment of the juvenile or for the protection of the public.”<sup>58</sup>

Beyond these authorities, DOC is charged with the statutory duty to ensure the safety of all juveniles placed under its supervision and provide them with medical care.<sup>59</sup> Accordingly, if juveniles under its supervision face a significant threat because of the spread of infectious disease, DOC has a duty to address the situation. Failure to provide adequate medical care or safety measures, depending on the severity, may constitute a violation of the Eighth Amendment to the U.S. Constitution, as discussed below.

If DOC determines that reducing populations at Type I juvenile correctional facilities is necessary to protect the health and safety of juveniles and staff, it could use the discretionary authorities described above to release juveniles to community supervision or aftercare, order changes in placement, or discharge certain qualifying juveniles altogether.

## Court authority and constitutional considerations

Courts have the authority to order a reduction in prisoner populations or other remedies if overcrowding creates conditions that infringe upon the prisoners’ rights under federal or state law. Notably, a failure to provide basic safety and medical care in prison may constitute a violation of the Eighth Amendment to the U.S. Constitution and article I, [section 6](#), of the Wisconsin Constitution, which guarantee against the infliction of cruel and unusual punishments..

The Eighth Amendment requires prison officials to provide humane conditions of confinement, including adequate food, clothing, shelter, and medical care, and reason-

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56. Wis. Stat. § [938.357 \(2\).](#)

57. Those individuals include the juvenile’s counsel or guardian ad litem, the parent, guardian, or legal custodian of the juvenile, and any foster parent or other physical custodian of the juvenile described in Wis. Stat. § [48.62 \(2\).](#)

58. Wis. Stat. § [938.53.](#)

59. Under Wis. Stat. § [938.505 \(1\)](#), DOC’s rights and duties are described as “the right and duty to protect, train, discipline, treat, and confine the juvenile and to provide food, shelter, legal services, education, and ordinary medical and dental care for the juvenile, subject to the rights, duties, and responsibilities of the guardian of the juvenile and subject to any residual parental rights and responsibilities and the provisions of any court order.”

able measures to guarantee the safety of the inmates.<sup>60</sup> Where overcrowding creates conditions that make these basic conditions impossible, the court can require a reduction in prison population as a remedy.<sup>61</sup>

However, the standard for finding that lack of adequate medical care for a prisoner violates the Eighth Amendment is high. The court must find that the prisoner is incarcerated under conditions posing a substantial risk of serious harm, and that prison officials have acted with “deliberate indifference” to inmate health or safety.<sup>62</sup>

While there is limited case law precedent to draw from pertaining to the standards of the Eighth Amendment in the context of a global pandemic, there was some judicial consideration of these issues during the swine flu outbreaks that affected prisons in 2009. Cases regarding prisoner exposure to swine flu indicate that courts may be reluctant to find an Eighth Amendment violation where prison officials are taking precautions to address the threat of infectious disease.<sup>63</sup> However, such a determination is fact-specific, so these cases are not necessarily determinative.

Indeed, lawsuits are being filed across the country to remedy the specific problems posed by the COVID-19 pandemic, and while some courts, including the Wisconsin Supreme Court,<sup>64</sup> have summarily denied petitions to release prisoners and take additional precautions to prevent the spread of COVID-19 in prisons, other courts have ordered these additional precautions.<sup>65</sup>

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60. *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 1976 (1994).

61. In *Brown v. Plata*, 563 U.S. 493 (2011), the court determined that overcrowding in California prisons prevented prisoners from having access to adequate medical care, an unconstitutional violation of the Eighth Amendment. The court ordered a reduction in prison populations as the remedy.

62. *Farmer v. Brennan*, 511 U.S. 825.

63. See, e.g., *Ayala v. NYC Dep’t of Corr.*, 2011 U.S. Dist. LEXIS 50131, at \*5 (S.D.N.Y. May 9, 2011), (Defendants sanitized the “contaminated facility” following a swine flu outbreak and took care to ensure the plaintiff was not placed in a facility prior to its sanitization. Absent any indication that the defendants ignored willfully the swine flu outbreak in their facilities, the plaintiff’s infection, though unfortunate, is insufficient to support an Eighth Amendment claim.); *Jackson v. Rikers Island Facility*, 2011 U.S. Dist. LEXIS 84842 (S.D.N.Y. Aug. 2, 2011), (Mere exposure to swine flu does not rise to the level of seriousness that would amount to a constitutional violation.).

64. On April 10, 2020, the American Civil Liberties Union (ACLU) of Wisconsin filed a petition asking the Wisconsin Supreme Court to order Governor Evers, Secretary of Corrections Kevin Carr, and Parole Commissioner John Tate II to release certain prisoners to mitigate the threat of COVID-19 at state correctional facilities. The petition invoked constitutional prohibitions on cruel and unusual punishments, the court’s power to enforce these prohibitions per *Brown v. Plata*, the secretary of corrections’ statutory authority to temporarily remove prisoners, and the governor’s constitutional clemency powers. The petition was denied on April 24. Emergency Petition and Memorandum to Supreme Court to Take Jurisdiction of an Original Action, WACDL v. Tony Evers, Wis. Sup. Ct. 20-0687. Ed Treleven, “[State Supreme Court Won’t Hear ACLU Lawsuit on COVID-19 in Prisons](#),” *Wisconsin State Journal*, April 25, 2020.

65. Such petitions have been denied in Colorado and Louisiana. Ryan Osborne, “[Colorado Supreme Court Denies Petition for More Action to Limit COVID-19 in Jails](#),” *Denver Channel 7 News*, April 6, 2020; Nicholas Chrastil, “[Judge Dismisses Suit Seeking Releases from Federal Prison with COVID-19 Outbreak](#),” *The Lens*, April 23, 2020. A Massachusetts court has ordered that eligible individuals who are being held pretrial are entitled to a rebuttable presumption in favor of release. See *Committee for Public Counsel Services vs. Chief Justice of the Trial Court*, March 31–April 3, 2020. An Ohio court took one step further, concluding that one prison’s response to a COVID-19 outbreak satisfied the “deliberate indifference” test for finding an Eighth Amendment violation and ordered the prison officials to identify which prisoners of the high-risk subclass should be prioritized for transfer or release from the prison. See Walter Pavlo, “[Federal Judge in Ohio Says FCI Elkton Meets ‘Cruel and Unusual Punishment’ Standard](#),” *Forbes*, April 23, 2020; *Wilson, et al. v. Williams et al.*, No. 20-cv-00794 (N. D. Ohio, order filed April 22, 2020). A Texas court held that the conditions at a state prison would not likely meet the “deliberate indifference” test: *Valentine v. Collier*, No. 20-20207, 2020 U.S. App. LEXIS 12941, (5th Cir. Apr. 22, 2020).

## Conclusion

The governor, DOC, and the courts all have some authority to order the change of prison operating procedures or to release certain inmates as part of a COVID-19 response strategy. The severity of the outbreak and resultant changes in prison conditions will all likely influence whether a large population of prison inmates will be released early to deal with the public health emergency. Alarming rates of COVID-19 at certain county jails may also inform decision-making at the state level by illustrating how quickly the virus spreads in high-turnover facilities with dormitory-style housing.<sup>66</sup> These considerations will likely continue long after the conclusion of the current public health emergency. Over the long term, policymakers must weigh whether and how to implement broader structural changes to decrease the risk of exposure to infectious diseases within correctional facilities. ■

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66. By late April, the Milwaukee County House of Correction reported more than 100 confirmed cases of COVID-19 among inmates. “[COVID-19 Dashboard for Individuals in County Care](http://www.county.milwaukee.gov),” Milwaukee County, accessed April 29, 2020, <http://www.county.milwaukee.gov>.