



Pandemic a 'natural experiment' for reducing incarceration, prosecutors say

Prosecutors on ASU panel are wary of inundating court system after crisis eases.

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Virtual court proceedings could be here to stay, experts tell ASU panel

America's criminal justice system was already in the process of reforming, but the COVID-19 pandemic could make further progress uncertain, especially if crime jumps when the shutdown ends, according to a panel of prosecutors who spoke at an Arizona State University event on May 6.

Court systems across the country have been working virtually, and that's one change that might stay, experts said during the "Prosecuting During the Pandemic" event. The online panel discussion was sponsored by the **School of Criminology and Criminal Justice** (<https://ccj.asu.edu/>), the **Morrison Institute for Public Policy** (<https://morrisoninstitute.asu.edu/>), both at ASU, and the Prosecutors' Center for Excellence.

"We're in the middle of a natural experiment," said Kristine Hamann, executive director of the Prosecutors' Center for Excellence. She said that prosecutors around the country were already rethinking booking and incarceration.

"It was driven by the desire to be fair. It was funding implications, resource implications, racial disparities, all reasons to look at whether low-level offenses were worthy of their time and efforts," she said.

"This pandemic is speeding that analysis."

Watch the full panel on Vimeo (<https://vimeo.com/morrisoninstitute/prosecutinginapandemic>)

Among the topics covered by the panel discussion:

The switch to technology was rapid

Allister Adel, Maricopa County attorney: There were two major challenges. The first was getting our employees to be able to telework. We have about 70% of our workforce teleworking now. The other challenge is that our court stopped using grand juries, which hopefully will resume in a couple of weeks with social distancing, but we've had to do preliminary hearings for all cases, including murder and child molestations, so it's gotten a bit adversarial.

Jeff Reisig, district attorney for Yolo County, California: It's been balancing the rights of victims and defendants, and even the attorneys themselves, against the real risk imposed by the virus. In California, victims have the right to be present at all critical proceedings and to be heard. We're in a shutdown and courts are open in a very limited capacity, so we can't safely or even legally bring victims into the courtroom for most proceedings. So we've had to find solutions for them, including the use of Zoom and other technology to get them into the courtroom so they can participate.

Prosecutors have gotten pushback

Darcel Clark, district attorney for Bronx County, New York: With the virus in our community as well as in our jails, prosecutors have been asked to look at those who are incarcerated to see if they can be released back into the community. That's a daunting task. We want to make sure we're compassionate to pretrial detainees and people who are incarcerated. We don't want them to get sick. But we also don't want to put them into a community full of people who are sick. Some of the pushback was that I consented to quite a few people being released because I didn't think they were a threat to public safety, and hopefully they'll come back to court, but some of the most violent cases I was asked to release, I couldn't consent. We went to the judges.

Reisig: We've had a little bit of pushback from the criminal defense bar on the idea that proceedings can be done remotely because there's a belief by some that clients get a better shake if they're physically present in the courtroom with a judge. That puts people at risk. We've had to work with the court and the defense bar to try to get around that. Frankly, the defense holds the cards on that issue and most of the time they can demand a court appearance.

The crisis has shed new light on justice reform

Adel: We have been collaborating with our sheriff and public and private defense bar. We've been able to reduce our jail population by 30%. We've been looking at the types of cases we file. Normally this office files 700 to 800 cases per week, but to give you an example, from April 4 to April 24, we only filed 332. So we're going after the worst of the worst. We also rolled out a very robust diversion program but with social distancing those programs have been put on hold.

Clark: In the Bronx, we've been doing this for a long time. In New York, we just went through major criminal justice reform laws. We've changed discovery policies, and people can't be held on bail. I started a new policy and sat with my team and the police department and the public defenders to let them know that there are certain crimes I was no longer going to prosecute — the low-level, nonviolent — and even some of the felonies I decided to prosecute as misdemeanors. So when the pandemic came, it was easier to really use that discretion to say even those misdemeanors we do try, maybe now is not the time.

Jon Gould (<https://ccj.asu.edu/content/jon-gould>), professor and director of the School of Criminology and Criminal Justice at ASU: We know that the American criminal justice system targets or affects people of color. There are two things prosecutors could be doing. The first issue is, "Who do you end up charging and what do you charging them with?" Darcel Clark talked about how now is not the time for misdemeanor cases. Do you hold them or come back later or think that this is the time for alternate systems rather than the criminal justice system? The other thing is that prosecutors need to sit down with sheriff's offices and go through the list of everyone in jail ahead of trial and make a decision on who truly needs to be there because they're dangerous or because we're mad at them or because they can't afford bail. Being charged with a minor crime should not put your life at risk in a pandemic.

The technology changes will likely continue

Clark: (The pandemic) has forced us to move into the 21st century. Our courts weren't there. I can tell you that my office wasn't there. Technology costs a lot of money. With this pandemic, we were forced into a situation where we had to invest in technology to allow us to do the work. We have virtual court appearances. You can interview your witnesses virtually. It's a game changer. It helps us to be paperless and it's taken a long time to move from paper. I was dying to do it. It'll speed that effort.

Adel: We needed to find laptops so we refurbished a significant number so we could have more people working at home. I agree that technology has been key not just in the office but in partnering with the courts too. It's helping to do virtual hearings on a limited basis and I hope we can engage with that more.

Not everything can be online

Adel: Our courts are having us do in-person hearings for in-custody defendants. All out-of-custody defendants are not in person. We rotate which lawyers are going into court so they're not exposed very long. We practice social distancing.

Reisig: It's a hybrid in my county. Defendants and his or her attorney are in the courtroom but the prosecutor and all witnesses are appearing via Zoom. We've been doing violent cases that way for the last few weeks and it's been working.

Hamann: I've been talking to prosecutors around the country and it varies. Some people are in the courtroom and some are home, or everyone is home. There are many challenges to doing it virtually. How can the attorney speak to the client in private? Where is the court reporter? In Michigan, they've been posting their preliminary hearings on YouTube and for some of us, there's a worry there. It's an evolving issue.

Returning will be a gradual process

Adel: We had our own task force created two weeks ago to explore how we safely reopen. We're not going to flip the lights on and bring 800 people back to our building. We'll have a phased approach. How many people can be in the break room? How many in the rest room? People are nervous right now. Some want to come back to work and others are afraid. In Arizona, our schools are shut down. It's tough to bring a parent with children at home back into the work force.

Clark: We'll see how many employees are well enough to come back. The other thing is the safety of those who come back. They need to have masks, they need to have gloves. There has to be a cleaning schedule.

There will be a backlog of cases

Gould: When you come back, you'll have a huge backlog of cases, particularly the nonviolent ones that you may not have made a decision on. Will we see a free-for-all in terms of plea bargaining? Will we see cases dismissed?

Adel: In Maricopa, this does not mean someone is getting a free pass or immunity. We will still prosecute people when we're back but it has to be a measured approach because we can't flood the courts with a backlog of cases. We're not looking at dismissing anything at this point. Our No. 1 job is to protect the community and protect victims' rights.

Clark: We'll look at each case to make sure it's still viable. A lot of people have died in New York. Diversion is key. When we go back, mental health treatment, drug treatment and job training will ease what we can do.

Reisig: We did have a delay of many speedy trial timelines issued by our chief justice so it's given us some wiggle room. It's coming to a point where we have to act. I predict there will be some tough decisions made on some cases.

The future of reform is uncertain

Clark: I think what this pandemic did was to finally put some focus on the public health section. The reason why so many people end up in the criminal justice system is because so many other systems are failing, so criminal justice becomes a default. Someone is homeless, someone is ill, someone has an abuse problem. If those systems were working and people had insurance and could take care of themselves, they wouldn't end up in the criminal justice system. Even violence is a public health issue.

Adel: Before, when our legislature was in session, there were a lot of efforts to pursue criminal justice reform. We've seen interest in the business community. Will there be an appetite for those discussions when we get through this? I don't know. We need to make sure we're doing this in an incremental way or the system will collapse.

Gould: The virus is coming at a time in the American criminal justice system where we have seen a push toward reform, asking whether the system is targeting the right people. Kristine hit it on the head when she said we're in the midst of a real-time experiment. We are forgetting that there's something likely to come shortly after everyone comes back. There will almost assuredly be a rise in crime. The experience has been that criminal justice reform doesn't fare as well when people perceive that crime rates are rising. Will there still be room to experiment if we think crime is rising? I'm not sure about that.

Reisig: I think there will still be momentum for reform. Personally I believe the system is not very efficient in dealing with crime. I believe there are other ways, such as restorative justice or courts that deal with diversion.

Hamman: I've seen a lot of work going on in trying to come up with diversion programs remotely. It's not perfect. It's hard to take a urine sample remotely. There's a lot of work being done, and this crisis will see a lot of creativity. With creativity, we can do more than we think.

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