RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal legislatures to enact legislation, and correctional and detention facilities for both adults and minors to enact policies requiring that all incarcerated persons are provided with the following:

a.) soap, paper towels, hand sanitizer, and facial tissues in sufficient quantities to prevent the transmission of infectious disease;

b.) personal protective equipment including personal sanitizing products and face masks that are effective in preventing existing and emerging infections in sufficient quantities to prevent the transmission of infectious disease; and

c.) sufficient facilities for hand washing, including unrestricted access to clean water and working sinks.
**Introduction**

Over 2.3 million people are confined in American correctional and detention facilities. Over the past 40 years the United States has seen a 500% increase in inmates due to changes in sentencing laws and policy. Every year, 600,000 people enter prisons and people are jailed 10.6 million times annually. This leads to financial burdens and overcrowding. Many correctional facilities fail to provide inmates with sufficient personal hygienic items and adequate hygienic infrastructure to maintain basic health and to prevent the spread of infectious disease. In the midst of the COVID-19 pandemic, these deficits are especially threatening to the health of inmates and whomever comes in contact with them. This purpose of this resolution is to ensure safety and to protect public health during the pandemic.

According to the Center for Disease Control and Prevention (CDC), handwashing is one of the best ways to protect oneself from getting sick. Under normal circumstances, a person should wash their hands before eating, before and after treating an open wound, after using the toilet, blowing their nose, coughing or sneezing, and after handling garbage.

In pandemic conditions, the CDC recommends a person wash their hands after touching items or surfaces frequently touched by others, and before touching their eyes, nose, or mouth. This increased frequency requires more supplies than usual and access to clean, functioning water sources. However, for over 2 million people in jails, prisons, and detention facilities in the United States, this practice, with this level of regularity, is nearly impossible.

**Current Prison Conditions**

Many states require, by law, that certain items be issued to inmates. Others are less specific, so it is difficult to determine the exact types and quantity of products, and the frequency of distribution mandated.

Hygienic infrastructure, such as sinks with clean, running water, and hygiene products, including soap, toilet paper, and paper towels are basic necessities to prevent the spread of disease.¹ Everyone in these facilities should have sufficient access to these necessities, yet they rarely do. Some facilities provide prisoners with basic sanitary supplies, including soap, and toilet paper. However, the quantity and variety is limited and often restricted. Basic handwashing is a challenge when there is limited access to running water, and pipes are contaminated. Hand and respiratory hygiene are important steps to preventing transmission of infectious disease.

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“Jails and prisons are often dirty and have really very little in the way of infection control,” said Homer Venter, former chief medical officer at New York city’s notorious Rikers Island jail complex. “There are lots of people using a small number of bathrooms. Many of the sinks are broken or not in use. You may have access to water, but nothing to wipe your hands off with, or no access to soap.”

In most prisons, hand sanitizer with a high percentage of alcohol, the variety that kills coronavirus, is banned. Inmates in New York State prisons were producing large quantities of hand sanitizer that they were prohibited from using. They are especially vulnerable to an outbreak because of their close quarters and their health is contingent upon access to sufficient, proper washing facilities.

In a Texas immigration detention facility, migrant women were only given one small packet of shampoo to wash their entire bodies. As a result, women would go days without showering. In the South Louisiana Processing Center, more than 70 detainees in a dorm share only 5 bars of soap. Inmates in Twin Towers Correctional Facility reported, there is no regular delivery of soap and cleaning supplies.

In Alabama, a report issued by the Department of Justice found broken pipes, open sewage, and dilapidated personal hygiene facilities. One Alabama prison is reported to only have three or four working sinks at a time in a dorm housing over 200 men. In an honor dorm, housing older or longer-term inmates, there were 13 sinks for 350 men.

At the Mississippi State Penitentiary at Parchman, the health department found broken sinks and toilets in cells, holes in cell walls, widespread mold and mildew in showers, and sanitation problems in kitchens. As a result, inmates are dehydrated for days because

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they are afraid to drink water that is brown and smells like sewage from pipes that are
covered with rust and mold.

**The Rapid Spread of COVID-19**

While other infectious diseases have hit the United States, none since the 1918 Flu
pandemic has had such a chilling impact on society. The last time we faced a global
pandemic, spring 2009, was the H1N1 virus (Swine Flu).9 In one year, the CDC estimated
that the United States had 60.8 million cases, 274,304 hospitalizations and 12,469
deaths.10 Prisoners were largely spared, despite the facilities’ conditions and the
concerns of the Departments of Corrections.

Now, we are fighting a far more deadly pandemic, COVID19 (coronavirus). As of May 3,
2020, there were 1.2 million cases and 69,500 deaths in the United States. Coronavirus
was identified in early winter 2019 and reached the United States late January/early
February 2020. Schools, businesses and government buildings closed and the public has
been asked to quarantine to flatten the curve of the disease. Our healthcare system
cannot handle the many people who need the critical care caused by this novel virus.

As of May 3rd, 2020,11 the Federal Bureau of Prisons (BOP) confirmed 1984 federal
inmates and 346 BOP staff with positive COVID19 test results nationwide. There were 40
COVID19 inmate deaths. As of May 28, 2020, there were 1,392 confirmed cases of
COVID-19 among individuals who are or were in the custody of U.S. Immigration and
Customs Enforcement (ICE), and 44 confirmed cases of ICE employees at detention
centers. To date, ICE has only tested 2,670 detained individuals for COVID-19; as of May
23, 2020, nearly 26,000 individuals remained in ICE custody.12 Two gentlemen have died
after contracting COVID-19 in ICE detention.13

As states have attempted to take steps to stop the spread of the coronavirus, infections
amongst inmates and jail staff continue to rise at an exponential rate. In Illinois, the
number of detainees infected with coronavirus at the Cook County Jail in Chicago rose to
over 500 as of May 4, 2020, 6 having died.14 According to the New York Department of
Corrections, Rikers Island Jail has a 9.7% infection rate, versus 2-3% infection rate found
in most other correctional facilities and the general population.15 In Texas, cases have
been quickly rising as 22 incarcerated people and five prison employees died in the three

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10 CDC Estimates of 2009 H1N1 Infl uenza Cases, Hospitalizations and Deaths in the United States,
available at https://www.cdc.gov/h1n1flu/estimates_2009_h1n1.htm (last visited May 9, 2020).
(last visited May 4, 2020).
months since the pandemic’s arrival. In some states, the sharp increase in cases can be attributed to aggressive testing but other states have been doing little testing if any.\(^\text{16}\)

Nationwide, according to the Equal Justice Initiative, “the known infection rate for COVID-19 in jails and prisons is about 2½ times higher than in the general population. More than 44,000 incarcerated people and staff have coronavirus infections and 462 have died” as of May 21, 2020.\(^\text{17}\) In more than half the states, COVID-19 has infected youth, staff, but usually both in juvenile facilities where 70% of youth are held on non-violent offenses and facilities are overcrowded.\(^\text{18}\) Although, we may never know the true impact on the incarcerated population of the United States. The testing capability is low, we are a world leader in mass incarceration, and personal protective equipment has been sparse. The health of the prison population has not been prioritized.\(^\text{19}\) There have been recommendations by advocacy groups and public health professionals to release aging, infirm and non-violent offenders to reduce the density in prisons. Most states are not heeding the call and each day they wait, disease spreads.

The CDC determined many coronavirus cases are asymptomatic, and symptoms may appear 2-14 days after exposure.\(^\text{20}\) To reduce the spread and “flatten the curve,” maintaining the good health of the prison population is vital. Because COVID-19 is frequently asymptomatic, inmates continue to interact with correctional officers and staff while unknowingly shedding virus. Even with visitation and volunteer programs on hold at most facilities because of the pandemic, people regularly enter and leave the facility every day. If exposed through close contact with asymptomatic inmates, they carry it into the community housing the prison, their home community, and possibly public transportation, also close quarters with the public. The spread of disease in prisons pose elevated risk to homeless shelters because occupants of one institution often find themselves in the other.\(^\text{21}\) Without adequate testing, it is difficult to know how many inmates or correctional officers have been infected. Each person, inmate and staff, must be presumed a vector who can spread the virus within or outside the facility, and must take the best health precautions possible.

Products for Purchase


According to the Vera Institute, in 2015, the annual budget for state prisons ran from $65 million-$8 billion, depending on the size of the state system. Over 65% of the budget is for personnel costs. Prisons are responsible for providing adequate security, staff to run facilities, provide services, food, and programming, sufficient recreational and educational opportunities, infrastructure maintenance and upkeep, and health care for a large population with significant physical and mental health issues.

Among the products inmates can purchase from the prison commissary are snacks, postage and toiletries. Although, prisons provide soap, they often do not provide enough. In 2016, Massachusetts prisoners purchased 245,000 bars of soap costing $215,057, an average of 22 bars of soap annually, above what is provided by the correctional facilities. However, Massachusetts Department of Corrections claims to provide a bar of soap a week to each inmate.

Purchasing from the prison commissary is expensive. A bar of can cost over $2. Prison wages average 14-63 cents per hour, so saving for a bar of soap takes time. Inmates who cannot afford the commissary rely on family support, or do without. During a pandemic, like COVID19, this has high-risk ramifications for the entire prison population, staff and inmates alike, since handwashing is one of the few preventive measures available to reduce the spread of infectious disease. The health of an entire population in close quarters cannot depend on the buying power of an incarcerated workforce being paid far below minimum wage.

**Additional Protections During Pandemics**

Face masks and some hand sanitizers can limit the spread of infectious diseases, including COVID19. While medical face masks have been in short supply and need to be reserved for health care providers, masks made of other materials are helpful to prevent an outbreak. Because a large percentage of those infected with COVID19 are asymptomatic, healthy individuals should also wear face masks help prevent virus transmission. In prisons, where people do not have the opportunity for social distancing, face masks are an additional precaution that can prevent the spread of disease in close quarters.

Some correctional facilities have allowed inmates to wear masks but others have not and where they have not, the death toll continued to rise. In New York State, after the disease spread and people in prisons died, prison officials changed course and issued face masks.

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23 Ibid.


26 Id.
to 41,000 inmates. Like manufacturing hand sanitizer, inmates were tasked with making face masks, but not allowed to wear them, with fatal results.

Proper hand hygiene is the best preventive measure against contracting COVID19. However, even medical professionals do not have access to running water as often as necessary. Hand sanitizer with 75% alcohol content has been found effective to kill the COVID19 virus. The Departments of Corrections in almost 20 states, and the Federal prison system prohibit hand sanitizer for fear that inmates will consume it or start fires. The CDC recommended that correctional facilities relax the rules. Some facilities distributed sanitizer in a controlled way, others relaxed the rules completely, and some still prohibit it. Until an effective, non-alcohol based sanitizer is created, correctional facilities need to decide whether the harm from disease to its charges and staff outweighs the risks of distributing effective alcohol based sanitizer.

**Eighth Amendment Concerns**

The Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Prisoners are entitled to sanitary toilet facilities and basic supplies such as toothbrushes, toothpaste, soap, sanitary napkins, razors, and cleaning products. The Eighth Amendments prohibition against cruel and unusual punishment protects your right to safe and humane conditions. If prison conditions deprive you of a basic human need, such as sanitation or hygiene, you can challenge them. To prevail, the conditions must be “restrictive and even harsh.” In Farmer v. Brenner the court put forth an objective standard; you need to show you were deprived of a basic human need, or exposed to serious harm. The court will examine whether the condition(s) you are challenging could seriously affect your health or safety. Wilson v. Seiter set the subjective standard. You must demonstrate that the officials knew you were being deprived or harmed and did not respond reasonably. To prevail you must show how you were injured and prove that the

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28 Supra at 3.; Id.


31 Id.

32 DeSpain v. Uphoff, 264 F.3d 965 (10th Cir. 2001).

33 Gillis v. Litscher, 468 F. 3d 488 (7th Cir. 2006).


denial of a basic need caused your injury. You must demonstrate that the officials acted with "deliberate indifference."

Inmates are not permitted to use hand sanitizer, and social distancing measures cannot be taken because of overcrowding and space constraints. Measures to prevent infectious disease in prison are limited. Prison officials are required to provide soap, paper towels and clean water, among other basic provisions. If incarcerated persons are denied these basic sanitary and hygienic necessities, and it leads to a coronavirus infection, prison officials could be successfully challenged under the Eighth Amendment.

**American Bar Association Policy**

There is precedent for the American Bar Association’s involvement in public health issues. Public health and the law have long been intertwined. Over 15 years ago, the American Bar Association adopted a resolution urging its members to become more familiar with public health law in the event of infectious disease outbreaks, and to become involved in the preparedness of our communities to ensure that public health measures are protective of civil and constitutional rights. It is in this vein that we recommend this resolution.

In the American Bar Association Criminal Justice Standards on the Treatment of Prisoners, there is an entire section devoted to prison conditions for the welfare of inmates that states, “correctional authorities should provide prisoners, without charge, basic individual hygiene items appropriate for their gender.” Clean water, soap, paper towels and facial tissues are basic.

Most recently, the American Bar Association adopted resolution 109c supporting the provision of menstrual hygiene products and toilet tissues for incarcerated women. This addressed the need for necessary hygiene products that prisons were not or were inadequately providing for inmates. It is the responsibility of prisons to provide for the basic needs of the people in their care.

In light of the COVID19 pandemic, and the American Bar Association’s history of supporting both public health recommendations and prisoner’s rights, this resolution conforms to the Association’s objectives and is aligned with previous policy. COVID19 isn’t just a hygiene issue. It is in the interest of the staff and the surrounding community to encourage the proper hygiene needed to prevent an outbreak, which does not confine itself to the prison walls.

**Conclusion**

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36 Id.
37 Id.
38 ABA Resolution 04M102.
40 ABA Resolution 19M109c.
Mass incarceration is an American social problem with enormous, negative public health ramifications. Although there is no quick fix, there are ways to improve the conditions and outcomes for inmates. Simple provisions like adequate soap, paper towels and tissues along with a clean, well-functioning water system will make a difference to the health of millions of Americans.

Respectfully submitted,

Wendy Mariner
Chair, Civil Rights and Social Justice Section
August 2020
GENERAL INFORMATION FORM

Submitting Entity: Civil Rights and Social Justice Section

Submitted By: Wendy Mariner, Chair

1. Summary of Resolution(s).
This resolution urges federal, state, local, territorial, and tribal legislatures to enact legislation, and correctional and detention facilities to enact policies, to provide incarcerated people, both adults and minors, with access to sufficient quantities of soap products, paper towels and facial tissues, clean water and adequate facilities for hand washing and face masks and sanitizing products.

2. Approval by Submitting Entity.
This resolution was passed by the Civil Rights and Social Justice Council on April 24, 2020.

The Criminal Justice Section approved co-sponsorship of this resolution on May 22, 2020.

3. Has this or a similar resolution been submitted to the House or Board previously?
No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

There are three policies previously adopted by the American Bar Association that are relevant to this resolution, and this one is consistent with them. The first policy, 19M109C urged the provision of sufficient toilet paper and feminine hygiene products to all women prisoners. The second, American Bar Association Criminal Justice Standards on the Treatment of Prisoners Standards 23-3.5(c) stated that correctional authorities should provide prisoners, without charge, basic individual hygiene items appropriate for their gender, as well as towels and bedding, which should be exchanged or laundered at least weekly, and that Prisoners should also be permitted to purchase hygiene supplies in a commissary. The third policy, 04A102, stressed the importance of the American Bar Association and its lawyers and members to address new public health threats and ensure that public health measures are protective of civil and constitutional rights.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?
Not applicable.

Not applicable.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
This policy will be used as a basis of advocacy in federal, state, local, territorial and tribal correctional systems.

Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

Not applicable

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:
Standing Committee on Legal Aid & Indigent Defense
Commission on Hispanic Legal Rights & Responsibilities
Commission on Homelessness and Poverty
Commission on Immigration
Commission on Racial & Ethnic Diversity in the Profession
Coalition on Racial & Ethnic Justice
Commission on Youth at Risk
Young Lawyers Division
Law Student Division
Government and Public Sector Lawyers Division
National Conference of Federal Trial Judges
National Conference of State Trial Judges
Judicial Division
Law Practice Division
Section of Science & Technology Law
Health Law Section
Section of Litigation

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution
This resolution urges federal, state, local, territorial, and tribal legislatures to enact legislation, and correctional and detention facilities to enact policy, to provide all incarcerated adults and minors with sufficient access to soap products, paper towels and facial tissues, clean water and adequate facilities for hand washing, and face masks and sanitizing products.

2. Summary of the Issue that the Resolution Addresses
In order to prevent the vast transmission of infectious disease, inmates, being in close quarters, will be able to practice proper hand and respiratory hygiene with adequate cleaning products and facilities.

3. Please Explain How the Proposed Policy Position Will Address the Issue
Currently, many correctional facilities have broken sinks, one sink provided for too many people, inadequate quantities of soap and paper towels, rusted pipes and sewage leaking into the water supply. This resolution addresses both the lack and/or shortage of supplies.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified.
None.