



Alabama Law Scholarly Commons

Working Papers

Faculty Scholarship

4-15-2020

Pretrial Detention in the Time of COVID-19

Jenny E. Carroll

University of Alabama - School of Law, jenny.carroll@law.tamu.edu

Follow this and additional works at: https://scholarship.law.ua.edu/fac_working_papers

Recommended Citation

Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, (2020).

Available at: https://scholarship.law.ua.edu/fac_working_papers/396

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons. For more information, please contact cduncan@law.ua.edu.

PRETRIAL DETENTION IN THE TIME OF COVID-19

JENNY E. CARROLL*

Abstract

It is hard to overstate the impact of COVID-19. When it comes to the criminal justice system, the current COVID-19 crisis has shone a light on pre-existing flaws. Long before the first confirmed case in Seattle or elsewhere, America's jails and prisons were particularly susceptible to contagions, exacerbated by problems from overcrowding to over policing to lack of reentry programs. This Essay focuses on one aspect of the challenges the criminal justice system faces in light of COVID-19 and beyond—that of a pretrial detention system that falls more harshly on poor and minority defendants, has swollen local jail populations, and has incentivized pleas contributing in its own right to prison overcrowding.

Even in the best of times the pretrial detention system is often punitive, fraught with bias, produces unnecessarily high rates of detention, and carries a myriad of downstream consequences both for the accused and the community at large. In the context of the COVID-19 crisis, this pretrial detention system faces an exacerbated challenge: the health and safety of those in custody and those who staff U.S. jails and prisons. This new reality reveals that even during “ordinary times” the pretrial detention system fundamentally miscalculates public safety interests to the detriment of both detainees and the communities they leave behind. Simply put, current pretrial detention models fail to account for risks to defendants during periods of incarceration and pit defendants' interests against the very communities that depend on them. The public health crisis of COVID-19 demonstrates in very real terms the interconnected nature of a defendant's and the community's safety interests. This connection is not unique to the current public health crisis, however, COVID-19 brings to light the persistent reality that communities are often weakened, not made safer, by the removal of defendants during pretrial periods.

INTRODUCTION

The impact of COVID-19 cannot be overstated. As of April 3, 2020, the new strain of coronavirus, which causes COVID-19, has infected over one million people, leading to over 50,000 deaths worldwide.¹ On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic.² Across the world, governments have declared states of emergency and have urged citizens to distance themselves from one another, a practice now called social

*

¹ See <https://www.worldometers.info/coronavirus/> (updating regularly).

² *WHO Characterizes COVID-19 as a Pandemic*, World Health Organization (Mar. 11, 2020) <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-Mar.-2020>.

distancing.³ Schools, bars, restaurants, and entertainment venues are closed.⁴ Non-essential workers are ordered to stay at home.⁵ Group gatherings have been prohibited.⁶ The frightened public is told that the only way to defeat the virus is to flatten the curve of the infection by staying home in isolation.⁷

In the United States, daily briefings from the White House COVID-19 Task Force stoke the unease: a vaccine remains an elusive and distant event;⁸ there is insufficient personal protective equipment for healthcare providers⁹ and insufficient ventilators and hospital beds for the infected;¹⁰ rates of infection and death tolls continue to rise at a dizzying pace¹¹—and even these rates are unreliably low, as access to testing remains elusive.¹² Medical experts note that while

³ *New York Times World Coronavirus Updates*, <https://www.nytimes.com/2020/04/06/world/coronavirus-live-news-updates.html> (chronically worldwide response to the disease).

⁴ *See* The Coronavirus Outbreak, N.Y. TIMES, <https://www.nytimes.com/2020/03/15/world/coronavirus-live.html> (tracking closures).

⁵ *See* National Governors Association, <https://www.nga.org/coronavirus/#states> (tracking each state's orders regarding non-essential workers).

⁶ *See, e.g.*, CDC, *Interim Guidance for Coronavirus Disease*, (Mar. 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html> (recommending limiting gatherings to fifty).

⁷ Siobhan Roberts, *Flattening the Coronavirus Curve*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/science/coronavirus-curve-mitigation-infection.html>.

⁸ *See, e.g.*, *When Will a Coronavirus Vaccine be Ready?* THE GUARDIAN (Apr. 6, 2020), <https://www.theguardian.com/world/2020/apr/06/when-will-coronavirus-vaccine-be-ready>; Zeke Miller, *Government Official: Coronavirus Vaccine Trial Starts Monday*, ABC News (Mar. 15, 2020), <https://abcnews.go.com/Health/wireStory/government-official-coronavirus-vaccine-trial-starts-monday-69611096> (quoting a government official that a vaccine is eighteen months away).

⁹ Andrew Jacobs, Matt Richtel & Mike Baker, *“At War with No Ammo”: Doctors Say Shortage of Protective Gear is Dire*, N.Y. TIMES, (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html>.

¹⁰ Patti Neighmond, *As the Pandemic Spreads, Will There be Enough Ventilators?*, NPR (Mar. 14, 2020), <https://www.npr.org/sections/health-shots/2020/03/14/815675678/as-the-pandemic-spreads-will-there-be-enough-ventilators>; Ken Alltucker & Nick Pezenstadler, *Too Many Coronavirus Patients, Too Few Ventilators*, USA TODAY, (Mar. 18, 2020), <https://www.usatoday.com/story/news/health/2020/03/18/coronavirus-ventilators-us-hospitals-johns-hopkins-mayo-clinic/5032523002/>.

¹¹ According to the CDC and international epidemic experts, a possible scenario—based on the characteristics of the covid-19 virus—is that “[b]etween 160 million and 214 million people in the U.S. could be infected over the course of the epidemic,” and “[a]s many as 200,000 to 1.7 million people could die.” Sheri Fink, *Worst-Case Estimates for U.S. Coronavirus Deaths*, N.Y. TIMES (Mar. 13, 2020) <https://www.nytimes.com/2020/03/13/us/coronavirus-deathsestimate.html>. Estimates for its overall fatality rate factoring in demographics is 0.3–3.5%, “which is 5–35 times the fatality associated with influenza infection.” Declaration of Chris Beyrer, MD, MPH, Professor of Epidemiology, Johns Hopkins Bloomberg School of Public Health, on file with author; Nick Wilson et al., *Case-Fatality Risk Estimates for COVID-19 Calculated by Using a Lag Time for Fatality*, 26(6) EID JOURNAL (prepublication June 2020), https://wwwnc.cdc.gov/eid/article/26/6/20-0320_article.

¹² *See* Sarah Kliff & Julie Bosman, *Official Counts Understate the Coronavirus Death Toll*, N. Y. TIMES (Apr. 5, 2020), <https://www.nytimes.com/2020/04/05/us/coronavirus-deaths-undercount.html>.

COVID-19 can prove fatal across all age ranges, adults over sixty and people with chronic medical conditions are especially vulnerable.¹³

The nation's jails and prisons carry their own heightened risk in the current health crisis.¹⁴ Unlike free people, detainees cannot engage in “social distancing” and “self-quarantine” and “flattening the curve” of the epidemic—all of these things are impossible in jails and prisons, or are made worse by the way jails and prisons are operated.”¹⁵ Furthermore, a greater percentage of detainees qualify as “high risk” for COVID-19 due to age and pre-existing health conditions, compounding the risk for both mass spread and severe symptoms.

In many ways, the current COVID-19 crisis has revealed a criminal justice system that was always broken and always teetered on the edge of some disaster. Long before the first confirmed case in Seattle, U.S. jails and prisons were particularly susceptible to contagions.¹⁶ These were not their only problems, though other problems from overcrowding to over-policing to lack of reentry programs and more have contributed to this susceptibility. This Essay focuses on one aspect of the challenges the criminal justice system faces in light of COVID-19—that of a pretrial detention system that falls more harshly on poor and minority defendants, has swollen local jail populations, and has incentivized pleas, contributing in its own right to prison overcrowding.

Part I of this Essay considers the pretrial detention system outside of the context of the current crisis. Part II discusses the impact of COVID-19 on the pretrial detention system and raises the question of what endemic flaws this moment of crisis might reveal. Part II then concludes that with or without a COVID-19 crisis, the pretrial detention system fundamentally miscalculates safety, by failing to account for risks to defendants during periods of incarceration and by pitting defendants' interests against the very communities that depend on them. The current public health crisis demonstrates in very real terms the interconnected nature of a defendant's and the community's safety interests.

I. THE TROUBLE WITH PRETRIAL DETENTION IN THE BEST OF TIMES

¹³ The mortality rate for people with cardiovascular disease is 13.2%, for those with diabetes: 9.2%, for those with hypertension: 8.4%, for those with chronic respiratory disease: 8%, and for those with cancer: 7.6%. World Health Organization, *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)* at 12 (Feb. 28, 2020), https://wwwnc.cdc.gov/eid/article/26/6/20-0320_article; see also CDC, *People at Risk for Serious Illness from COVID-19*, (Mar. 12, 2020)

<https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>.

¹⁴ See Megan Crepeau & Jason Meisner, *Cook County Jail Detainee Dies of COVID-19*, CHI. TRIB. (Apr. 6, 2020), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-cook-county-jail-death-20200406-42b3dkcqsbeyzflmsso6s2j4wi-story.html> (placing the infection rate at 234 inmates); *Coronavirus Spread at Rikers is a “Public Health Disaster”, Says Jail’s Top Doc*, THE GUARDIAN (Apr. 1, 2020), <https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster> (estimating the rate of infection in NYC jails at 3.91% compared to 0.5% of the free population).

¹⁵ Jennifer Gonnerman, *How Prisons and Jails can Respond to the Coronavirus*, THE NEW YORKER (Mar. 14, 2020), <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus> (quoting Homer Venters former Chief Medical Officer of Rikers). Venters also noted “it’s going to be very, very difficult to deliver a standard of care either in the detection or the treatment of people who are behind bars.” *Id.*

¹⁶ See Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047 (2007) <https://academic.oup.com/cid/article/45/8/1047/344842>. For scientific reports on specific contagions in jails and prisons see CDC, *Scientific Reports and MMWR’s*, <https://www.cdc.gov/correctionalhealth/SR-MMWR.html>.

Even during the best of times, the nation's pretrial detention system has been the subject of repeated criticism and reform movements.¹⁷ The Constitution references pretrial detention only once, prohibiting excessive bail in the Eighth Amendment. Despite this singular reference, other components of due process, such as the presumption of innocence and the burden of proof, implicate and support pretrial release. Historically pretrial release was the default¹⁸ and the original purpose of bail was to ensure the defendant's presence in court at future proceedings.¹⁹ Time, and bail reform, expanded that purpose to focus on the nature of the offense alleged and, later, on whether or not the defendant posed a risk to the community if released pretrial.²⁰

These entwined considerations—flight risk and future dangerousness—make up the modern pretrial release calculation and, except for defendants that are statutorily ineligible for pretrial release,²¹ courts may only impose pretrial conditions on the defendant upon a finding that such conditions are necessary to mitigate the risk identified by the State.²²

In making this determination, courts first weigh the defendant's liberty interests against the State's claim of risk of either flight or future danger if the defendant is permitted to remain free.²³ Courts then rely on predictive proxies²⁴ in an effort to determine the probability that, if released, the defendant will in fact pose a risk and to determine what conditions might mitigate that risk.²⁵ For this second calculation, courts increasingly utilize pretrial assessment tools (PSAs) to generate a risk score.²⁶ These PSAs utilize algorithms to determine the probability that a defendant will either fail to appear and/or will pose a danger if released.²⁷ Like their human counterparts, PSA determinations are predictive and courts are always left, in the end, to balance the defendant's

¹⁷ See Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 599–606 (2017).

¹⁸ See SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM* 20 (2018) (noting that denying bail in non-capital cases was historically seen as a denial of the presumption of innocence); Judicial Act of 1789 (“[b]ail shall be admitted except where the punishment may be death.”)

¹⁹ See *Ex Parte Milburn*, 34 U.S. 704 (1835).

²⁰ This shift began in earnest in the 1940s and progressed through the 1980s with the passage of the Bail Reform Act of 1984. See BAUGHMAN, *supra* note 21, at 19–21; *Schall v. Martin*, 467 U.S. 253 (1984); *United States v. Salerno*, 481 U.S. 739 (1987).

²¹ See *United States v. Salerno*, 481 U.S. 739, 755 (1987).

²² See *Stack v. Boyle*, 342 U.S. 1 (1951); *Salerno*, 481 U.S. at 746–7. See also *ABA Standard 10–1.2* https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimj_ust_standards_pretrialrelease_blk/. This is not to say that courts are the only actors who may effect pretrial release decisions. As noted, legislators may designate particular offenses or defendants as ineligible for bail. In addition, discretionary decisions by police, sheriffs, and prosecutors may also effect pretrial detention.

²³ See, e.g. 18 U.S.C. §3142(e)-(f).

²⁴ These include the nature of the offense the defendant allegedly committed, the defendant's criminal history and his ties to the community as evidenced by his work history or residence.

²⁵ Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837 (2016).

²⁶ See, e.g., Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 344 (2018); Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 61 (2017) (both describing such tools).

²⁷ *Id.* Such tools were originally touted as decreasing the influence of bias in pretrial decision making, yet, as will be discussed next, recent critiques of such tools suggest that they promote the very bias they were implemented to eliminate. See, e.g. Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2122 (2019).

interests against the predicted risks he poses pretrial. The process is imperfect at best, catastrophic at worst.

This Part explores the concerns that have plagued the pretrial detention system. In the end, the pretrial detention system *is* a deeply flawed one. While constitutional and statutory mandates as well as financial incentives should skew to minimize pretrial detention, in reality, there is a disconnect with the articulated goals of the system and the rates of pretrial detention. High rates of pretrial detention contribute to jail and prison overcrowding²⁸ and tax county and community resources that are often stretched perilously thin already.²⁹ From due process to bias inherent in the system to concerns to downstream consequences, the pretrial detention system is plagued by failings that predate the COVID-19 crisis, though COVID-19 has certainly exacerbated them. '

A. *The Due Process Problems with Pretrial Hearings*

In the context of pretrial detention hearings, the Supreme Court has defined a defendant's due process rights as limited to a determination that a condition of release or detention promotes the State's articulated interest.³⁰ If a court makes a finding at the hearing that a defendant poses a risk of flight or presents a danger to the community if released, then the court may set conditions necessary to mitigate that risk without running afoul of the Due Process Clause.³¹

The problem with this due process analysis is multifaceted. First, pretrial detention hearings often lack many of the robust procedural safeguards of a trial.³² This is not to say the defendant enjoys no procedural protections, but it is to say that these protections are significantly curtailed at the pretrial detention stage.³³ For example, pretrial detention proceedings themselves tend to be remarkably short—often less than two minutes in length—and may occur prior to appointment of counsel for a defendant.³⁴ The brevity of these hearings raises significant questions regarding the rigor of the court's consideration of the necessary prerequisites to imposing detention

²⁸ Pretrial detainees are more likely accept a plea deal than a released defendant. *See, e.g.* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713–14 (2017).

²⁹ *See* Alexi Jones, *Does Our County Really Need a Bigger Jail?*, Prison Policy Initiative (May, 2019), <https://www.prisonpolicy.org/reports/jailexpansion.html>; Natalie Ortiz, *Pretrial Population and Costs Out County Jails at a Crossroads*, National Association of Counties (June 29, 2015), <https://www.naco.org/articles/pretrial-population-and-costs-put-county-jails-crossroads-0>; Margaret Elizabeth Spark, *Bailing on Bail: The Unconstitutionality of Fixed, Monetary Bail Systems and Their Continued Use Throughout the United States*, 52 GA. L. REV. 983, 1004 (2018).

³⁰ *See* Stack v. Boyle, 342 U.S. 1, 5 (1951); United States v. Salerno, 481 U.S. 739, 750 (1987); United States v. Montalvo-Murillo, 495 U.S. 711, 716 (1990).

³¹ *Id.*

³² *See* BAUGHMAN, *supra* note 23, at 109; Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1351 (2012); Douglas Colbert, *Prosecution without Representation*, 59 BUFF. L. REV. 428 (2011).

³³ *Id.*

³⁴ *See* EMILY BAZELON, CHARGED 37 (2019); Douglas L. Colbert, et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1755 (2002) (observing that pretrial detention hearings in Baltimore City with counsel lasted “on average two minutes and thirty-seven seconds versus one minute and forty-seven seconds without counsel”).

or other pretrial conditions.³⁵ Historically, such concerns have been dismissed with the assurance that speedy trial clocks limited periods of pretrial detention.³⁶ In reality, modern pretrial detention periods often extend to nearly a year—and sometimes are longer than or as long as any sentence imposed.³⁷

Second, defendants often operate at a distinct disadvantage in pretrial proceedings. Prior to making a charging decision, the State, through police investigation, has had the opportunity to amass evidence that a newly charged defendant has not.³⁸ For cases where bail is precluded, the prosecutor literally controls the bail proceedings through his charging discretion. Once a pretrial detention decision is made, federal and state procedural rules often preclude reconsideration of detention or the conditions of release absent a demonstration of a change in circumstances not apparent at the time of the original determination.³⁹

Finally, pretrial detention often occurs not because of a genuine risk of flight or future dangerousness, but because a defendant is unable to satisfy conditions of release. In making a finding that some condition will sufficiently mitigate the risk the defendant poses, courts may permit release pretrial upon satisfaction of the conditions.⁴⁰ However, the courts often engage in little consideration of the defendant's ability to meet the condition monetary or otherwise.⁴¹ In other words, a defendant may be held pretrial not because he poses some insurmountable risk, but because he is too poor to meet the conditions of his release or because resources such as treatment beds or secure housing do not exist for him.

B. Bias

Accusations of bias in the criminal justice system are neither new nor unique to pretrial detention.⁴² Over-policing of poor and minority populations, disproportionate rates of arrests, prosecutions and convictions, and inequity in sentencing all translate into higher rates of pre- and post-trial detention among marginal populations.⁴³ Bias by early decision-makers including police, prosecutors, and judges fuel these high rates of detention.⁴⁴

³⁵ See Dorothy Weldon, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2420-21 (2018); Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES at 21-32, (Erik Luna ed., 2017) at: http://academyforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice_Vol_3.pdf.

³⁶ See Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 739, n. 310 (2018) ; *Bail Reform Act, 1984*, 130 CONG. REC. 938, 945 (Feb. 3, 1984) (Senator Grassley)(noting that the speedy trial act would prevent lengthy periods of pretrial detention).

³⁷ See Patrick Liu, Ryan Nunn & Jay Shambough, *The Economics of Bail and Pretrial Detention*, TECHNICAL REPORT, THE HAMILTON PROJECT, December 2018.

³⁸ See also BAZELON, *supra* note 34; at 37.

³⁹ See 18 U.S.C. § 3142(f) (providing a judge may reopen a pretrial detention question only when there is new evidence that is material to the decision of whether detention is appropriate). Admittedly, COVID-19 might constitute such a new condition.

⁴⁰ See, e.g. 18 U.S.C.A. § 3146 (permitting restrictions on travel to prevent flight risk) and 18 U.S.C.A. § 3142 (g) (permitting courts to set conditions of release to mitigate risk to the community).

⁴¹ See Jenny E. Carroll, *Beyond Bail*, 73 FLORIDA L. REV. ____ (forthcoming 2021).

⁴² See, e.g., Edward Green, *Race, Social Status, and Criminal Arrest*, 35 AM. SOC. REV. 476 (1970).

⁴³ See Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. CRIMINOLOGY 1171 (2011).

⁴⁴ See Shima Baradaran, *Race, Prediction, and Discretion*, 81 G.W. L. REV. 157, 200-210 (2013). It is also worth noting that each early actor may not engage in decision-making equally. Judges may defer to police

Bias in pretrial decision making has long been the subject of critique.⁴⁵ Early pretrial detention reformers argued that judicial discretion increased detention rates among poor and minority defendants because judges often failed to consider indigency and so often set bail and conditions of release that marginal defendants could not meet.⁴⁶ These early reformers argued courts could reduce bias by analyzing a series of known factors such as criminal history and community ties that could predict with reasonable accuracy the risk a defendant might pose if released.⁴⁷ They argued that through this method, unnecessary conditions, including bail, could be avoided and release rates would increase.⁴⁸ Despite the wide adoption of these proposed reforms, including in the Bail Reform Act of 1984, rates of pretrial detention across the nation continued to rise and continued to disproportionately effect poor and minority populations.⁴⁹

In response, machine-based risk assessment tools were introduced in an effort to reduce arbitrary and inaccurate calculations of risk by reducing the amount of discretion in pretrial release decisions.⁵⁰ Such tools generate a risk assessment score for each defendant that a court or legislature can use to set the criteria for release.⁵¹ A defendant who receives a low score is unlikely to pose either a risk of flight or a risk of danger to the community and may be released. In contrast, a defendant who receives a high score may pose a greater risk and merit detention. By shifting pretrial assessments away from judges toward machine generated ones, the hope was that the bias that had long plagued pretrial detention processes would be mitigated. It wasn't.

Despite the promise of accurate and neutral findings, risk assessment tools quickly displayed the same bias as the system they sought to improve.⁵² There are different possible explanations for these results. The PSAs may carry their own embedded biases.⁵³ Or they may be susceptible to user bias through inconsistent interpretation of risk assessment scores.⁵⁴ Coupled with the lack of information about how such scores are generated, these risk assessment tools have done little to mitigate inherent biases in the pretrial detention process.⁵⁵ In the end, despite multiple reform movements, poor and minority defendants are more likely to be subjected to pretrial detention.

and prosecutors in assessing risk. This may occur explicitly in the form of hearings that emphasize evidence in support of the charge and offer little opportunity for a defendant to challenge such evidence, or in the form of judges allowing prosecutors or police to set *de facto* conditions of release through recommendations. Or it may occur implicitly as the relationship between pretrial hearing judges and law enforcement fosters both a relationship and reliance that may give such actors an outsized influence over judicial decision makers.

⁴⁵ In the 1960s the Vera Institute argued that judges in New York City were over-detaining poor and minority defendants based on miscalculations of the risk that they would fail to appear at future court dates. See WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 11 (1976).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Albert W. Alschuler, *Preventive Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 Mich. L. Rev. 510, 515 (1986) and Baradaran, *supra* note 44, at 184-85.

⁵⁰ See Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 713 (2018).

⁵¹ Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 494-5 (2018).

⁵² Mayson, *supra* note 30; Stevenson, *supra* note **Error! Bookmark not defined.**, at 344; Mayson, *supra* note 70, at 509.

⁵³ *See id.*

⁵⁴ *See* Stevenson, *supra* note 31, at 344.

⁵⁵ Eaglin, *supra* note 31, at 61; Mayson, *supra* note 3050.

C. *The Downstream Consequences of Pretrial Detention*

Even in the best of times, the line between pretrial detention and punishment has always been a murky one. While the Supreme Court has repeatedly drawn a boundary between detention that punishes and that which merely promotes compelling State interests prior to trial,⁵⁶ significant downstream consequences of even brief periods of pretrial detention render such detention effectively punitive.⁵⁷

In custody prior to trial, the accused not only suffer the “ordinary” indignities of jail, but they also lose wages, homes, child custody, and the opportunity to meaningfully assist in their own defense.⁵⁸ Defendants detained prior to trial are less likely to receive mental health and addiction treatment and more likely to plead guilty to their charges.⁵⁹ These downstream consequences of pretrial detention affect the defendant and their community. The community a defendant leaves behind during pretrial detention not only loses one of its own, but also loses all the benefits of that defendant’s presence. In custody, defendant’s do not earn a wage to support their families or pay their rent. They are absentee parents, partners, and mentors. Whatever investment they have made in their community prior to their detention they cannot continue, or must continue in a more limited way, while detained. Pretrial detention serves to disrupt and destroy the very ties between the defendant and the community that might, in the long run, protect and promote community safety. In this, what the Court declines to refer to as punishment may nonetheless feel punitive to those who suffer it.⁶⁰

II. COVID-19 AND PRETRIAL DETENTION

Whatever failings the pretrial detention system suffers in the best of times, COVID-19 further complicates things. Detention in the face of the pandemic skews the calculation of the liberty interests at stake and alters incentives for pretrial actors. In the midst of a public health crisis, pretrial detention determinations raise more than a possibility of a finite period of confinement and indignity—they determine if a person will be exposed to a known fatal contagion as a result of an accusation. Beyond this, closures of courts in the wake of the public health crisis⁶¹ raise the specter that speedy trial rights will no longer serve (if they ever did) as a backstop to

⁵⁶ See *United States v. Salerno*, 481 U.S. 739, 748 (1987); *Bell v. Wolfish*, 441 U.S. 520, 539 (1979); *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015).

⁵⁷ See BAUGHMAN, *supra* note 18 **ERROR! BOOKMARK NOT DEFINED.**, at 82–91; Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1416–38 (2017); Heaton, et al., *supra* note 28, at 713–14.

⁵⁸ See Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235, 277-279 (2018), at 241–52; Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=1 (describing the consequences of pretrial detention on poor defendants in the New York’s criminal justice system).

⁵⁹ See, e.g. Heaton, et al. *supra* note 28 **Error! Bookmark not defined.**

⁶⁰ See Carroll, *supra* note 41; Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1330 (2012).

⁶¹ See, e.g. Sarah Jarvis, *Coronavirus: The Latest Court Closures and Restrictions*, LAW 360, March 12, 2020, at: <https://www.law360.com/articles/1252836/coronavirus-the-latest-court-closures-and-restrictions> (updated regularly).

indefinite periods of pretrial detention. These complications suggest that an alternative calculation of pretrial detention is necessary in the face of this crisis and beyond—a calculation that recognizes that pretrial release may in fact promote public safety.

Even before the current health crisis, the conditions of our nation's jails and prisons rendered their occupants susceptible to contagions in ways that members of the free world are not,⁶² making jails and prisons “ticking time bombs” for the spread of infectious disease.⁶³ Jails and prisons are infamous for overcrowding and lack of medical care.⁶⁴ In 2016, the DOJ issued two reports on the Bureau of Prisons (BOP) confirming these concerns, finding that the BOP experienced chronic medical staff shortages and failed to take adequate measures to address them, leading to problems meeting the medical needs of prisoners, requiring the use of outside hospitals, and endangering the safety and security of institutions.⁶⁵ The DOJ also reported that BOP facilities and services, including medical services, were inadequate to meet the needs of an aging prison population leading to delays in medical treatment for prisoners with acute and chronic heart and neurological conditions, who wait an average of 114 days to see medical specialists.⁶⁶ States prison facilities far no better.⁶⁷ Close and shared quarters in prisons makes the problem even worse.⁶⁸ Prisoners are housed in small cells and must share bathrooms, laundry, and meal facilities. Toilets in cells usually have no lids and often double as sinks.⁶⁹ Poor air circulation promotes the spread of contagions.⁷⁰ Chronic understaffing in jails and prisons decreases inmate safety.⁷¹

⁶² See Bick *supra* note 17.

⁶³ David Patton & Jon Sands, Letter to Attorney General Will P. Barr from the Federal Public & Community Defenders, Mar. 19, 2020 <https://sentencing.typepad.com/files/20200319--letter-to-ag-barr-et-al.-re-covid-19.pdf>.

⁶⁴ United States Dep't of Justice Civil Rights Division, *Investigation of Alabama State Prison For Men* (April 2, 2019) <https://www.justice.gov/opa/press-release/file/1150276/download> (noting chronic overcrowding in Alabama prisons).

⁶⁵ U.S. Dep't of Justice Office of the Inspector General, *Review of the Federal Bureau of Prisons' Medical Staffing Challenges* (Mar. 2016), <https://oig.justice.gov/reports/2016/e1602.pdf>.

⁶⁶ U.S. Dep't of Justice Office of the Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (Rev. Feb. 2016), <https://oig.justice.gov/reports/2015/e1505.pdf>.

⁶⁷ See, e.g., United States Dep't of Justice Civil Rights Division, *Investigation of Alabama State Prison For Men* (Apr. 2, 2019) <https://www.justice.gov/opa/press-release/file/1150276/download>.

⁶⁸ See Gonnerman, *supra* note 15; Dr. Lipi Roy, *Infections And Incarceration: Why Jails And Prisons Need To Prepare For COVID-19 Now*, FORBES (Mar. 11, 2020), <https://www.forbes.com/sites/lipiroy/2020/03/11/infections-and-incarceration-why-jails-and-prisons-need-to-prepare-for-covid-19-stat/#1fa6b08e49f3>.

⁶⁹ See Motion and Memorandum in Support of Pretrial Release and in Support of Community Efforts to Limit the Spread of COVID-19, United States District Court, Western District of Washington at Seattle, on file with author.

⁷⁰ See Gonnerman, *supra* note 15; Roy, *supra* note 68.

⁷¹ See Oversight of the Federal Bureau of Prisons and Implementation of the First Step Act of 2018: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 115th Cong. 2–4 (2019) (statement of Kathleen Hawk Sawyer, Director, Fed. Bureau of Prisons).

High rates of older and medically compromised individuals,⁷² the treatment of hand sanitizer as contraband,⁷³ and requiring marginalized inmates to pay for medical care and personal hygiene supplies⁷⁴ further exacerbates the issue. In the face of the current health care crisis these circumstances combine to create a high-risk roulette in which detainees, unable to practice best preventive guidelines, await infection and, for some, death.

In light of the COVID-19 crisis, practitioners, activists, and scholars across the nation have called for detention reform on multiple levels.⁷⁵ The response has been mixed. Some jurisdictions have adopted policies releasing those close to the completion of their sentences, those held as a result of administrative probation or parole violations (such a failure to make curfew, failure to check in with a parole or probation officer, or failure to pay a fine or fee), and those detained for non-violent and/or misdemeanor offenses. For example, six counties in North Carolina affirmed they will release detainees charged with “low-level offenses” after an individual review confirming that “release does not constitute a public safety concern.”⁷⁶ Others have adopted “cite and

⁷² See U.S. Dep’t of Justice Office of the Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, 1 (Rev. Feb. 2016); Weihua Li & Nicole Lewis, *COVID-19*, The Marshall Project <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19>.

⁷³ See Roy, *supra* note 93 (“Hand sanitizers, for instance, are often considered contraband Other harsh realities of jail life that prevent proper application of CDC recommendations include limited access to toilet paper and paper towels; and handcuffs prohibit the use of hands to cover one’s mouth.”).

⁷⁴ See Jimmy Jenkins, *Prisons and Jails Change Policies to Address Coronavirus Threat Behind Bars*, NPR (Mar. 23, 2020), https://www.npr.org/2020/03/23/818581064/prisons-and-jails-change-policies-to-address-coronavirus-threat-behind-bars?utm_medium=RSS&utm_campaign=national.

⁷⁵ See, e.g., Peter Wagner & Emily Widra, *No Need to Wait for Pandemics: The Public Health Case for Criminal Justice Reform*, Prison Policy Initiative (Mar. 6, 2020), <https://www.prisonpolicy.org/blog/2020/03/06/pandemic/>; Nancy Gertner & John Reinstein, *Compassionate Release Now for Prisoners Vulnerable to the Coronavirus*, THE BOSTON GLOBE (Mar. 23, 2020), <https://www.bostonglobe.com/2020/03/23/opinion/compassionate-release-now-prisoners-vulnerable-coronavirus/>; Hannah Cox, *Coronavirus Will Turn Our Prisons into Death Zones Without Reform*, WASH. EXAMINER (Mar. 17, 2020), <https://www.washingtonexaminer.com/opinion/coronavirus-will-turn-our-prisons-into-death-zones-without-reform..>

⁷⁶ Jordan Wilkie, *Coronavirus Raises Health Legal Concerns for NC Jails*, CAROLINA PUBLIC PRESS (Mar. 20, 2020),

<https://carolinapublicpress.org/30039/coronavirus-raises-health-legal-concerns-for-nc-jails/>. See also Katie Benner, *Barr Expands Early Release of Inmates at Prisons Seeing More Coronavirus Cases*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/us/politics/barr-coronavirus-prisons-release.html>; *U.S. Jails Begin Releasing Prisoners to Stem Covid-19 Infections*, BBC NEWS (Mar. 19, 2020) <https://www.bbc.com/news/world-us-canada-51947802>.

release”⁷⁷ or non-policing policies with regard to non-violent misdemeanors.⁷⁸ Still others have offered alternative forms of detention, including release to a family member, house arrest and/or electronic home monitoring (EHM).⁷⁹ In fact, during the last week of March, Attorney General William P. Barr “asked the [BOP] to identify and release all inmates who were eligible for home confinement, no longer posed an threat to the public and were particularly vulnerable to the coronavirus” citing the “emergency conditions” created by COVID-19 as the impetus for his request.⁸⁰

District attorneys and state courts have also weighed in on the debate, some supporting these temporary reforms, hailing them as an appropriate balance between law enforcement and public health in light of the COVID-19 epidemic.⁸¹ Others, however, have been less supportive—urging rigorous arrest policies,⁸² seeking continuances in pending criminal cases while opposing pretrial release,⁸³ and advocating that the homeless and the addicted should be detained as they are less able to comply with CDC handwashing and social distancing guidelines.⁸⁴

As the number of confirmed cases and deaths in the jail and prison systems grow, the scope of the crisis within the criminal justice system has become increasingly apparent. Pretrial detainees already make up a disproportionate segment of jail populations.⁸⁵ This burden will only grow as

⁷⁷ A cite and release policy allows a police officer to issue a citation or ticket to an offender in lieu of arresting him or her. Similarly, non-policing policies allow police departments to simply deprioritize enforcement of some minor offenses. Even if the police are aware that the offense occurred, they will either decline to investigate it, or decline to arrest the suspected offender. Both policies tend to be limited in scope—often effecting only misdemeanors and nonviolent offenses—and both reduce pretrial detention by never placing a suspect within the jail system. A recent example of this was the decision in New York City to not arrest those suspected of simple possession of marijuana. Benjamin Mueller, *New York Will End Marijuana Arrests for Most People*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/nyregion/nypd-marijuana-arrests-new-york-city.html>.

⁷⁸ See, e.g., Liz Kellar, *Cite and Release, Not Jail for Some Over Covid-19 Concerns*, THE UNION (Mar. 18, 2020) <https://www.theunion.com/news/cite-and-release-not-jail-for-some-over-covid-19-concerns/>; Nicole Manna, *Fort Worth Police Will Give Citations for Low-Level Crimes Amid Coronavirus Outbreak*, FORT WORTH STAR TELEGRAM (Mar. 27, 2020), <https://www.star-telegram.com/news/coronavirus/article241254951.html>.

⁷⁹ See, e.g., Benner, *supra* note 88.

⁸⁰ *Id.*

⁸¹ See, e.g., *Coronavirus Latest: Philadelphia DA Larry Krasner Urges Leader to Reduce Prison Populations Due To COVID-19 Pandemic*, CBS NEWS (Mar. 19, 2020), <https://philadelphia.cbslocal.com/2020/03/19/coronavirus-latest-philadelphia-da-larry-krasner-urges-leaders-to-reduce-prison-populations-due-to-covid-19-pandemic/>.

⁸² See, e.g., Andrew Mark Miller, *Police Groups Slam Cities and States Releasing Jail Inmates to Mitigate Coronavirus Fears*, THE WASH. EXAMINER (Mar. 21, 2020), <https://www.washingtonexaminer.com/news/police-groups-slam-cities-and-states-releasing-jail-inmates-to-mitigate-coronavirus-fears>.

⁸³ See, e.g., David J. Mitchell, *DA Hillar Moore: State Prosecutors Seeking Orders, Bill to Suspend Criminal Legal Deadlines*, THE ADVOCATE (Mar. 16, 2020), https://www.theadvocate.com/baton_rouge/news/coronavirus/article_a74ad19a-67a3-11ea-8bbd-57cce1eda6c.html.

⁸⁴ See Mark Joseph Stern, *New Orleans Prosecutors Argue the Coronavirus is a Reason to Keep People in Jail*, SLATE (Mar. 18, 2020), <https://slate.com/news-and-politics/2020/03/new-orleans-prosecutors-jail-coronavirus.html>.

⁸⁵ See Baradant & McIntyre, *supra* note 39, at 551.

state prison officials halt intake in an attempt to stop the virus from further infiltrating prisons.⁸⁶ In leaving prisoners to the care of the county systems,, the COVID-19 crisis highlights the pretrial detention system's failure to properly calculate the competing interests at stake in detention determinations by failing to consider the defendant's heightened substantive due process claim to be safe and receive adequate medical care and miscalculating the community interest in preventing the spread of COVID-19.⁸⁷

A. *Substantive Due Process Interests in Crisis and Beyond*

In making pretrial detention decisions, various actors weigh the interest of the defendant in pretrial release against the State's interest in safety, reducing the risk of flight and, for later pretrial actors, fiscal burdens associated with detention. In this calculation, pretrial actors consider the defendant's interests as *distinct* from the community's interests protected by the State. This consideration, however, fails to account both for risks a defendant may face in custody and for the community's loss during the period of detention.

Turning first to the risks a defendant faces during pretrial detention, admittedly, the Bail Reform Act and its state law analogs do not specifically address the possibility of a public health crisis and its implications for pretrial detention considerations.⁸⁸ Likewise, the Court has provided little guidance as to what nonmonetary conditions or circumstances might violate the Excessive Bail Clause of the Eighth Amendment by creating too great a health or safety risk to a pretrial detainee.⁸⁹

The Court has, however, provided guidance in other contexts. For instance, the Court has employed the Cruel and Unusual Punishment Clause of the Eighth Amendment to prohibit "barbarous punishment."⁹⁰ This includes prohibiting prison officials from failing to provide medical care,⁹¹ behaving with deliberate indifference to the medical needs of inmates,⁹² and knowingly exposing inmates to serious and communicable diseases.⁹³ At their core, these cases

⁸⁶ See Carol Robinson, *State Prison Officials Halt Intake of New Inmates Amid Covid-19*, AL.COM (Mar. 20, 2020), https://www.al.com/news/2020/03/state-prison-officials-halt-intake-of-new-inmates-amid-covid-19.html?utm_campaign=aldotcom_sf&utm_source=facebook&utm_medium=social.

⁸⁷ The concerns noted above are not the only concerns that arise out of the COVID-19 crisis in the context of the criminal justice system. From a constitutional perspective, detainees suffer denial of speedy trial and jury rights, a lack of access to counsel now excluded from jails, and the risk of cruel and unusual conditions of punishment if detained following conviction. This Essay touches on some of these concerns briefly, though without the full attention they deserve.

⁸⁸ See 18 U.S.C. §§ 3141 et seq.

⁸⁹ The Court has tied the analysis of "excessiveness" to the Due Process Clause, finding that bail (or more accurately the lack of bail) is neither excessive nor punitive so long as the decision to detain is narrowly tailored to achieve an articulated and compelling state interest. See *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015) ("if the condition of confinement being challenged 'is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment."); *Salerno*, 481 U.S. at 755; *Bell*, 441 U.S. at 535 (holding that pretrial detention may not be punitive). In *Bell* the Court also noted that some level of overcrowding or intrusive searches might violate a pretrial detainees liberty interests. 441 U.S. at 542.

⁹⁰ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

⁹¹ *Id.*

⁹² *Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018).

⁹³ *Helling v. McKinney*, 509 U.S. 25 (1993).

recognize that even during periods of incarceration, the detainee maintains substantive due process interests in safety from physical harm.⁹⁴

While this may not obligate the State to provide optimal medical care, the State may not ignore the medical needs of detainees, particularly critical medical protection.⁹⁵ In *Brown v. Plata*, the Court explained that a prisoner “may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”⁹⁶ The current crisis brings the Court’s reasoning directly into play. For detainees who are not outwardly sick, adequate medical care means abiding by social distancing and isolation guidelines, having the ability to wash hands frequently and carefully, and access to medical professionals to assess the severity of potential symptoms.⁹⁷ It also means access to protective face masks as the CDC has recommended all people wear facemasks when social distancing guidelines cannot be met.⁹⁸ For those who are experience severe symptoms, it means access to adequate medical professionals, hospitals, and perhaps even ventilators.⁹⁹ Thus, while punishment may infringe on an inmate’s personal liberty, the infringement must not include exposure to contagions or denial of medical care. While these cases all involve punishment as opposed to pretrial detention, it would seem odd that a detainee should have more rights after conviction than before. Rather it seems clear, that a pretrial detainee, like post-conviction detainees, has a liberty interest in physical safety during periods of pretrial detention.

Certainly, those held as flight risks as opposed to those considered unsafe should be eligible for release, as concern that a defendant will not return to a future court date cannot and should not outweigh the detainee’s liberty interest in remaining alive and healthy.¹⁰⁰ Further, the fact that COVID-19 has not yet overwhelmed jails cannot and should not be a justification for further detention, particularly given the lack of available testing¹⁰¹ and as new cases in jails appear

⁹⁴ *Hope v. Pelzer*, 536 U.S. 730, 738 (2002).

⁹⁵ *Id.*

⁹⁶ 563 U.S. 493, 510–11 (2011).

⁹⁷ *What to Do if You Are Sick?*, CDC (Apr. 5, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html>.

⁹⁸ *Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission*, CDC (Apr. 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>.

⁹⁹ *What to Do if You Are Sick?*, *supra* note 122.

¹⁰⁰ *See, e.g.*, *United States v. Scarpa*, 815 F. Supp. 88 (E.D.N.Y. 1993) (holding that a defendant with AIDS who was charged with murder should be released on bail given the “unacceptably high risk of infection and death on a daily basis inside the MCC”); *United States v. Adams*, No. 6:19-mj-00087-MK, 2019 WL 3037042 (D. Or. July 10, 2019) (holding that a defendant charged with violation of the Mann Act and possession of child pornography who suffered from diabetes, heart conditions, and open sores should be released on home detention because of his medical conditions).

¹⁰¹ *See, e.g.*, Connor Sheets, *Alabama Prison System COVID-19 Plan Anticipates Widespread Infection, Death, National Guard Intervention*, AL.COM, April 5, 2020 at:

<https://www.al.com/news/2020/04/alabama-prison-systems-covid-19-plan-anticipates-widespread-infection-deaths-national-guard-intervention.html>

(noting the lack of testing in Alabama prisons); Elise Schmelzer, *22 Inmates at Denver’s Two Jails Under Observation After Showing Coronavirus Symptoms, None Have Been Tested*, THE DENVER POST (Mar. 20, 2020), <https://www.denverpost.com/2020/03/20/denver-jail-coronavirus-observation/>.

daily.¹⁰² As the Court has noted in the context of the Eighth Amendment's prohibition against cruel and unusual punishment, detention facilities must accommodate the basic human need of safety.¹⁰³ It would seem an odd application of this right to deny a person the opportunity to avoid infection by requiring that they remain in jail until already exposed to the harm.

Yet, pretrial detention decisionmakers fail to take the potential detainee's interests in safety into account when calculating pretrial release or describing community safety concerns. Instead, in assessing safety concerns, prosecutors and courts tend to speak of the community interest in the defendant's detention rather than the threat a defendant may face if detained.¹⁰⁴ This draws a false division between a detainee's and the community's interest. The Court's decisions with regard to punishment suggest at least a shared constitutional concern over the detainee's safety while in custody and the community's interest.¹⁰⁵ However, even if one does not believe this shared concern exists during ordinary times, it certainly does now with the threat of COVID-19. The current threat changes the calculus of safety concerns to include a defendant's interests, both because the threat of infection inherent in detention is high¹⁰⁶ and because the community has a particular interest in reducing the rate of infection among all populations.¹⁰⁷ For both early and late pretrial decisionmakers, these public safety concerns coupled with the financial implications of closed courts, prisons declining transfers from local jails, infection risk for inmates and jail staff, and rising costs of medical care all counsel towards a reconsideration of the risks a defendant's release poses.

B. *Considering Safety and Communities in Crisis*

The recognition of a detainee's interest in safety also squarely raises questions about how "community safety" is calculated, both in terms of which communities count for this calculation and, more fundamentally, why a defendant's interests are separated from the community's in pretrial decision making. These are linked inquiries and they are inquiries made simultaneously more visible and more complex in the context of COVID-19.

The current health crisis confirms, in ways previously obscured or ignored, that a defendant's community is a shifting and multi-faceted one. A defendant may call a particular community his home, but during periods of detention the community he shares contact includes jail and prison staff. To fully contemplate community safety in this time of crisis, therefore, requires consideration of the risk pretrial detention may pose to those a detainee comes into contact with as a product of his detention. Put another way, a COVID-19 outbreak in a jail affects not only those detained, but jail staff themselves and their families.¹⁰⁸ The calculation of community safety during this public health crisis must shift to encompass multiple communities.

¹⁰² See, e.g., *COVID-19 Infection Tracking in NYC Jails*, THE LEGAL AID SOCIETY (Apr. 7, 2020), <https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/>.

¹⁰³ See *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

¹⁰⁴ See Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837, 891-2 (2016).

¹⁰⁵ See, *supra* notes 90-96 and accompanying text.

¹⁰⁶ This claim is true for all defendants, but particularly those who fall into high-risk categories: the elderly, immuno-compromised, and pregnant.

¹⁰⁷ See Roberts, *supra* note 7.

¹⁰⁸ Infection among jail staff makes this plain, see, e.g., Bernadette Hogan, *N.Y. State Prison Guards Beg Cuomo to Protect Workers from Coronavirus*, N.Y. POST (Mar. 30, 2020),

Beyond this, the current crisis highlights the false dichotomy promoted by the pretrial detention system between the defendant's liberty interests and the community's safety interests. When pretrial decisionmakers consider public safety concerns, they tend to speak in terms of the public as one body and the defendant as another—as if a defendant lives in complete isolation without a community or family of his own.¹⁰⁹ The “community” requires protection from the defendant—his past criminal record, or his lack of resources or a home, counseling toward some lurking future danger from which the court must insulate the community.¹¹⁰ This calculation, however, makes assumptions about the community itself that often fail to take to account the community's own perceptions of the risk the defendant poses or the hardship that the loss of the defendant may produce in the life of those around him.¹¹¹ In fact, the community interest in safety is often not separate from the defendant's, but entwined with it. This is not to say that in every case the community is better off when a defendant is released, or that every member of the community may benefit or suffer in the same ways when a defendant is detained, but it is to say that separating defendant's and a community's interest may fail to properly appreciate the complex dynamics of “community safety.”

The COVID-19 crisis heightens the potential harm of detention and highlights the importance of calculating community safety in terms that take the defendant into account—not only as a matter of the defendant's safety but as a matter of the community's. The current public health crisis raises the hard question of whether detaining a defendant for any period creates so significant a communal risk that community safety counsels toward release in all but extreme cases. This risk presents in multiple scenarios. A detained defendant may never come home, and his community may suffer the long-term effects of his permanent absence. Or, if left to linger in a highly susceptible jail facility, he may bring the contagion back to the community, creating a new infection source. Or, an outbreak in a jail will send sick and dying detainees to already overtaxed hospitals, creating further resource scarcity in an already overburdened system.¹¹² In any of these scenarios, pretrial release becomes a means of preserving not just the defendant's health and safety but the community's. Likewise, fiscal concerns may counsel toward release as a means to reduce overcrowding not only in jails, but in medical facilities.

Despite these claims, one response might be for courts to decline to release any defendant once detained. Indeed, this argument has been floated by state prosecutors and police as an appropriate response to COVID-19, and by the Department of Justice as a necessary component of the current state of emergency.¹¹³ On April 1, the BOP locked inmates in their cells for two weeks in hopes of halting or slowing the spread of COVID-19 in an already compromised

<https://nypost.com/2020/03/30/ny-state-prison-guards-beg-cuomo-to-protect-workers-from-coronavirus/>.

¹⁰⁹ See Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019) (describing this phenomenon in the context of prosecution).

¹¹⁰ See Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2122 (2019); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018); Gouldin, *supra* note 104.

¹¹¹ See Carroll, *supra* note 41.

¹¹² See, e.g., Sheets, *supra* note 101.

¹¹³ See Betsy Woodruff Swan, *DOJ Seeks New Emergency Powers Amid Coronavirus Pandemic*, POLITICO (Mar. 21, 2020), <https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023>. Congress has pushed back on this request, but will likely grant some additional powers. See Riley Beggin, *DOJ Asks Congress for Broad New Powers Amid COVID-19. Schumer Says, “Hell no.”* VOX (Mar. 22, 2020), <https://www.vox.com/policy-and-politics/2020/3/22/21189937/coronavirus-department-justice-doj-powers>.

Draft (April 14, 2020) – Do Not Cite Without Author's Permission

system.¹¹⁴ Some local actors have followed suit, declining to release pretrial detainees citing public safety concerns.¹¹⁵

Such a plan follows a particular logic: if you fear that the virus will spread rapidly in jails and may be undetectable in some of those infected,¹¹⁶ detaining all persons indefinitely will effectively insulate the remaining population from any risk of infection as a result of any period of detention. This logic, however, ignores the Court's own doctrine on pretrial release—a doctrine that presumes freedom as a default and detention as a last resort.¹¹⁷ It runs contrary to fundamental constitutional principles that the accused do not forfeit all rights in the face of arrest, detention, or even a pandemic and the fear it generates.

Taken to its extent, it is a logic that would dictate that a defendant should continue to be held even after completing a sentence. If that feels unsustainable as a matter of policy or humanity or constitutionality under the Eighth Amendment (and, spoiler alert, it should), then it should feel equally if not more unsustainable in the context of pretrial detention, in which a defendant has not even been convicted. It is a logic that transforms any possible period of detention into a death sentence, both for the detainee and for those who work in our jails and prisons. And one that ignores the reality that even those already exposed to the virus are less likely to infect others if they self-isolate rather than remain incarcerated in crowded and unsanitary conditions.

It is also a logic that will tax already strained medical facilities. As Governor Andrew Cuomo laments the lack of hospital beds and ventilators in the state¹¹⁸ and inmates at Rikers Island are offered \$6 an hour to dig graves,¹¹⁹ the impact of mass infection in jails and prisons is starkly apparent. In a closed environment like jails and prisons with no opportunity for effective social distancing, once introduced, infection and mortality rates will rise. For medical facilities this translates to the introduction of hundreds of new patients into a system that is already overburdened.

To be sure, questions about pretrial release in the face of COVID-19 raises broader logistical questions. Not all pretrial detainees are the same—some pose different levels of risk in terms of safety or flight, and some have few resources that might ensure their own safety upon release. These differences, however, can be addressed in terms of the release decisions themselves

¹¹⁴ See Anastasia Tsioulcas, *Prisoners Across the Country Will be Confined for 14 Days to Cut Coronavirus Spread*, NPR (Mar. 31, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/31/824917318/prisoners-across-country-will-be-confined-for-14-days-to-cut-coronavirus-spread>.

¹¹⁵ See, e.g., Alice Sperry & Akela Lacy, *Louisiana's Coronavirus Plan for Prisons Could Create Death Camps*, THE INTERCEPT (Apr. 7, 2020), <https://theintercept.com/2020/04/07/louisiana-coronavirus-prisons/>.

¹¹⁶ See Melissa Healy, *How 'silent spreaders' are fueling the coronavirus pandemic*, L.A. TIMES (Mar. 17, 2020), <https://www.latimes.com/science/story/2020-03-17/how-silent-spreaders-are-fueling-the-coronavirus-pandemic> and CDC Emerging Infectious Diseases, *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, (Mar. 12, 2020), <https://wwwnc.cdc.gov/eid/article/26/6/20-0412> (both noting asymptomatic carrier pose a high risk for transmission given that COVID-19 carries a long phase of "silent" viral shedding before symptoms actually develop).

¹¹⁷ See *supra* notes 56 and accompanying text.

¹¹⁸ See *New York: Makeshift Hospitals Set Up as Cuomo Warns 'Tsunami is Coming'*, THE GUARDIAN (Mar. 30, 2020), <https://www.theguardian.com/us-news/2020/mar/30/new-york-coronavirus-andrew-cuomo-makeshift-hospitals>.

¹¹⁹ See Ryan Grim, *Rikers Island Inmates Offered \$6 an Hour to Dig Mass Graves*, THE INTERCEPT (Mar. 31, 2020), <https://theintercept.com/2020/03/31/rikers-island-coronavirus-mass-graves/>

and conditions of release. Jurisdictions can and have limited release to those accused of non-violent offenses and have placed conditions on releases including home monitoring, curfew requirements, or maintaining residence in a particular jurisdiction.¹²⁰

Discussion of release in the time of COVID-19 also highlights a more fundamental issue—the lack of support services for marginalized individuals regardless of a health care epidemic. As courts purport to base release decisions on factors such as a detainee’s ability to return to employment, education, or even a stable home, the lack of jobs, exclusion from school upon arrest, inequities in education opportunities, wide spread housing and food insecurity, lack of mental health facilities, and lack of addiction treatment facilities in marginal communities become a pathway to the criminal justice system, a basis to detain, and an impediment to release.¹²¹ This is clear in a time of crisis, but it is equally clear that one cannot have a conversation about meaningful pretrial detention reform (or criminal justice reform), without addressing the reality that we use our jails and prisons to house the very people that we fail to support in other contexts.

A system that relies on detention, whether indefinite and lawless detention in this time of crisis or finite detention beyond, is destined to fail. A continued system that imagines an all-or-nothing proposition in which the most vulnerable among us must either be detained pretrial or be released without support and in which the interest of our community is diametrically opposed to the accused’s is likewise unsustainable and cruel. Instead, in the face of this crisis and beyond we should recognize what is surely and fundamentally true: a defendant is part of the very community pretrial decisionmakers seek to preserve and protect. The borders of that community may shift and change, but what does not change is the reality that a defendant’s detention will create a void in that community that may well value his presence and his life.

CONCLUSION

This Essay began as a warning. In the face of a burgeoning health crisis, it sought to chart a path forward in which pretrial detainees might be released rather than remain in custody while the infection spread throughout the nation’s jails and prisons. In the weeks of its writing, this Essay has borne witness—like so many others—to the awful collision between the criminal justice system and COVID-19. In New York, one of the epicenters of the crisis, officials moved to release many detainees, including pretrial detainees.¹²² And yet, among the remaining incarcerated population, COVID-19 infection rates are nine times the rate of the free population.¹²³ As

¹²⁰ See, e.g. Keith L. Alexander, *As Inmates in D.C., Maryland and Virginia Test Positive for the Coronavirus, Jail Officials Scramble to Reduce the Risk*, Washington Post, April 1, 2020, at: https://www.washingtonpost.com/local/public-safety/as-inmates-in-dc-maryland-and-virginia-test-positive-for-the-coronavirus-jail-officials-scramble-to-reduce-the-risk/2020/04/01/b0d9cfd8-7363-11ea-85cb-8670579b863d_story.html.

¹²¹ See Travis Steams, *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, 11 SEATTLE J. FOR SOC. JUST. 963, 969-70 (2013).

¹²² See, e.g. Zusha Elinson and Deanna Paul, *Jails Release Prisoners Fearing Coronavirus Outbreak*, WALL STREET J., March 22, 2020, at: <https://www.wsj.com/articles/jails-release-prisoners-fearing-coronavirus-outbreak-11584885600>

¹²³ See Jonathan Stempel, *Rikers Island Jail Officers’ Union Sues New York City over Coronavirus*, Reuters, April 2, 2020, at: <https://www.reuters.com/article/us-health-coronavirus-new-york-rikersisl/rikers-island-jail-officers-union-sues-new-york-city-over-coronavirus-idUSKBN21K3KR> (noting that the Legal Aid Society of New York “state[s] that the 5.1% infection rate [in Riker’s Island]

confirmed cases and deaths mount, the prediction of the susceptibility of incarcerated populations has proven horrifically accurate.

Of course, the current COVID-19 crisis did not break the pretrial detention system. The system has long suffered all the cracks and deterioration of a system built on inequity and injustice. The crisis, however, highlights the failings of the system in new ways. The overcrowding in jails that makes the spread of COVID-19 so likely highlights how many are held in jails not because they present a true risk but because they are poor, are unable to make bail or pay for a condition of release, or simply have nowhere else to go.

The crisis also sends a sharp reminder that pretrial detainees are members of the very community the pretrial detention system claims to protect. In the time of this crisis, exposing the pretrial detention population to higher risk factors also represents a further unnecessary drain on community resources—namely increased strain on the already scarce medical resources—upon the detainees contracting COVID-19. In each of these instances, the crisis counsels toward a reconsideration of the current system.

Pretrial detention is not the only aspect of the criminal justice system affected by COVID-19. As the crisis has heightened, procedural safeguards within the system have collapsed. Court closures have delayed trials, suspended jury rights, and delayed appellate processes.¹²⁴ Closed jails have excluded not only access to family members but also access to counsel.¹²⁵ Sentenced defendants are facing risks not contemplated at the time of sentencing, raising Eighth Amendment concerns. Finally, court decisions to sentence even in the face of the epidemic subject defendants to unnecessary and unwarranted risks in the name of business as usual during a time that is anything but usual.

Like pretrial detention, COVID-19 did not break these systems. Failures in the criminal justice system are heightened by the crisis, but they will persist long after a vaccine is found and COVID-19 becomes a historical event. This crisis, however, in highlighting these problems on a national scale, presents an opportunity for reform. Most fundamentally it offers an opportunity to recognize that those detained within the system are not isolated or forgotten populations but are linked to our larger community. It is an opportunity to recognize that as our nation moves forward, we must think of safety and liberty interests not just in terms of those best able to weather this crisis through the inconvenience of self-isolation and limited supplies, but in terms of how the most marginal among us will weather this storm. It is an opportunity to question the system and its daily inhumanity.

was nine times higher than in all of New York City, 11 times higher than in Italy's Lombardy region, and 44 times higher than in China's Hubei province, all major areas for the coronavirus outbreak.”)

¹²⁴ See, e.g. Sarah Jarvis, *Coronavirus: The Latest Court Closures and Restrictions*, LAW 360, March 12, 2020, at: <https://www.law360.com/articles/1252836/coronavirus-the-latest-court-closures-and-restrictions> (updated regularly).

¹²⁵ See, e.g. Kimberly Kindy, Mark Berman and Julie Tate. *Jails and Prisons Suspend Visitation to Keep Coronavirus from Spreading*, Wash. Post, March 17, 2020, at: https://www.washingtonpost.com/national/jails-and-prisons-suspend-visitation-to-keep-coronavirus-from-spreading/2020/03/16/0cae4adc-6789-11ea-abef-020f086a3fab_story.html.