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Sick Deal: Injustice and Plea Bargaining During COVID-19

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INTRODUCTION

You have been arrested. You are put in handcuffs and transported to a local jail where you are fingerprinted and photographed. The crime you are charged with is not serious or violent, but you have prior criminal convictions, or perhaps a history of not coming to court when told—making you ineligible for a future release on your own recognizance. Bail was set, but like most others in the cell you occupy, you cannot pay even the smallest bond. You are facing a period of pretrial detention.

A week passes without being brought to see a judge for your arraignment. Then another week passes. If you are lucky, you may have spoken to an attorney on the phone, but no one has come to the jail to see you. All around, individuals are beginning to talk about a mysterious new illness.

As you continue to sit in pretrial detention, the spread of the novel coronavirus among prisoners rises quickly. By the week of April 22, 2020 the number of confirmed cases in prisons grows three-fold—from 1,643 to

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6,664.[1] By the middle of September, 2020 the count is up to 132,677, with 1,108 reported deaths.[2] Mass testing reveals that the number of prisoners who have contracted the virus is far greater than expected, partly because of the number of people who carry the virus without exhibiting symptoms.[3] Many facilities cannot conduct mass testing of inmates, and others choose not to test at all.[4]

For you and the inmates around you not yet infected, precautionary measures are largely nonexistent. You are locked in a facility where social distancing—the primary method for avoiding transmission—is practically impossible.[5] It is unlikely that you have ready access to hand sanitizer or face masks.[6] Prisons and jails begin using solitary confinement as a method of quarantining.[7]

Slowly, the wheels of justice continue to grind. You are contacted by an attorney who has negotiated a plea bargain in your case. If you admit guilt, you will be released and given what is commonly known as credit for time served. Your attorney explains that a jury trial may be far away, with many courts extending speedy trial deadlines and suspending jury trials.[8] You can

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[1] Katie Park, Tom Meagher, & Weihua Li, *Tracking the Spread of Coronavirus in Prisons*, THE MARSHALL PROJECT (Mar. 24, 2020, 3:05 PM), https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons [https://perma.cc/JX7T-UWYC].

[2] Katie Park, Tom Meagher, *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT (Sept. 23, 2020, 6:00 PM), https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons [https://perma.cc/U98R-8VHX].

[3] *See* Jeremy Roebuck & Allison Steele, *Montgomery County's Jail Tested Every Inmate for COVID-19 — and Found 30 Times More Cases Than Previously Known*, PHILA. INQUIRER (Apr. 28, 2020), https://www.inquirer.com/news/coronavirus-testing-montgomery-county-jail-asymptomatic-philadelphia-prisons-20200428.html [https://perma.cc/5JLV-YZ4V].

[4] *See, e.g.*, Jeremy Roebuck, *One Philadelphia Prison Has Yet to Report a Single Case of the Coronavirus. But It Hasn't Tested Any Inmates.*, PHILA. INQUIRER (April 22, 2020), https://www.inquirer.com/news/coronavirus-fdc-philadelphia-inmate-release-covid-class-action-public-interest-law-center-justice-department-20200422.html [https://perma.cc/JBU8-P8M2].

[5] Jake Harper, *Crowded Prisons Are Festering 'Petri Dishes' For Coronavirus, Observers Warn*, NAT'L PUB. RADIO (May 1, 2020, 11:01 AM), https://www.npr.org/sections/health-shots/2020/05/01/848702784/crowded-prisons-are-festering-petri-dishes-for-coronavirus-observers-warn [https://perma.cc/J4ZV-BYVU].

[6] *Id.*

[7] UNLOCK THE BOX, THE RABEN GROUP, SOLITARY CONFINEMENT IS NEVER THE ANSWER (2020), https://static1.squarespace.com/static/5a9446a89d5abbfa67013da7/t/5ee7c4f1860e0d57d0ce8195/1592247570889/June2020Report.pdf [https://perma.cc/B8G8-MBN2].

[8] *See, e.g.*, Madison Alder, *U.S. Court in Seattle May Not Hold Jury Trials Until 2021*, BLOOMBERG LAW (May 28, 2020, 1:51 PM), https://news.bloomberglaw.com/us-law-week/u-s-court-in-seattle-plans-no-criminal-jury-trials-until-2021 [https://perma.cc/4VNV-6KAK];

take the plea and be released from jail, or you can maintain your innocence. If you choose the latter, you will remain in custody with your health at a constantly growing risk, waiting for a jury trial that could be several months away—at best.[9]

Imagine you are innocent of the crime for which you have been arrested and charged. How much would your innocence weigh on your decision to accept or reject a plea offer that will effectuate your release? Research into the cognitive science of decision-making suggests that innocent defendants under these circumstances are at a high risk of entering into guilty pleas.[10] Compounding this problem is the sheer volume of misdemeanor and low-level felony cases, where the plea offer will result in immediate or almost immediate release from pretrial detention. These conditions pose serious problems for trial courts that will almost certainly end up taking "knowing and voluntary" pleas from numerous innocent defendants during the COVID-19 pandemic.

This essay briefly explores these issues and argues that the current COVID-19 outbreak has the potential to greatly exacerbate the coercive nature of pretrial detention and plea bargaining. This essay explores what it means constitutionally to enter what's known as a knowing and voluntary plea and argues that the current state of the law does not adequately recognize the coercive nature of confinement conditions.

Rosalio Ahumada, *California Chief Justice Suspends All Jury Trials Statewide in Response To Coronavirus*, SACRAMENTO BEE (Mar. 23, 2020, 9:08 PM), https://www.sacbee.com/news/coronavirus/article241453161.html [https://perma.cc/LRA7-49SC]; Adam Pinsker, *Coronavirus Causing Courts to Suspend Jury Trials*, IND. PUB. MEDIA (Apr. 3, 2020), https://indianapublicmedia.org/news/coronavirus-cause-courts-to-suspend-jury-trials.php [https://perma.cc/K24L-4DRM]; *Chief Justice Issues Emergency Order Expanding Remote Hearings and Suspending Jury Trials into Early July Statewide*, SUPREME COURT OF THE STATE OF FLORIDA (May 4, 2020, 3:42 PM), https://www.floridasupremecourt.org/News-Media/Court-News/Chief-Justice-issues-emergency-order-expanding-remote-hearings-and-suspending-jury-trials-into-early-July-statewide [https://perma.cc/5Y4T-8FC6].

[9] One additional consideration is that, even if jury trials were to resume, the trial process may still be affected by the negative psychological impacts associated with the COVID-19 pandemic. A recent survey by NJP Litigation Consulting/West found that among the over 400 jury eligible participants surveyed over half would find it difficult to give a trial their full attention, with 58% of respondents stating that they would not be willing to participate in deliberations that lasted more than a day. NJP LITIGATION CONSULTING/WEST, COVID-19 AND JURY SERVICE (2020) [https://perma.cc/WZ2W-E6BX].

[10] *See infra* Part II.

I. PRETRIAL CUSTODY, PLEA BARGAINING, AND THE COGNITIVE SCIENCE OF DECISION-MAKING

Developed in the 1970s, the traditional view of plea bargaining—commonly termed "bargaining in the shadow of a trial"—described criminal defendants as strategic decisionmakers.[11] Faced with accepting or rejecting a plea, defendants will weigh the severity of the trial outcome and the probability of conviction against the severity of a proposed plea agreement.[12] Defendants, as rational actors, will strategically maximize utility—accepting plea agreements when the plea outcome is less than the anticipated trial outcome or the outcome from an open plea to the court.[13]

Early experiments testing the "shadow of a trial" model found that "innocent" subjects could be induced to plead guilty if the right conditions were present—particularly when the likelihood of conviction was high.[14] Innocent subjects were just as likely to reject a plea bargain when the likelihood of conviction was low as they were when the chance of succeeding

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[11] The term originates from a paper that theorized parties to divorce proceedings would use anticipated court outcomes to orient themselves in private negotiations. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 966 (1979). In this way, divorcing parents who negotiate private dissolution agreements bargain "in the shadow of the law"—the basis for their bargaining position is driven by what each parent could expect would result from trial using the legal rules governing alimony, child support, marital property, and custody. *Id.* at 968. While the term itself did not appear until 1979, scholars for some time had theorized about the larger impact that criminal trial outcomes have on plea bargaining. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2465 n.2 (2004).

[12] *See* Stuart S. Nagel & Marian Neef, *Plea Bargaining, Decision Theory, and Equilibrium Models: Part I*, 51 IND. L. J. 987, 999 (1976). The equation is more accurately described as $DIS=A(LS)^B$, where DIS is dissatisfaction units, LS is the likely sentence expressed in years or other time units, A is the dissatisfaction received if LS is only one time unit, and B equals a positive exponent less than one to show the degree of increasing dissatisfaction from additional time units.

[13] *See id*. at 1003.

[14] *See* Kenneth S. Bordens, *The Effects of Likelihood of Conviction, Threatened Punishment, and Assumed Role on Mock Plea Bargaining Decisions*, 5 BASIC & APPLIED SOC. PSYCHOL. 59 (1984). In the Bordens study, 422 college students were "charged" with a crime, assigned "innocent" or "guilty" roles, and provided with descriptions of the evidence against them, the likelihood of conviction, the potential sentence if a plea bargain was accepted, and the potential sentence if the plea bargain was rejected and the defendant convicted in court. *Id*. at 63–64.

at trial was 50%.[15] When the likelihood of conviction was around 90%, however, innocent defendants became more willing to accept a plea.[16]

More recent cognitive research suggests that plea decision-making is far more contextual than theorized and is subject to decision biases that increase the likelihood of innocent defendants pleading guilty.[17] One important decision bias is "framing"—the tendency to view a decision as a gain or loss based on the individual's "baseline," or starting point.[18] A noncustodial plea offer is more likely framed as a gain for an in-custody rather than out-of-custody defendant because it effectuates a meaningful change in the defendant's starting point.[19]

The baseline of the defendant, and thus the "frame" through which they view the plea offer as a loss or gain can affect the ability of the defendant to meaningfully weigh their own innocence in the decision-making process. This is because individuals are more susceptible to decision biases when meaning based differences compete with each other—like choosing whether to admit guilt when innocent to secure a release from pretrial detention.[20] In these contexts, the motivation to maintain one's innocence can be dwarfed by the more immediate desire to be released from custody.[21]

The conclusions of cognitive scientists are supported by pretrial detention outcomes in the real world. Individuals who are detained pretrial are more likely to plead guilty than those who were released pending trial.[22] These findings are magnified in the context of juveniles, who are even less likely to meaningfully weigh internal determinations of guilt or innocence when deciding to plead.[23] Juveniles are not only more likely to admit guilt than their adult counterparts, but they are also more likely to discount long term consequences over short term benefits such as release from

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[15] *Id*. at 67.

[16] *Id*. at 68 tbl. 1 (reporting that when the likelihood of conviction was 90%, 31.58% of the "innocent" subjects accepted the plea bargain—slightly more than double the percentage of "innocent" subjects who accepted the plea bargain when the likelihood of conviction was 50%).

[17] *See* Rebecca K. Helm, *Cognitive Theory and Plea-Bargaining*, 5 POL'Y INSIGHTS FROM THE BEHAV. & BRAIN SCI. 195, 198 (2018).

[18] Bibas, *supra* note 11, at 2513.

[19] *Id*. at 2514.

[20] *See* Helm, *supra* note 17, at 198.

[21] *See id.*

[22] *See* Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 543–51 (2017).

[23] *See* Helm, *supra* note 17, at 197–200.

commitment.[24] This research suggests that pretrial detention plays a significant role in driving innocent defendants to plead guilty.[25]

Compounding the coercive impact of pretrial detention is the context in which it occurs. Misdemeanor case filings and convictions in the United States grossly outweigh their felony counterparts.[26] Individuals charged with misdemeanors also make up a significant portion of defendants subject to pretrial detention—in New York, about 35% of individuals charged with a misdemeanor spend more than a week in detention.[27] Cognitive science suggests these individuals are the most likely to discount their own innocence when entering into a plea agreement because a guilty plea can effectively grant release from custody.[28]

Now place a virus outbreak against the cognitive backdrop that innocent individuals will plead guilty to secure their release from confinement. It logically follows that a defendant's subjective "baseline" would take into account the *conditions* of such confinement, including perceptions that remaining in pretrial confinement poses a serious health risk. Faced with indefinite pretrial detention, where the risks of exposure to a deadly virus are high, modern cognitive science suggests a higher likelihood of a plea by an innocent defendant. In a world where it is uncontested that innocent defendants plead guilty,[29] this issue poses a legitimacy problem for the criminal justice system.

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[24] Allison D. Redlich, Stephanos Bibas, Vanessa A. Edkins, & Stephanie Madon, *The Psychology of Defendant Plea Decision Making*, 72 AM. PSYCHOLOGIST 339, 346 (2017).

[25] *See* Helm, *supra* note 17, at 199 ("[O]ffering categorical, meaning-based incentives to plead guilty is likely to compete with and potentially override considerations of guilt and innocence. The more such incentives are offered, the more likely plea offers are to be coercive even to innocent defendants.").

[26] *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314–15 (2012).

[27] *E.g.*, Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 732 (2017).

[28] Jenia I. Turner, *Plea Bargaining*, *in* 3 REFORMING CRIM. JUST.: PRETRIAL & TRIAL PROCESS 73, 82 nn.48–49 (Erik Luna ed., 2017) (noting empirical studies that demonstrate innocent defendants are at high risk of pleading when doing so significantly reduces confinement length or results in immediate release); *see also* Natapoff, *supra* note 26, at 1346–47 (noting the immense pressure to plead guilty that exists when a defendant cannot make bail, and when pleading guilty will result in release). This is further supported by some of the earliest research into plea bargain decision making that focused on the "shadow of a trial" theory. Bordens, *supra* note 14, at 70–72 (finding that, contrary to prior studies, innocence was discounted when in addition to a high likelihood of conviction there was a large differential between the plea outcome and the court sentencing outcome—i.e., when a plea would result in probation but a court sentence would result in continued incarceration).

[29] Currently, around 20% of exonerations listed on the National Registry of Exonerations involved guilty pleas. THE NATIONAL REGISTRY OF EXONERATIONS, http://www.la

II. PRETRIAL CONFINEMENT CONDITIONS, PLEA VALIDITY, AND THE LAW

Today it could be assumed that plea bargaining has always been considered a constitutionally permissible practice,[30] but the constitutionality of plea bargaining was more open to question just over half a century ago.[31] In the 1957 case *Shelton v. United States*, the Fifth Circuit Court of Appeals addressed facts that exemplify the modern understanding of plea bargain decision-making when Jay Shelton was charged with interstate transportation of a stolen vehicle. [32] Mr. Shelton represented himself, professed his innocence, and fought the case, which resulted in a mistrial.[33] Faced with the potential of a second trial, Mr. Shelton remained confident that his innocence would be affirmed.[34]

What shook Mr. Shelton was the thought of remaining in pretrial detention during the second trial, and then facing additional pretrial detention as he fought a case in Miami.[35] The prosecutor knew of this vulnerability, telling Mr. Shelton during a plea discussion that " . . . a jury will convict you, and if they don't convict you, you still will have to go down to Florida and be tried there."[36]

The prosecutor then made an offer that cognitive science tells us would be very difficult to refuse[37]—plead guilty now with a guaranteed sentence of

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w.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P [https://perma.cc/XPH4-9P5Y] (last visited June 21, 2020).

[30] *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3 (AM. BAR ASS'N 1997). The practice has been sanctioned by the American Bar Association since 1968 as part of the Project on Minimum Standards for Criminal Justice. *See* AMERICAN BAR ASSOCIATION, AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PLEAS OF GUILTY (1967) (adopted, as amended, by House of Delegates in 1968). The standards, however, developed in part out of the need to address constitutional concerns related to plea bargaining that had, up until that point, largely been ignored. *See* Howard C. Bratton, *Standards for the Administration of Criminal Justice*, 10 NAT. RESOURCES J. 127, 130–32 (1970).

[31] *See, e.g.*, Shelton v. United States, 242 F.2d 101 (5th Cir. 1957).

[32] *Id.* at 102.

[33] *Id.*

[34] *See id.* at 103–04.

[35] *See id.*

[36] *Id.* at 103.

[37] *See* Bibas, *supra* note 11, at 2514 ("A defendant who is in pretrial detention is more likely to view prison as the baseline and eventual freedom as a gain, particularly if freedom is possible in weeks or months. Thus, one side effect of pretrial detention is that detained defendants may become more pliable in plea bargaining."); Helm, *supra* note 17, at 197–98

one year (in addition to the sentence Mr. Shelton was serving on a separate case), and the Miami case will go away.[38] Mr. Shelton insisted he would be acquitted on the Miami charge, but the prosecutor reminded him that even if he was found not guilty he would spend months in pretrial detention fighting the case.[39] Mr. Shelton ultimately made the decision most defendants would be motivated to make: "[I]f I went to trial I expected to be acquitted of this charge, but as a matter of expediency I [took the prosecutor] up on the proposition, to avoid going down to Miami, spending many, many months [in detention]."[40]

The Fifth Circuit decried the validity of the plea.[41] In reversing, the court characterized pleas as "confess[ions] . . . of the offense[s] charged."[42] When the record shows that the defendant will receive some benefit in exchange for the plea, the plea may be subject to impeachment as having been made involuntarily.[43] The trial court must inquire, then, to ascertain whether the plea is being made voluntarily "in truth and in fact."[44] The court rested its conclusion not on the fact that Mr. Shelton had maintained his innocence throughout the plea bargaining process, but on the more fundamental notion that "[j]ustice and liberty are not the subjects of bargaining and barter."[45]

In a subsequent *en banc* hearing, this dramatic holding was reversed.[46] In a single page opinion, the court narrowed the inquiry necessary to find a plea was made "voluntarily."[47] For the *en banc* majority, a plea is "voluntary" so long as it is entered absent threats, misrepresentations, or improper promises such as bribes.[48] The dissenters rebuked such a standard,

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(noting that, because adults rely on information processing driven by meaning-based distinctions, where multiple meaning-based differences are introduced—such as (1) the decision to plead guilty when innocent to (2) secure release from pre-trail detention—decision biases like framing and baselining may ultimately drown-out the importance of maintaining one's innocence).

38 *Id.* at 103–04.

39 *Id.*

40 *Id.*

41 *See id.* at 113.

42 *Id.* at 112.

43 *Id.* at 113.

44 *Id.*

45 *Id.*

46 Shelton v. United States, 246 F.2d 571, 573 (5th Cir. 1957).

47 *Id.*

48 *Id.* at 572 n.2.

noting with prescience the coercive nature of plea bargaining and its ability to "elicit an untrue plea of guilty."[49]

Mr. Shelton's case never reached the Supreme Court,[50] but the nine justices had subsequent opportunities to address the constitutionality of plea bargaining. One of the earliest cases, *United States v. Jackson*, stands in contrast to most others because it set limits on plea bargaining by striking down a law that imposed the death penalty *only* after a jury trial.[51] Such a law "chill[ed] the assertion of constitutional rights [to trial] by penalizing those who choose to exercise them . . . ."[52] *Jackson* became the basis for challenging capital punishment laws in states like South Carolina, North Carolina, and New Jersey,[53] and the impact of the decision on plea bargaining in death penalty cases is still felt today.[54]

From *Jackson* on, however, the Supreme Court found it difficult to identify a plea bargain that was unconstitutional.[55] While pleas must be made "voluntarily and knowingly,"[56] it does not matter that the individual continues to profess his or her innocence,[57] is threatened with additional

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[49] *Id.* at 579.

[50] The Supreme Court granted certiorari, but the Solicitor General confessed error rather than have the court hear the merits. Shelton v. United States, 356 U.S. 26 (1958). Scholars have noted the potential for *Shelton* to have radically changed the legal landscape related to plea bargaining had the case been heard, given the then liberal make-up of the bench and the potential for a ruling that plea bargaining was a coercive practice. Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. (forthcoming 2020) (manuscript at 19–20) (on file with author). This was perhaps a motivating factor in the Solicitor General's decision to confess error rather than have the case heard—to prevent the court from being able to take up the issue. *Id.* By the time the court began to hear what are now considered to be the fundamental cases related to the validity of plea bargains, a serious ideological shift had occurred which changed the probability of success for criminal defendants arguing before the Supreme Court and diminished the viability of challenging the practice of plea bargaining. *Id.* at 20.

[51] United States v. Jackson, 390 U.S. 570, 572 (1968).

[52] *Id.* at 581. The *Jackson* holding was severely narrowed in subsequent cases. *See, e.g.*, Corbitt v. New Jersey, 439 U.S. 212, 217–21 (1978) (upholding a New Jersey statute that mandated a life sentence upon a jury conviction for first degree murder, but made the imposition of a life sentence discretionary if the defendant entered a plea of *non vult*).

[53] James G. Billings, *Criminal Law – United States v. Jackson and Its Impact Upon State Capital Punishment Legislation*, 47 N.C. L. REV. 421, 426–30 (1969).

[54] For an in-depth discussion of *Jackson*, plea bargaining, and the death penalty, see Joseph L. Hoffman, Marcy L. Kahn, & Steven W. Fisher, *Plea Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313 (2001).

[55] *See* Tina Wan, Note, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative*, 17 REV. OF L. & SOC. JUST. 33, 41–45 (2007).

[56] Brady v. United States, 397 U.S. 742, 745 (1970).

[57] North Carolina v. Alford, 400 U.S. 25, 37 (1970).

charges,[58] is charged with more serious crimes only after rejecting a plea and invoking the right to trial,[59] or is denied access to favorable evidence.[60]

The Supreme Court has never directly addressed the impact that conditions of pretrial confinement have on the voluntary nature of a plea, but it has delimited the boundaries of permissible pretrial confinement conditions.[61] In the 1970s, several pretrial detainees challenged the conditions of their confinement at a New York correctional center, including: the practice of "double-bunking" in cells designed to house one prisoner; rules restricting detainee access to books and personal items; and suspicionless cavity searches.[62]

The Second Circuit reasoned that individuals in pretrial custody retain the "rights afforded to unincarcerated individuals" from the presumption of innocence.[63] Thus, such individuals could only be subjected to restrictions which "are necessary for confinement alone," or which the government can justify by "compelling necessity."[64] Under the "compelling necessities" test, many of the conditions of the correctional center violated the due process rights of detainees.[65]

In a 5–4 decision, with Justice Powell concurring and dissenting in part, the Supreme Court rejected the "compelling necessities" standard, asking instead whether the conditions of confinement amounted to effective *punishment* of the detainee in violation of the Due Process Clause.[66] To make such a determination, the court looked to whether the particular condition

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[58] Bordenkircher v. Hayes, 434 U.S. 357 (1978). The Court in *Bordenkircher* left open the question of whether a plea becomes involuntary when third parties such as the defendant's family members are threatened with criminal charges as part of the plea bargaining process. *Id* at 364 n. 8 (citations omitted) ("This case does not involve the constitutional implications of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused . . . which might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider. . . ."[citation]."). However, several lower courts have since upheld the practice. *See, e.g.*, Harman v. Mohn, 683 F.2d 834, 836–38 (4th Cir. 1982); United States v. Nuckols, 606 F.2d 566, 569–570 (5th Cir. 1979);1979).

[59] United States v. Goodwin, 457 U.S. 368, 380 (1982).

[60] United States v. Ruiz, 536 U.S. 622, 633 (2002).

[61] *See* Bell v. Wolfish, 441 U.S. 520, 534–39 (1979).

[62] *Id.* at 523–27.

[63] Wolfish v. Levi, 573 F.2d 118, 124 (2d. Cir. 1978).

[64] *Id.*

[65] *See id.* at 126–32 (finding unconstitutional several conditions related to overcrowding, restrictions on access to reading materials, the reading by prison officials of inmate mail, suspicionless strip searches, and cell searches where the inmate was prohibited from observing the search).

[66] *Bell*, 441 U.S. at 534–35.

was *reasonably related* to a legitimate governmental objective, for if it did then the condition could not, in the eyes of the court, amount to "punishment."[67] Such a test, compared with the compelling necessities standard set by the appellate court, significantly decreased the government's burden to justify the confinement condition.

The Court in *Bell* struggled to find any of the conditions not reasonably related to some legitimate governmental objective. While double-bunking caused "genuine privations and hardship," the practice fell far short of constituting "punishment" according to the court.[68] Likewise, restricting access to certain reading materials or personal items was found necessary to ensure "institutional security."[69] Even the practice of suspicionless cavity searches could not, in the eyes of the majority, rise to the level of an impermissible search constituting punishment.[70] Deference towards correctional facility officials pervades the Court's reasoning, and reflects a larger trend.[71] The Justices chastised the lower appellate and district courts, claiming they had "trenched too cavalierly into areas that are properly the concern of [custodial] officials."[72]

The low burden imposed on the government in the reasonable relation test poses a serious hurdle to arguing that COVID-19 related confinement conditions rise to the level of due process violations. Some conditions attendant to contracting the virus like overcrowding, lack of sanitary conditions, and lack of testing create a hardship beyond the double-bunking at issue in *Bell*. But other conditions, like the lack of adequate personal protective equipment, may be ripe for a "security justification" like those offered to excuse restricted access to reading materials and personal items. Considering the extreme deference granted to custodial officials, it will be difficult to challenge draconian quarantine practices—like solitary confinement—when officials need only justify it as reasonably related to maintaining the health of the custodial population—an arguably legitimate governmental goal.

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[67] *Id.* at 538–39.

[68] *Id.* at 542.

[69] *Id.* at 546–47, 550–51.

[70] *Id.* at 558–62. This, despite the fact that the evidence in the record before the court was that on only one occasion had such searches ever resulted in finding of contraband. *Id.* at 558.

[71] *See, e.g.*, Sharon Dolovich, *State Punishment and Private Persons*, 55 DUKE L. J. 437, 481–88 (2005).

[72] *Bell*, 441 U.S. at 554.

III. COVID-19 AND CRIMINAL JUSTICE REFORM

A higher burden must be imposed on the government to justify potentially coercive pretrial confinement conditions in light of the ongoing—and potentially reoccurring—public health emergency facing detention facilities. Justice Marshall, dissenting in *Bell*, derided the majority for diluting constitutional standards with "virtually unlimited deference to detention officials' justifications for particular impositions."[73] Marshall instead focused on the impact that confinement conditions had on inmates and the powerful psychological effect that pretrial detention has on those separated from "family and friends."[74]

In line with this view, the Court should adopt a legal test that balances the deprivations of liberty against the state's interests served, and be sensitive to the "tangible physical and psychological harm that a particular disability inflicts on detainees and to the nature of the less tangible, but significant, individual interests at stake."[75] Under the rule proposed by Marshall, the "greater the imposition on detainees, the heavier the burden of justification the Government would bear."[76] Adopting such a standard would allow courts to mitigate the coercive power of pretrial detention during public health pandemics.

But even if a more liberal test like Marshall's was adopted, it is not clear that proving a due process violation alone would convince a court to withdraw a guilty plea.[77] Without clarity from a high court or legislative body, trial courts are unlikely to be receptive to the post-conviction claim that an individual involuntarily pled due to their confinement conditions.

This lack of viable post-conviction relief increases the need for prophylactic measures to decrease the likelihood of innocent defendants pleading guilty during the COVID-19 crisis. This need persists despite past

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[73] *Id.* at 563, 565–67.

[74] *Id.* at 569.

[75] *Id.* at 570.

[76] *Id.*

[77] *See, e.g.*, Cain v. State, 575 S.W.2d 893 (1978). In *Cain*, a Missouri Court of Appeals rejected a motion to withdraw a plea that argued pretrial detention and confinement conditions rendered the plea involuntary or coerced. *Id.* at 896. The Court demanded not only a showing that the appellant was subject to cruel and unusual punishment, but also the "heavy burden of proof to establish that the coercive nature of the prison conditions was directly related to the root decision to plead guilty." *Id.* at 895–96. Confusing the issue further is that claims of cruel and unusual punishment in confinement conditions are typically civil in nature and relate to confinement *post*-conviction. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Helling v. McKinney, 509 U.S. 25, 31 (1993)) (" . . . it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.'").

criminal justice reform efforts to reduce prison populations, which have steadily advanced over the past decade.[78] Early release provisions cannot adequately mitigate the pressure on those in pretrial detention because such individuals make up some two-thirds of jail inmates.[79]

Before the COVID-19 pandemic, several states enacted bail reform measures intended to decrease pretrial detention populations.[80] Many of these reforms succeeded in dramatically reducing the number of individuals in pretrial detention, including those facing minor or non-violent offenses.[81] But bail reform efforts have been much slower to spread from state to state, with several seeing rollbacks or delays in implementation.[82]

Thus, additional emergency orders that discourage pretrial detention for low-level offenses should be widely, and uniformly, used during the pandemic. In California, for example, the state supreme court issued an early directive mandating the use of an "emergency bail schedule" that set zero-dollar bail for most misdemeanor and low-level felony charges.[83] The emergency bail schedule was responsible for reducing nearly a third of detainees in California jails, and it increased the ability of inmates not released to comply with social distancing requirements.[84]

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[78] Nicole Lewis, *The U.S. Prison Population is Shrinking*, THE MARSHALL PROJECT (Apr. 24, 2019, 6:00 AM), https://www.themarshallproject.org/2019/04/24/the-us-prison-population-is-shrinking [https://perma.cc/BEH9-DCXF]. Many of these reductions are due in large part to changes in state sentencing laws. *Id.*

[79] ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES IN 2018, at 1 (2020).

[80] These include New Jersey, New Mexico, and Maryland, as well as localities within Wisconsin, Colorado, and Oregon. Colin Doyle, Chiraag Bains, & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, HARVARD LAW SCHOOL CRIMINAL JUSTICE POLICY PROGRAM (Feb. 2019), http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf [https://perma.cc/44SL-WXZB].

[81] Suzette Parmley, *Two Years Into Bail Reform, Pretrial Detention Much Lower, AOC Report Says*, NEW JERSEY LAW JOURNAL (Apr. 3, 2019, 8:51 PM), https://www.law.com/njlawjournal/2019/04/03/two-years-into-bail-reform-pretrial-detention-much-lower-aoc-report-says/ [https://perma.cc/9975-AEMV].

[82] Jamiles Lartey, *New York Rolled Back Bail Reform. What Will The Rest Of The Country Do?*, THE MARSHALL PROJECT (Apr. 23, 2020, 6:00 AM), https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states [https://perma.cc/J4HG-HG9F].

[83] *Judicial Council Adopts New Rules to Lower Jail Population, Suspend Evictions and Foreclosures*, CALIFORNIA COURTS NEWSROOM (Apr. 6, 2020), https://newsroom.courts.ca.gov/news/judicial-council-adopts-new-rules-to-lower-jail-population-suspend-evictions-and-foreclosures [https://perma.cc/U7UH-AVZE].

[84] Jason Pohl, *California Jail Population Plummets During Pandemic. Could This Lead to Long-Term Change?*, THE SACRAMENTO BEE (May 27, 2020, 08:22 AM), https://ww

States that implemented emergency orders decreasing pretrial detention have not seen correlative increases in crime rates, contrary to law enforcement officials' assertions.[85] This trend is buttressed by the growing research that indicates long-term efforts to decrease prison populations have not led to significantly increased crime rates,[86] and may even have a positive effect on lowering recidivism.[87] When pretrial release programs have adequate infrastructure and institutional support, data also suggests that decreasing pretrial detention does *not* inevitably lead to increased rates of defendants failing to appear for court dates.[88]

But decreasing the jail population is no substitute for judicial scrutiny. The dissenting judges in the *en banc* decision in *Shelton* understood this fact well, focusing directly on the need for courts to look beyond whether a plea was premised on lies or threats: "The vice is not that a misrepresentation was made . . . [or] that threats or force were employed . . . . The vice is that, because of those actions working on *mind, body and will* of the prisoner, he was led to take the step of making a guilty plea [] which he otherwise would not have done."[89] Until the law recognizes the coercive effects of pretrial detention and the plea bargaining process, the COVID-19 pandemic will only exacerbate an existing injustice.

CONCLUSION

The COVID-19 pandemic has the potential to magnify a pre-existing problem—innocent defendants pleading guilty to get out of jail. Modern

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w.sacbee.com/news/coronavirus/article242900061.html [https://perma.cc/993X-AHWZ]. Despite these positive advancements, the California Supreme Court voted in June to rescind the mandatory use of the emergency bail schedule just as COVID-19 cases began spiking in the state. Robert Salonga, *Coronavirus: California Justices Rescind Emergency Zero-Bail Order*, THE MERCURY NEWS (last updated June 13, 2020, 8:54 AM), https://www.mercurynews.com/2020/06/10/coronavirus-california-justices-rescind-emergency-zero-bail-order/ [https://perma.cc/GV7Z-9MXX]; Amanda Holpuch & Maanvi Singh, *US Records Highest One-Day Total in Coronavirus Cases Since April*, THE GUARDIAN (June 24, 2020), https://www.theguardian.com/us-news/2020/jun/24/americans-coronavirus-covid-19-cases-increase [https://perma.cc/8CN9-VZJJ].

[85] *Decarceration and Crime During COVID-19*, ACLU (July 27, 2020), https://www.aclu.org/news/smart-justice/decarceration-and-crime-during-covid-19/ [https://perma.cc/4RG8-RKT3].

[86] *See, e.g.*, Marc Mauer & Nazgol Ghandnoosh, *Fewer Prisoners, Less Crime: A Tale of Three States*, THE SENTENCING PROJECT (2014), https://sentencingproject.org/wp-content/uploads/2015/11/Fewer-Prisoners-Less-Crime-A-Tale-of-Three-States.pdf [https://perma.cc/NWD2-GGHX].

[87] *See* Heaton, Mayson, & Stevenson, *supra* note 27, at 759–68.

[88] *See* Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, *in* 3 REFORMING CRIM. JUST.: PRETRIAL & TRIAL PROCESS 21, 29, 31–34 (Erik Luna ed., 2017).

[89] Shelton v. United States, 246 F.2d 571, 579 (1957).

research into the cognitive science of decision-making suggests that innocent defendants are particularly likely to discount their own innocence when a guilty plea will effectuate their release from custody. The number of defendants presented with plea bargains that get them out of jail is large; credit-for-time-served offers are most highly associated with low-level felony and misdemeanor offenses, which make up the bulk of criminal filings. COVID-19 creates a significant risk of contracting a potentially fatal illness for those defendants who stay in custody to fight the charges they face—a highly motivating factor to accept a guilty plea, and one with the power to overshadow the value of maintaining one's innocence.

At the same time, there is no current legal framework to challenge a plea as involuntary based on the confinement conditions faced in pretrial detention. The conditions themselves may rise to the level of a due process violation, but the current legal threshold is high and largely deferential to the justifications of custodial officials. Furthermore, the current legal framework leaves unresolved whether the due process violation would invalidate the plea. Without a viable legal path to challenge confinement conditions and their coercive effect on plea decisions, prophylactic measures are needed to decrease the risk of innocent individuals pleading guilty. These measures should include the widespread use of emergency orders limiting the use of pretrial detention during public health crises.

Fundamental changes to pretrial detention and the plea bargaining process are necessary if we want a justice system that understands and accounts for the way people make real-world decisions—a system of true justice rather than one of expediency. Such fundamental change, unfortunately, is unlikely to come in time for those living in an era of plea bargaining and COVID-19.