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CRISIS AND COERCIVE PLEAS

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INTRODUCTION

In the midst of the coronavirus pandemic, activists and advocates have rightly focused their attention on the immediate need to decrease the number of people in jails and prisons.¹ Jails and prisons have been ravaged by the

* Associate Professor of Law, Rutgers Law School. I would like to thank participants in the NIU Criminal Law Works-in-Progress workshop, Geoffrey Bickford, Russell Covey, Lucian Dervan, Sarah Dobson, Margaret Maffai, Kristina McKenna, Dale Rappaneau, Cheryl Saniuk-Heinig, and Jenia Iontcheva Turner.

¹ Emily Widra & Peter Wagner, *Jails and Prisons Have Reduced Their Populations in the Face of the Pandemic, but not Enough to Save Lives*, PRISON POL'Y INITIATIVE (Aug. 5, 2020), <https://www.prisonpolicy.org/blog/2020/08/05/jails-vs-prisons-update-2/> [<https://perma.cc/7TBK-2X8D>].

virus and defendants are at real risk of illness or death in those spaces.² But as the crisis continues and the backlog of criminal cases grows, defendants face additional risks. This essay focuses on one such risk: the heightened risk for coerced and false pleas during the crisis.

The vehicle by which the criminal system resolves most criminal cases—the plea bargain³—is ripe for abuse and overuse in the best of times. Unfortunately, now is far from the best of times, and as I outline here, there are several reasons why the usual risk factors for coercive plea bargaining are exacerbated during this public health crisis. Furthermore, despite recent efforts to reform the plea system, the pandemic risks entrenching many of the most negative characteristics of plea bargaining even more deeply.

Quite simply, the coercive nature of plea bargaining will get worse in a system that is backlogged and unable to hold jury trials for several months. Many states are not counting the delays caused by the coronavirus toward a defendant's speedy trial clock, which means the cases can remain active for long periods of time and without any risk to the prosecutor that the case will be dismissed for lack of prosecution.⁴ For a defendant in this backlogged system, with a case hanging over her head and a speedy trial clock without finality, the plea will be her only option. In such an environment, coercive pleas can and will flourish.

This essay proceeds in three parts. Part I of the essay discusses the particular concerns related to coercive plea bargaining during the COVID-19 crisis. Part II offers solutions to these issues and suggests that this moment may provide opportunities for creative problem-solving capable of outlasting the virus. Finally, Part III discusses some silver linings of the crisis for the criminal system at large and the practice of plea bargaining in particular. Like many other recent pieces about the impact of coronavirus on the criminal justice system,⁵ this essay addresses the current crisis in the hopes

² Katie Park & Tom Meagher, *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons#staff-cases> [<https://perma.cc/P6GG-L7VG>].

³ Ninety to ninety-five percent of guilty pleas are resolved through guilty plea. Lindsey Devers, DEP'T OF JUSTICE, RESEARCH SUMMARY: PLEA AND CHARGE BARGAINING 1 (2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf> [<https://perma.cc/6SXJ-6QXW>].

⁴ See *infra* Part I.2.

⁵ See, e.g., Matthew Bender, *Unmuted: Solutions to Safeguard Constitutional Rights in the Virtual Courtroom and How Technology Can Expand Access to Counsel and Transparency in the Criminal Justice System*, 66 VILL. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3672441; Susan Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68

that it will teach us important lessons about the system more broadly. By seeing some of the worst parts of the system exposed through COVID-19, we may be able to better meet future challenges and tackle some of the underlying daily injustices of the modern criminal process.

I. THE RISK FACTORS FOR COERCIVE PLEAS DURING AND AFTER COVID-19

There are three broad categories of concern for the misuse and abuse of plea bargaining during this crisis: 1) the even greater coercive force of a prison or jail sentence during a pandemic, 2) the difficulty with holding—or complete lack of—jury trials, and 3) issues with access to counsel. These areas overlap in many ways, but defining these categories allows one to explore the challenges that defendants will face during and after this crisis.

A. THE EVEN GREATER COERCIVE POWER OF A PRISON OR JAIL SENTENCE DURING A PANDEMIC

1. *Pretrial Detention and Incarceratory Sentence as Potential Death Sentence*

A regular feature of the criminal system is the pretrial detention of defendants who cannot afford bail. For many decades, this practice has been criticized for coercing defendants into accepting pleas.⁶ People are, of course, inclined to avoid sitting in a jail cell under any circumstances, even where they may be innocent and could launch a defense. Recent studies indicate that pretrial detention increases the risks of a false plea substantially.⁷

BUFFALO L. REV. 5 (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3683408; Julia Ann Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158 (2020); Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U.L. REV. ONLINE 59 (2020), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1291&context=nulr_online&preview_mode=1&z=1596157754; Benjamin Levin, *Criminal Law in Crisis*, U. COLO. L. REV. (2020), <https://lawreview.colorado.edu/?p=627>; Jenia I. Turner, *Remote Criminal Justice*, TEX. TECH. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699045; Melanie D. Wilson, *The Pandemic Juror*, U. TENN. LEGAL STUD. RES. PAPER No. 401 (2020), <https://ssrn.com/abstract=3678923>.

⁶ HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 20–31 (2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf [<https://perma.cc/39EL-2HTZ>].

⁷ See Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences against Pretrial Detention in Decisions to Plead Guilty*, 24 PSYCHOL. PUB. POL'Y & L. 204, 213–14 (2018) (reviewing the results of the authors' study finding that pretrial detention increases the likelihood that even innocent people will plead guilty).

During the pandemic, the risk of false or coerced pleas is amplified. The COVID-19 crisis makes jails and prisons—already unsafe spaces—particularly treacherous because they are hotspots for viral spread.⁸ As Jenny Carroll notes, COVID-19 has highlighted the many failings of the pretrial detention system.⁹ She writes, “[i]n the midst of a public health crisis, pretrial detention determinations raise more than the possibility of confinement, indignity, and [] downstream consequences []; these decisions raise the possibility that a person will be exposed to a known fatal contagion as a result of an accusation.”¹⁰ A prison or jail sentence poses similar risks, and there have already been thousands of cases of COVID-19 in jails and prisons across the nation and 1,276 deaths, including of several young, otherwise healthy individuals.¹¹ The number of cases and deaths in the nation’s jails and prisons rise daily.¹² In addition to these risks, many states are struggling with a lack of alternatives to pretrial detention. For example, as *The Appeal* reported, a shortage of ankle monitors has resulted in many people staying in jail, even when a court has ordered home detention.¹³

And prosecutors know all of this. There have been disturbing anecdotal reports of state prosecutors threatening defendants by holding out a plea bargain as the defendant’s only way to avoid incarceration and potential exposure to coronavirus.¹⁴ As the crisis continues and the coronavirus sweeps through more jails and prisons, more defendants will decide to plead guilty rather than risk exposure to the virus while incarcerated pretrial,

⁸ Anna Flagg, *Jails Are Coronavirus Hotbeds. How Many People Should Be Released to Slow The Spread?*, FIVETHIRTYEIGHT (June 3, 2020), <https://fivethirtyeight.com/features/jails-are-coronavirus-hotbeds-how-many-people-should-be-released-to-slow-the-spread/> [<https://perma.cc/ZQZ5-NYTA>].

⁹ Carroll, *supra* note 5.

¹⁰ *Id.* at 72.

¹¹ See Park & Meagher, *supra* note 2. Throughout the country, as of October 24, 2020, 152,955 people in prison have tested positive for COVID-19 and 1,276 people in prison have died from the illness. *Id.* In addition, there have been 34,188 cases of coronavirus reported among prison staff and 86 reported deaths. *Id.*

¹² See *id.*

¹³ Kira Lerner, *Amid One of the Nation’s Worst Coronavirus Outbreaks, a Shortage of Ankle Monitors Kept Some People in Jail*, THE APPEAL (June 2, 2020), <https://theappeal.org/chicago-cook-county-jail-coronavirus-ankle-monitors-shortag/> [<https://perma.cc/48XB-2U2J>].

¹⁴ @RadleyBalko, TWITTER (Mar. 16, 2020, 4:00 PM), <https://twitter.com/radleybalko/status/1239657752001236992?s=20> [<https://perma.cc/3H9T-V6AY>]; Jolie McCullough & Emma Platoff, *Coronavirus Pauses Many Texas Court Proceedings. For Some, That Means More Time in Jail*, THE TEX. TRIB., Mar. 19, 2020, <https://www.texastribune.org/2020/03/19/texas-courts-coronavirus-jury-trials-defense-attorneys/> [<https://perma.cc/Y9WE-NZGU>] (citing a defense attorney who said that at least one local prosecutor “who tried to use fear of catching the virus in jail to sway a defendant to take the offer already on the table”).

regardless of their innocence¹⁵ or their ability to launch a successful challenge of their case.

These same fears affect those who are not incarcerated and awaiting trial: rather than risk time incarcerated, these individuals may take a plea since it could mean serving a home confinement sentence during the crisis,¹⁶ or they may be willing to take a non-incarceratory sentence rather than fighting the case and potentially ending up in a prison overrun by COVID-19.

The coronavirus crisis highlights how seldom conditions of confinement are brought up at sentencing and how unusual this is.¹⁷ The virus makes it impossible to ignore the reality of where we send people when they are sentenced or held pretrial, because these forms of segregation now come with risks of exposure to a potentially fatal illness. And because of the pervasive nature of plea bargaining, these conditions—and the very real likelihood of death by COVID-19—may become another bargaining chip in the plea negotiation.

2. Waivers

Waivers are a common part of the plea process. When a defendant pleads guilty, the defendant gives up rights typically associated with taking a plea, like the right to proceed to trial. But the defendant often gives up many additional rights, such as the right to appeal or the right to receive *Brady* material.¹⁸ These waivers showcase the power of the government to set the terms of the plea agreement. And a prosecutor's insertion of waivers into a plea deal reminds us of the fact that plea bargains are contracts of adhesion.

¹⁵ Edkins & Dervan, *supra* note 7.

¹⁶ There is some speculation that this is the reason Lori Loughlin, the actress awaiting trial in the college admissions scandal, decided to plead guilty after months of holding out for trial. She will be sentenced to two months in jail, and some speculate that she will be able to serve the sentence at home rather than in a federal facility because of the coronavirus. Josh Barro & Ken White, *Should Joe Scarborough Sue President Trump*, LRC PRESENTS: ALL THE PRESIDENT'S LAWYERS PODCAST, at 30:51 (May 27, 2020), <https://www.kcrw.com/news/shows/lrc-presents-all-the-presidents-lawyers/should-joe-scarborough-sue-president-trump> [<https://perma.cc/WFK6-MB3J>].

¹⁷ Levin, *supra* note 5.

¹⁸ *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (finding the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant); *see also* Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 960–66 (2012) (discussing the use of plea waivers to bar defendants from requesting future DNA testing).

During this crisis, we are seeing ways in which prosecutors are requiring defendants to waive specific rights related to COVID-19 in order to secure the benefit of the plea. In Northern California, the U.S. Attorney requested that some defendants waive any compassionate release requests for 180 days.¹⁹ A district court judge ultimately struck down the waiver provision in a powerful decision,²⁰ but the mere fact that the US attorneys attempted such a waiver indicates the degree of latitude the parties have in negotiating pleas and showcases the power of the prosecutor in setting the terms of a plea bargain.

Still other prosecutors have been attempting to secure plea bargains via letters sent directly to defendants. In one such letter in Maine, a local prosecutor's office offered—in light of the pandemic—to resolve a drunk driving case via a form the defendant would fill out and return by mail.²¹ The offer included a sentence of 48 hours in jail and a fine, and although it noted that the defendant could consult with an attorney, it did not require such consultation.²² Such a resolution would allow a defendant to give up the constitutional right to counsel before accepting a jail sentence without any appropriate waiver of that right.²³ Furthermore, the offer expired about a month after the letter was sent and contained language that the defendant could not “argue for [a] less” serious offer,²⁴ a move that could result in an uncounseled defendant feeling pressured to accept the offer in the letter rather than lose out on any deal in the future.

This sample of waivers demonstrates just how broadly prosecutors are interpreting their power to impose waivers of constitutional and procedural rights on defendants during the pandemic, making it nearly impossible for defendants to appeal or alter their convictions or sentences if the plea was coerced.

¹⁹ See generally *United States v. Sembrano*, No. 19-cr-00651-CRB-1, 2020 WL 3161003, at *2 (N.D. Cal. May 28, 2020); see also *Order Rejecting Plea Agreement, United States v. Osorto*, 445 F. Supp. 3d 103, 104–05 (N.D. Cal. May 11, 2020) (No. 19-cr-00381-CRB-4).

²⁰ *Sembrano*, 2020 WL 3161003 at *2 (“[T]he fact that the Government appropriately and often successfully opposes compassionate release motions on the merits does not explain why defendants should waive their right to bring such a motion at all. If the Government can oppose – and courts can deny – motions for compassionate release on the merits, why is it also necessary for defendants to waive or limit their right to move for compassionate release before the merits of such a motion are knowable.”)

²¹ Letter to Todd Collins, Office of the District Attorney, Aroostook County, Re: New Language in DA's Office Plea Recommendation, June 26, 2020 (on file with author).

²² *Id.*

²³ *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

²⁴ Letter to Todd Collins, *supra* note 21.

B. THE DIFFICULTY OF HOLDING OR COMPLETE LACK OF JURY TRIALS

1. No Jury Trials

Even before the crisis, we were living in a country with nearly no trials, and the negative effects of a lack of trials are many: less development of the law, fewer opportunities to develop a case's factual record, fewer opportunities for juries to review the decisions of prosecutors—the list goes on.²⁵ Because of the public health crisis, in most jurisdictions there were no jury trials during the spring and summer of 2020,²⁶ although some jurisdictions did have limited jury trials—both live and online—during the summer.²⁷ The fall of 2020 saw more courts attempting to hold trials with mixed results. For instance, Maine's first attempt to hold an in-person criminal jury trial was scrapped after a witness's child reported COVID-19 symptoms.²⁸ The status of the jury trial continues to evolve, but it is unlikely things will go back to any version of normal for many months (even in the very best scenario).

The lack of jury trials makes sense from a public health perspective. Indeed, even the National Association of Criminal Defense Attorneys has stated that holding criminal jury trials during the pandemic would be “reckless and irresponsible,” and the “understandable fear, panic, and

²⁵ Robert J. Conrad Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 157–61 (2018).

²⁶ *Coronavirus and the Courts*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency> [<https://perma.cc/WG4M-6SB3>] (last visited Sept. 20, 2020) (showing statewide jury trial restrictions for each state and indicating that even as of September 2020, many states were still postponing jury trials).

²⁷ See, e.g., Andrew Wolfson, *A Jury Social Distanced Through an 8-Week Trial as COVID-19 Raged. Here's How They Did it*, LOUISVILLE COURIER J. (Apr. 26, 2020), <https://www.courier-journal.com/story/news/crime/2020/04/26/federal-jury-sits-through-8-week-trial-amid-coronavirus-pandemic/3028236001/> [<https://perma.cc/M5QC-XRTN>] (discussing Kentucky trials); Max Mitchell, *Ohio's First Post-COVID Jury Trial was Set to Begin. Then the Defendant Nearly Collapsed*, LAW.COM (Apr. 29, 2020, 6:48 PM), <https://www.law.com/2020/04/29/ohios-first-post-covid-jury-trial-was-set-to-begin-then-the-defendant-nearly-collapsed/?sreturn=20200509051618> [<https://perma.cc/Y7E7-CZC4>] (discussing Ohio trials); Justin Jouvenal, *Justice by Zoom: Frozen Video, a Cat – and Finally a Verdict*, WASH. POST (Aug. 12, 2020), https://www.washingtonpost.com/local/legal-issues/justice-by-zoom-frozen-video-a-cat--and-finally-a-verdict/2020/08/12/3e073c56-dbd3-11ea-8051-d5f887d73381_story.html [<https://perma.cc/6RYE-CDJ8>] (discussing Texas's first online criminal trial).

²⁸ Megan Gray, *Maine's First Mid-Pandemic Jury Trial Postponed Because of Possible COVID-19 Exposure*, PORTLAND PRESS HERALD (Sept. 15, 2020), <https://www.pressherald.com/2020/09/15/court-postpones-first-mid-pandemic-jury-trial-because-of-possible-covid-19-exposure/> [<https://perma.cc/J2EP-FZA9>].

uncertainty” stemming from the pandemic would “undermine the truth-seeking purpose of trials.”²⁹ As Melanie Wilson has noted, forcing jurors to attend trials during a pandemic is an extension of the system’s often cruel treatment of jurors and will serve to undermine the trial function since jurors may likely rush to judgment to limit their potential exposure to COVID-19.³⁰

But other types of danger abound in an extended period without trials, particularly for defendants who are sitting in jail awaiting trial.³¹ While many scholars have pushed back on the idea that plea bargains occur in the “shadow of the trial,”³² at least some plea bargaining happens with the idea that a trial *could* occur. For instance, defendants who want to avoid immigration consequences may opt for trial when no immigration-safe plea bargain is on the table.³³ Or when the parties cannot reach a resolution on the appropriate sentence, a defendant may wish to proceed to trial. And, of course, innocent defendants may want a trial if the prosecutor refuses to drop the case. However, with limited trials taking place and, as I explain below, a hold on speedy trial clocks, plea bargaining is the *only* option for resolving a case—a situation that only works for the prosecutor’s benefit. This is what Thomas Maher recently called “plea bargaining in the shadow of COVID-19.”³⁴

Additionally, as live jury trials resume, the health safety protocols needed to reduce the spread of COVID-19 will make the trial so burdensome that there will likely be fewer held. An August 2020 opinion by Judge Gary R. Brown of the Eastern District of New York walked through the myriad

²⁹ NAT’L ASS’N OF CRIM. DEF. LAWS., CRIMINAL COURT REOPENING AND PUBLIC HEALTH IN THE COVID-19 ERA 8 (June 2, 2020), <https://nacdl.org/getattachment/56802001-1bb9-4edd-814d-c8d5c41346f3/criminal-court-reopening-and-public-health-in-the-covid-19-era.pdf> [<https://perma.cc/DKA7-D5GW>].

³⁰ Wilson, *supra* note 5, at 1–2.

³¹ Although it is outside the scope of this essay, the canceling of grand juries during the coronavirus raises other concerns about unfairness to defendants. Simone Weichselbaum, *Can’t Make Bail, Sit in Jail Even Longer Thanks to Coronavirus*, THE MARSHALL PROJECT (May 1, 2020, 5:00 AM), <https://www.themarshallproject.org/2020/05/01/can-t-make-bail-sit-in-jail-even-longer-thanks-to-coronavirus> [<https://perma.cc/F53S-A72C>].

³² The seminal article questioning the “shadow of trial” theory of plea bargaining is Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

³³ *Lee v. United States*, 137 S. Ct. 1958, 1968–69 (2017) (finding that defendants, even when they are offered a favorable plea deal, may opt for trial where they face serious immigration consequences).

³⁴ Thomas Maher, *Plea Bargaining in the Shadow of COVID-19*, DUKE L. CSJ BLOG (May 19, 2020), <https://sites.law.duke.edu/cs-j-blog/2020/05/19/plea-bargaining-in-the-shadow-of-covid-19/> [<https://perma.cc/GGU3-NYGW>].

challenges of in-person criminal jury trials.³⁵ As Judge Brown noted, the typical safety protocols—wearing face masks, social distancing, temperature screenings, and the like—are probably insufficient to protect trial-goers since most trials require hours of close contact among the participants.³⁶ Those trials that do occur will be plagued with issues that decrease the chances of a fair trial for the defendant. For instance, in addition to jurors needing to maintain social distance, lawyers will likely have to remain socially distant from one another and from their clients. This will make communication between the defense attorney and client more difficult at trial, and it poses a risk to the defendant’s ability to participate in her own defense. In addition, smaller courtrooms may be unable to accommodate these arrangements, leaving fewer courtrooms for trials to proceed. Trials will be at risk of being cancelled at the last minute or mid-trial if any participants develop symptoms.³⁷

The burdens of COVID-19 will also likely make it harder to select jurors. Many jurors will opt out of service or fail to show up because of the very real health risks of jury service, especially those from communities hit hardest by the virus.³⁸ This means the jury pool will not only be smaller, but likely less diverse. As Melanie Wilson argues, “[g]iven that the virus is harming people of color in disproportionate numbers, and that white people, Republicans and young people are least concerned about spreading and contracting the virus, resuming jury trials during the pandemic may exacerbate racial disparities in jury pools.”³⁹ Jury service will also be unpleasant and anxiety-inducing, requiring people to wear masks for long stretches of time. Other actors in the courtroom will also have to wear masks and maintain social distance. Given these difficulties, judges and jurors will be inclined to move trials along quickly, which rarely benefits defendants.⁴⁰ And it’s important to note that these are just *some* of the potential challenges

³⁵ United States v. Cohn, No. 19-CR-097 GRB, 2020 WL 5050945, at *7 (E.D.N.Y. Aug. 26, 2020).

³⁶ *Id.* at 7–8

³⁷ Gray, *supra* note 28.

³⁸ For a discussion of how certain communities have been devastated by COVID-19, see Maria Godoy, *What Do Coronavirus Racial Disparities Look Like State by State?*, NPR (May 30, 2020, 6:00 AM), <https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state> [<https://perma.cc/7R9X-6D93>].

³⁹ Wilson, *supra* note 5, at 10–11.

⁴⁰ *Id.* at 9–10.

courts will face if they try to resume jury trials during the pandemic, which is why jury trials are not picking up speed any time soon.⁴¹

Because of these many challenges, some defendants are opting for bench trials. Bench trials are not as difficult to carry out as jury trials for many reasons: if they are done in-person, they involve fewer people, and if they are done via video, they can be easier to coordinate. In this sense, they pose a much smaller health risk to the parties involved while allowing defendants to have their day in court. It is surprising then that in one documented case out of the Eastern District of New York prosecutors objected to the defendant's mid-pandemic request for a bench trial, despite the defendant's health conditions that put him at greater risk of complications from COVID-19.⁴² Prosecutors instead insisted that the defendant continue to drag out his case until jury trials resumed.⁴³ The judge ultimately granted the defendant's request for a bench trial.⁴⁴ But the implications for coercive plea bargaining are clear here. The defendant had decided not to plead guilty and to proceed to a bench trial. The government attempted to block that request, which left the defendant to let his case linger while he waited for—likely unsafe—jury trials to resume. Had the court not granted the defendant's request for a bench trial, the defendant would have had to plead guilty or continue to wait for a jury trial he was terrified to attend because of his health issues.

It is critical to note, though, that bench trials are not a constitutional substitute for jury trials, which defendants are entitled to in cases that carry a potential sentence of six months or more.⁴⁵ Although there is some evidence that defendants have a greater chance of acquittal at a bench trials,⁴⁶ there are many reasons that a defendant may opt for a jury trial. Even if some defendants are willing to accept a bench trial, the right to a jury trial cannot be abrogated by the pandemic. A lack of trials, particularly jury trials, will

⁴¹ *Judiciary Issues Report on Restarting Jury Trials*, U.S. CTS. (June 10, 2020), https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf [<https://perma.cc/4CVY-RSUV>].

⁴² *United States v. Cohn*, No. 19-CR-097 GRB, 2020 WL 5050945, at *5 (E.D.N.Y. Aug. 26, 2020).

⁴³ *Id.* at *6.

⁴⁴ *Id.* at *22.

⁴⁵ *Baldwin v. New York*, 399 U.S. 66, 73–74 (1970).

⁴⁶ John Gramlich, *Only 2% of Federal Criminal Defendants go to Trial, and Most Who do are Found Guilty*, PEW RSCH CTR. (June 11, 2019, <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty>) [<https://perma.cc/6QA8-7D6T>]. In the federal court system in 2018, 38% of defendants who went to a bench trial were acquitted compared to only 14% of those who opted for a jury trial. *Id.*

ultimately cement plea bargaining as the only means of resolving a criminal case.

2. No Speedy Trial Clock

Another reason that the lack of trials is so concerning is because in many jurisdictions once the pandemic began courts either formally or informally stopped the speedy trial clock. Most states have adopted some speedy trial statute, which requires the prosecutor to move forward with the case within a specified period of time.⁴⁷ While many delays are not counted against the speedy trial clock,⁴⁸ a delay should, in general, correspond with some heightened chance that the speedy trial clock runs out and the case gets dismissed. Furthermore, there is a constitutional right to a speedy trial under the Sixth Amendment. In *Barker v. Wingo*, the Court outlined the factors to consider in determining post-hoc whether a defendant was denied a speedy trial.⁴⁹ Those factors include the length of delay, the reasons the government gives for delay on their end, whether the defendant asserted her rights, and any prejudice to the defendant.⁵⁰ While the length of delay is the triggering mechanism, the factors work as a balancing test and require a fact-specific, post-hoc analysis of the case.⁵¹ As such, a defendant does not enter a criminal case with a clear understanding of what constitutes a constitutional speedy trial, but the Court does indicate that factors entirely out of the control of the state will weigh against the defendant in a speedy trial determination.

Defendants have not been able to rely on the speedy trial clock during the coronavirus crisis as a statutory or constitutional matter, and if prior disasters are any indicator, they will likely find that courts will be disinclined

⁴⁷ See N.Y. CRIM. PROC. LAW § 30.30(1) (Mckinney 2020) (stating a motion “must be granted where the people are not ready for trial within: (a) six months of the commencement of a criminal action is accused of . . . a felony; (b) ninety days of the commencement of a criminal action wherein a defendant is accused of . . . a misdemeanor.”); CAL. PENAL CODE § 1382 (West 2010) (stating the court “shall order the action to be dismissed” if “[i]n a felony case, when a defendant is not brought to trial within 60 days of the defendant’s arraignment” and “when a defendant in a misdemeanor or infraction case is not brought to trial within 30 days after he or she is arraigned . . .”). *But see* State v. Murphy, 496 A.2d 623, 627 (Me. 1985) (stating that defendant’s right to a speedy trial is not protected by statute but will be determined by the factors set forth in the Supreme Court case of *Baker v. Wingo*).

⁴⁸ See, e.g., N.Y. CRIM. PROC. LAW § 30.30(4)(a)–(j) (Mckinney 2020) (providing a range of reasons that certain time periods during the lifespan of a case are “excludable” from speedy trial calculations, including among others, pretrial motion practice, proceedings regarding the competency of the defendant, and pretrial discovery demands).

⁴⁹ *Barker v. Wingo*, 407 U.S. 514, 530–33 (1972).

⁵⁰ *Id.*

⁵¹ *Id.* at 530.

to start running the clock in the midst of the crisis.⁵² First, since the beginning of the crisis many state courts put the statutory speedy trial clock on hold.⁵³ In Massachusetts, for instance, the Supreme Court excluded all COVID-related delays until late October, including all delays related to pretrial release.⁵⁴ This means that the clock was simply stopped, even for defendants who were being jailed while awaiting trial.

Stopping the speedy trial clock significantly increases the prosecutor's leverage in plea negotiations. If a defendant objects to the terms of a waiver or some other aspect of her plea agreement, the typical option—that is, to proceed to trial—is not available. Second, on the back end, it is unlikely that there will be any constitutional speedy trial remedy since COVID-related delays are not the fault of the state. As such, the “reason for the delay” will not be attributed to the government.⁵⁵ Although courts may change their tune as the crisis progresses, these circumstances have likely already induced many defendants to take pleas, knowing that no trial was in sight. As the waiting game continues, there will undoubtedly be many more.

In many places it remains unclear as to when trials will resume, and even if trials resume in some form in the next several months, there will likely be a tremendous backlog of cases. As a result, defendants once again have only two options: let the case linger or plead guilty.

C. ISSUES WITH ACCESS TO COUNSEL

Meaningful dialogue with counsel is necessary for a defendant to voluntarily and knowingly waive her right to trial. A defendant is presumed to understand the panoply of rights one waives at the time of the plea if she

⁵² Patrick Ellard, *Learning from Katrina: Emphasizing the Right to a Speedy Trial to Protect Constitutional Guarantees in Disasters*, 44 AM. CRIM. L. REV. 1207, 1221–29 (2007).

⁵³ In federal court, several district courts have temporarily stopped the speedy trial clock. See, e.g., U.S. N.D.T.X., *Special Order No. 13-11: Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic* (April 22, 2020), <http://www.txnd.uscourts.gov/sites/default/files/documents/SO13-11.pdf> [<https://perma.cc/3MSK-MHCV>] (“[T]he ends of justice served by ordering these continuances outweigh the best interests of the public and each defendant’s right to a speedy trial.”).

⁵⁴ *Commonwealth v. Lougee*, 147 N.E.3d 464, 468 (Mass. 2020); see also Superior Court Standing Order 9-20: Fourth Updated Protocol Governing Superior Court Operations During the Coronavirus (COVID-19) Pandemic, effective October 1, 2020, <https://www.mass.gov/superior-court-rules/superior-court-standing-order-9-20-fourth-updated-protocol-governing-superior> (noting that all jury trials are delayed until at least October 23, 2020 and that “trial continuances order by SCJ are excluded from speedy-trial calculations”).

⁵⁵ Although, as at least one commentator noted after Hurricane Katrina, a lack of preparation for inevitable crisis should be held against the state in a speedy trial analysis. Patrick Ellard, *supra* note 52, at 1233–35.

consulted with competent counsel.⁵⁶ Defendants' indispensable consultation with counsel will be a challenge throughout the pandemic, because in-person meetings between attorneys and their clients—which is, in many cases, the ideal scenario for open dialogue—have halted.⁵⁷ “Out” clients can call from home but many families are home together during the pandemic making it difficult to have private conversations. In addition, the pandemic makes it challenging to find spaces outside of the home that provide a private and safe place to talk earnestly with a lawyer. This is also a real challenge for lawyers working at home, who struggle to find private locations to have confidential conversations.

For incarcerated clients, the challenges are even more profound. As mentioned above, data shows that those incarcerated in jails and prisons are at great risk of catching the virus. In addition, there is evidence that at least some jails and prisons are responding to the risk of COVID-19 by making it more difficult for defendants to speak with their attorneys.⁵⁸

But communication between lawyers and clients is not the sole challenge during this crisis. Many essential defense attorney functions are likely difficult or impossible to carry out. For instance, defense attorneys have an obligation to investigate their clients' cases, including before accepting a plea.⁵⁹ But how does a defense attorney find hard-to-reach witnesses during the pandemic? How does a defense attorney travel to the scene of the crime when travel is restricted or poses a health danger? Some attorneys may be willing to take the risk, but an attorney with a pre-existing condition may understandably decide the risk is not worth it. How do

⁵⁶ *Brady v. United States*, 397 U.S. 742, 758 (1970) (focusing on the critical role of competent counsel in defendant's ability to knowingly and voluntarily accept a guilty plea).

⁵⁷ Chrissy Madjar, Kenneth Hardin, Eric Quandt, & Nathan Wade, *75 Percent of My Job is In-Person, But I Can Barely See My Clients*, MARSHALL PROJECT (April 17, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/17/how-do-i-defend-people-now> [https://perma.cc/NPV5-K6CZ].

⁵⁸ Kim Kelly, *At the Center of the Coronavirus Pandemic, People Inside NYC Jails Describe Fear, Confusion and a Lack Of Supplies*, THE APPEAL (April 8, 2020), <https://theappeal.org/new-york-city-jails-coronavirus-covid-19/> [https://perma.cc/44T3-WJXL] (discussing the challenges, including the lack of cleaning phones and public spaces, that pretrial detainees face in communicating with the outside world). In addition, during the recent Black Lives Matters protests, some prisons and jails shut down movement and communication entirely. Lauren Gill, *Federal Bureau of Prisons Locks Down Prisoners and Takes Away Communications Amid Protests*, THE APPEAL (June 3, 2020), <https://theappeal.org/federal-bureau-of-prisons-locks-down-prisoners-and-takes-away-communications-amid-protests/> [https://perma.cc/MP6X-S5BG].

⁵⁹ ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTIONS § 4-4.1: DUTY TO INVESTIGATE AND ENGAGE INVESTIGATORS (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ [https://perma.cc/9H4Q-7YM7].

attorneys share and discuss discovery with clients, both those that are incarcerated pretrial and not? How do clients get access to the many other people on a defense team, like paralegals, investigators and mitigation specialists? All of this pretrial work also puts defendants in a much better position for plea negotiations.

These issues are exacerbated by the fact that budgets are being slashed for most public defender offices.⁶⁰ Evidence from the last recession indicates that public defense is a low funding priority for states in crisis.⁶¹ There are also revenue-generating challenges specific to this crisis that will impact defense work. For instance, in some places, funding for defense work is generated through the collection of fines paid for traffic offenses.⁶² With far fewer people on the road, this revenue has dropped off a cliff, which will likely produce a cascade of negative budget results. This same budget challenge occurred after Hurricane Katrina as well, and states would be wise to learn from the lessons of Katrina. Before Katrina, funding for the public defender came largely from parking fines.⁶³ After the hurricane, that source of revenue dried up and the number of public defenders in New Orleans dropped from thirty-nine to eight.⁶⁴ It is clear that these economic issues, along with the public health restrictions, create difficult and long-lasting problems for a defendant's right to counsel.

II. POSSIBLE SOLUTIONS

Crisis can provide opportunity for change and reflection. One major change since the pandemic began is that fewer people are being arrested in many jurisdictions, particularly for low-level offenses.⁶⁵ In addition, there have been more frequent grants of clemency and early release of those

⁶⁰ See, e.g., Debra Cassens Weiss, *Public Defenders in this State are Told to Slash Budgets as Traffic-Ticket Funding Plummets*, ABA J. (Apr. 9, 2020), <https://www.abajournal.com/news/article/public-defenders-are-told-to-slash-budgets-as-traffic-ticket-funding-plummets> [<https://perma.cc/PEW4-J57Y>].

⁶¹ Associated Press, *Public Defender Offices are in Crisis*, NBC NEWS (June 3, 2009, 8:59 PM), http://www.nbcnews.com/id/31093502/ns/us_news-crime_and_courts/t/public-defender-offices-are-crisis/#.XuF3j55KhR0 [<https://perma.cc/BBG8-CMVL>].

⁶² See Cassens Weiss, *supra* note 60.

⁶³ Ellard, *supra* note 53, at 1220.

⁶⁴ *Id.*

⁶⁵ Weihua Li, *Police Arrested Fewer People During Coronavirus Shutdowns – Even Fewer Were White*, THE MARSHALL PROJECT (June 2, 2020) (noting that although arrests were down, racial disparities in arrest rates worsened during the pandemic), <https://www.themarshallproject.org/2020/06/02/police-arrested-fewer-people-during-coronavirus-shutdowns-even-fewer-were-white> [<https://perma.cc/JDB7-85TX>].

servicing incarceratory sentences than the system normally experiences.⁶⁶ One revelation that could emerge from the pandemic is an understanding that, as a society, we do not need to arrest, detain, and incarcerate people at the rates we currently do. The pandemic did not reveal the problems with mass incarceration, but it may give us some empirical data to work with in the future as we examine the scope of the system.

The backdrop to the solutions here should be an understanding that the broad solution to the problems I address above are to dismiss many more cases and, in those that are not dismissed, allow defendants to await resolution at home without having to attend live court sessions. For the cases that live on, I offer the following suggestions to lessen the risk of coercive plea bargaining. Some of these I see as temporary fixes that should come and go with the virus, but others may prove to be longer lasting. If stakeholders can use this moment as an opportunity for creative problem-solving, there may be a silver lining to the chaos caused by the crisis.

A. VIRTUAL JURY TRIALS

The primary concern I identify above is the lack of jury trials. There are some jurisdictions that have had jury trials during the pandemic by seating jurors six feet apart and requiring everyone in the courtroom to wear a mask.⁶⁷ This solution puts people at risk of becoming ill or dying from the virus.⁶⁸ The courts ask citizens to pay too high a price in service of live trials.

I propose therefore that courts should experiment with trials over Zoom or video conference, at least in misdemeanor cases. I realize this proposal is fraught and practically challenging, but the response to the virus demonstrated that whole areas of life can be switched over to Zoom or other remote services with some planning. Indeed, lawyers are already thinking about this possibility.⁶⁹ In Texas, at least one civil court has experimented

⁶⁶ Associated Press, *Illinois Governor Grants Commutations Amid Pandemic*, TELEGRAPH HERALD (Apr. 10, 2020), https://www.telegraphherald.com/coronavirus/article_0ce77ad8-8bd2-59cb-b62b-ee3df2fd8051.html [<https://perma.cc/LF9D-22U8>].

⁶⁷ Shaila Dewan, *Jurors, Plea Remove Your Masks: Courtrooms Confront the Pandemic*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/us/coronavirus-jury-trial-oregon.html> [<https://perma.cc/Z9PY-EFVQ>].

⁶⁸ However, even when courts do have live trials, those trials must make public either the transcript of the trial or a video recording of the trial in order to ensure the defendant's Sixth Amendment right to a public trial. Stephen E. Smith, *The Right to a Public Trial in the Time of COVID-19*, 77 WASH. & LEE. REV. ONLINE 1, 11 (2020), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol77/iss1/1> [<https://perma.cc/XW7V-JMMK>].

⁶⁹ Matt Reynolds, *Could Zoom Jury Trials Become the Norm During the Coronavirus Pandemic*, ABA J. (May 11, 2020), <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic> [<https://perma.cc/REZ6-SFXG>].

with a Zoom jury trial⁷⁰ and another court held a criminal trial in a traffic case via videoconference, with jurors being provided iPads to follow the proceedings on a dedicated YouTube channel.⁷¹

There are many reasons why Zoom trials are problematic. As Jenia I. Turner chronicles in her article, *Remote Criminal Justice*, lawyers and judges report many issues with online proceedings, including problems monitoring witnesses, glitches with technology that disrupt the proceedings and an overall difficulty with presenting cases effectively.⁷² Other scholars have noted that Zoom trials erode the privacy of the participants.⁷³ Indeed, the criminal trial in Texas was streamed via YouTube and was observed by hundreds of people at any given moment.⁷⁴ In another trial streamed via YouTube, a viewer at home called the court to report that a lawyer had failed to redact the defendant's full social security number in a document he screen-shared.⁷⁵ Although trials are typically open to the public, the average audience for a run-of-the-mill in-person trial would not have nearly the same audience as one broadcast over the internet. In addition, virtual proceedings may lead to bad outcomes for defendants. For instance, prior studies found that defendants got worse results during virtual bail hearings than live bail hearings.⁷⁶

Recent scholarship, however, pushes back against the idea that virtual justice is necessarily inferior. As Susan Bandes and Neal Feigenson note,

⁷⁰ Zoe Schiffer, *A Court in Texas is Holding the First Jury Trial by Zoom*, THE VERGE (May 18, 2020, 2:24 PM), <https://www.theverge.com/2020/5/18/21262506/texas-court-jury-trial-zoom-remote-virtual-verdict> [<https://perma.cc/5JN4-ZANY>] (noting that the verdict will be non-binding as the court experiments with this format). According to the judge, it went well. Rebecca Davis O'Brien, *Is Anywhere Safe for a Jury Trial During the Covid-19 Pandemic? Try a School Gym.*, WALL ST. J. (May 19, 2020), <https://www.wsj.com/articles/is-anywhere-safe-for-a-jury-trial-during-the-covid-19-pandemic-try-a-school-gym-11589893201> [<https://perma.cc/EK2B-H9XX>].

⁷¹ Katie Hall, *Travis County Traffic Case to be Trial Run for Video Chat Juries*, THE STATESMAN (Aug. 6, 2020), <https://www.statesman.com/news/20200806/travis-county-traffic-case-to-be-trial-run-for-video-chat-juries> [<https://perma.cc/3PAQ-8DQU>]; Jouvenal, *supra* note 27.

⁷² Turner, *Remote Criminal Justice*, *supra* note 5, at 21–27.

⁷³ Sarah Esther Lageson, *The Perils of 'Zoom Justice'*, THE CRIME REPORT (Sept. 1, 2020) (discussing Lageson's book *Digital Punishment*, in which she reports on the harms to defendants, witnesses and others whose testimony is broadcast via YouTube and other online platforms).

⁷⁴ The author watched parts of the trial on YouTube, where the tally of viewers was observable. *Id.*

⁷⁵ *Id.*

⁷⁶ Shari Seidman Diamond, Locke E. Bowman, Manyee Wong, & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 891–98 (2010).

our common law system is built on a tradition of live confrontation and, as such, an assumption that in-person proceedings are best.⁷⁷ But virtual trials offer opportunities to challenge those assumptions and perhaps even create a more open system.⁷⁸ Matthew Bender goes further and argues that virtual proceedings can be done fairly and in accordance to the constitution,⁷⁹ and may even have a number of benefits, including expanding access to counsel to underserved communities.⁸⁰

So, the jury is out—so to speak—about the advantages or disadvantages of Zoom trials. Stakeholders will find that this moment provides a forced experiment with new forms of technology that may or may not work for the future. But my argument here is that offering zoom trials to defendants expands the range of options available during this exceptional moment. To avoid coercive pleas, defendants need options, particularly the option to proceed to a jury trial.

But courts should also ramp up their ability to hold bench trials. Jury trials are critical and should not be replaced, but bench trials are easier to hold than jury trials and achieve many of the same ends. They resemble hearings, which are being held via video conferencing software with success around the country.⁸¹ Therefore, although bench trials are not a perfect substitute for jury trials, they have been shown to work during this crisis and would provide defendants the opportunity to have their case heard.⁸² To this end, judges must commit to increasing the number of bench trials—a sentiment echoed by the National Association of Defense Attorneys, which takes it a step further and states that court systems should “afford the accused the unilateral right to elect a bench trial where that right does not already exist.”⁸³

From a procedural and constitutional standpoint, trials are the backbone of the criminal justice system. Without trials, defendants are left with only the plea offer on the table, which is an unfair position for them and an untenable position for a system meant to provide an opportunity to air the facts of a case. By removing trials, the public and adversarial nature of the

⁷⁷ Bandes & Feigenson, *supra* note 5, at 3–4, 7.

⁷⁸ *Id.* at 68–70.

⁷⁹ Bender, *supra* note 5, at 40–46.

⁸⁰ *Id.*

⁸¹ For instance, the actress Lori Loughlin recently had a plea hearing via Zoom. Kate Taylor, *Lori Loughlin Pleads Guilty via Zoom in College Admissions Case*, N.Y. TIMES (May 22, 2020), <https://www.nytimes.com/2020/05/22/us/lori-loughlin-pleads-guilty.html?searchResultPosition=2> [<https://perma.cc/2DJP-8CP6>].

⁸² See Reynolds, *supra* note 69.

⁸³ NACDL, *supra* note 29, at 1.

criminal justice system breaks down. It does not have to be this way: proceedings over phone or video conferencing software can ensure that trials continue *and* remain open to the public. Plea bargaining should not be the only solution.

B. STRENGTHENING THE ROLE OF THE JUDGE IN PLEA BARGAINING

Judges have an important role to play in ensuring the fairness of plea bargains during this crisis, and there are several ways that this can happen. First, judges should be vigilant in seeking out unsavory waivers. Judge Breyer in the Northern District of California wrote a powerful opinion about the injustice of asking defendants to waive their right to request compassionate release, which should serve as a model for other judges who confront these same waivers.⁸⁴ But more than that, judges should scour plea agreements for novel waivers that relate to the COVID-19 crisis and interrogate their purpose before accepting them.⁸⁵

Second, judges should be wary of all plea waivers during this crisis. Defendants are under more pressure than normal to plea bargain, and waivers of appeal and other rights should be excluded from these agreements. Judges should encourage and push for the full exchange of discovery before any pleas are taken. They should take additional care to develop a factual record that reflects a crime and a voluntary and knowing plea on the part of the defendant. These are the inherent requirements of a judge under any circumstance, but the crisis asks us to confront the role of a judge in the rote nature of the plea process. During the coronavirus crisis, judges must closely supervise the plea process for signs of coercion, otherwise it will occur. Unfortunately, early signs indicate that judges are not taking extra time to assure that pleas are knowing and voluntary during this extraordinary time.⁸⁶

Third, although judges only have so much power over the terms of the plea at the front-end, on the backend they can be more open to defendants' claims of coercion during appeals and other post-conviction proceedings. A plea must be taken voluntarily and free from coercion. Courts tend to cabin the scope of voluntariness,⁸⁷ but the crisis should inform the legal conception

⁸⁴ See *United States v. Sembrano*, No. 19-cr-00651-CRB-1, 2020 WL 3161003, at *1 (N.D. Cal. May 28, 2020).

⁸⁵ It is also worth noting that bar associations can play a role here by formally ruling that certain waivers are unethical, thereby providing guidance to lawyers and judges.

⁸⁶ Turner, *Remote Criminal Justice*, *supra* note 5, at 61 (finding that in observations of 59 plea hearings across eighteen different Texas courts, judges did not inquire into the factual basis of the guilty plea 83% of the time and did not inquire into the voluntariness of the plea 39% of the time).

⁸⁷ *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978).

of voluntariness. Is it voluntary to accept a plea when the alternative was potential death in a prison or jail?

Finally, individual judges and court systems should count delays caused by the pandemic toward any statutory or constitutional speedy trial clock. Courts have allowed speedy trial delays during and after other disasters as well,⁸⁸ but unlike a hurricane, which is a discrete event, we have no idea how long this crisis will last. Without a vaccine, it is likely the problems associated with the coronavirus will be with us for some time, making these issues surrounding plea bargaining a prolonged problem, not a temporary one. The burden of this crisis should not fall on defendants. Indeed, the Supreme Court in *Barker v. Wingo* explained that the Speedy Trial provision of the Sixth Amendment was meant to serve three main interests: to prevent oppressive pretrial incarceration, to reduce the anxiety associated with a pending charge for the defendant, and to minimize the possibility that the defense case would be impaired.⁸⁹ All of these interests are implicated during the pandemic. Moreover, running the speedy trial clock during the pandemic does not benefit defendants involved in serious cases, because in many places the speedy trial clock does not apply to murder or similarly serious charges. As a result, it is unlikely that defendants in serious cases will receive a windfall from running the clock during the pandemic. Many misdemeanors could be dismissed, but the alternative—to have these cases drag on or result in mass plea bargains—is neither necessary for public safety nor positive for the integrity of the system.

At the very least, courts should run the clock on the detention of those incarcerated pretrial. In any case that is not resolved by a plea within a short window, the defendant should be released, even if the case continues. Releasing defendants pretrial is made all the more critical because of the high rates of COVID-19 in jails.⁹⁰ But this should not be an opportunity to gouge defendants on the fees of ankle monitors or other forms of home surveillance. Again, the costs of our current disaster should flow to the state and not the defendant.

There is a real risk that judges, faced with mounting dockets and no clear end date to the crisis, will pressure defendants to plead guilty. Judges should resist this temptation. The risks of coercive plea bargaining are significantly heightened during the COVID-19 crisis. And the judge plays a unique role in warding off false and unfair pleas.

⁸⁸ Ellard, *supra* note 52, at 1221–29.

⁸⁹ *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

⁹⁰ *See Park & Meagher, supra* note 2.

III. SILVER LININGS OF THE CRISIS

Progressive changes have occurred during the pandemic. Arrests are lower in many jurisdictions.⁹¹ Governors are granting clemency to incarcerated individuals.⁹² Many people are being released from jails and prisons on compassionate release or for other reasons not related to the end of their sentences.⁹³ So far, these changes have not produced an attendant rise in crime.⁹⁴

On a broad level, the pandemic could expose some of the dysfunctions of the criminal system while also mitigating others. As Benjamin Levin explained in *Criminal Law in Crisis*, this “exceptional” moment “offer[s] an important opportunity to recognize the cruelty, inhumanity, and destructiveness that define U.S. criminal policy in ‘normal’ times.”⁹⁵ He argues that the virus will force us to look more closely at the conditions of jails and prisons, even when the country is not in the midst of a crisis. Perhaps, too, the virus will force judges to think not just about the length of the sentence but of the nature of the sentence.

Julia Simon-Kerr has also written about the potential benefits of having witnesses wear masks during criminal trials in a system that demands witnesses “perform” credibility.⁹⁶ If everyone is masked, it forces participants to focus more on the oral testimony of the witness rather than on their perceptions of the witness, which are often infused with bias.⁹⁷ Others have written about how this moment might be an opportunity for progressive

⁹¹ Associated Press, *Crime Drops Around the World as COVID-19 Keeps People Inside*, CHI. SUN TIMES (Apr. 11, 2020, 9:45 AM), <https://chicago.suntimes.com/coronavirus/2020/4/11/21217523/crime-drops-around-the-world-as-covid-19-keeps-people-inside> [<https://perma.cc/624Y-46UD>].

⁹² Associated Press, *supra* note 67.

⁹³ Professor Doug Berman is keeping track of many of the compassionate release grants on his blog, *Sentencing Law and Policy*. Doug Berman, *Still More COVID-Influenced Grants of Sentence Reductions Using § 3582(c)(1)(A), with waivers of exhaustion/waiting period*, SENTENCING L. & POL’Y (April 12, 2020), https://sentencing.typepad.com/sentencing_law_and_policy/2020/04/still-more-covid-influenced-grants-of-sentence-reductions-using-3582c1a-1.html [<https://perma.cc/TS98-8UAN>].

⁹⁴ See Neil MacFarquhar & Serge F. Kovaleski, *A Pandemic Bright Spot: In Many Places, Less Crime*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/coronavirus-crime.html> [<https://perma.cc/VT2K-VKZ6>].

⁹⁵ Levin, *supra* note 5, at 2.

⁹⁶ Simon-Kerr, *supra* note 5, at 161.

⁹⁷ *Id.* at 168–69.

prosecutors to successfully push for reforms that shrink the criminal system and the current rates of incarceration.⁹⁸

There may be benefits to the plea process itself during this time. Plea bargaining has always happened in the shadows, and such shadowed plea bargaining results in less data about the plea process.⁹⁹ In addition, during appellate litigation, we are often left to rely on the word of the parties about the nature of the promises made before the agreement was put into writing. With lawyers not able to meet in courtroom hallways to discuss pleas, it seems likely that more plea bargaining will occur by email and text, or by Zoom or video, which may be recorded. Indeed, lawyers already report that the plea process has slowed down as quick hallway discussions have been eliminated in favor of other forms of communication.¹⁰⁰ This could have the salutary effect of creating records of the plea process, giving us more data both for individual appeals and for the study of the plea system.

In addition, recent work on negotiation and plea bargaining indicates that although there are many drawbacks to negotiating over email or text, there may be hidden benefits, especially for people who are bargaining from a position of lesser power,¹⁰¹ which is often the case for defense attorneys. Email negotiation can “undermine existing power dynamics and encourage direct confrontation because it stops one individual from seizing control of the discussion and suppressing the view of another.”¹⁰² By forcing a layer of physical separation between the parties, the coronavirus could, in some instances, benefit defendants in the negotiation process. But to be clear, as described above, defendants generally operate from a position of weakness in these negotiations, and this incremental dismantling of a power structure is but small boon in an otherwise overwhelming system.

CONCLUSION

It has been a hundred years since we confronted a crisis like the one we now face. And it is true that this crisis could exacerbate many of the problems we see with plea bargaining—particularly its coercive nature—but there is

⁹⁸ See Chad Flanders & Stephen Galoob, *Progressive Prosecutors in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY (forthcoming 2020) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3605593 [<https://perma.cc/N99H-EVJC>].

⁹⁹ Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. (forthcoming 2020) (manuscript at 3–5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3545536 [<https://perma.cc/BCR9-U4ZF>].

¹⁰⁰ Turner, *Remote Criminal Justice*, *supra* note 5, at 51.

¹⁰¹ Noam Ebner, Anita D. Bhappu, Jennifer Gerarda Brown & Kimberlee K. Kovach., *You've Got Agreement: Negotiating Via Email*, 31 HAMLINE J. PUB. L & POL'Y 427, 434–43 (2009).

¹⁰² *Id.* at 439.

also hope. Our response to this crisis may create space for new solutions. By closely watching how stakeholders respond to this moment, we may see opportunities to reshape much of the criminal justice system.

Stakeholders should be wary of falling back on plea bargaining as the solution to the problems posed by the coronavirus. Coercive plea bargains are a risk even when the system is running smoothly. For the reasons I outline here, the risk of coercive pleas is heightened. Lawyers, judges and court administrators have a responsibility to protect against the use of such pleas.