

## PRETRIAL DETENTION IN THE TIME OF COVID-19

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**ABSTRACT**—COVID-19 has shone a light on the preexisting flaws in the criminal justice system. This Essay focuses on one of the challenges the criminal justice system faces in light of COVID-19: that of a pretrial detention system that falls more harshly on poor and minority defendants, swells local jail populations, is fraught with bias, produces unnecessarily high rates of detention, and carries a myriad of downstream consequences, both for the accused and the community at large. Long before the first confirmed case, United States’ jails were particularly susceptible to contagions. The COVID-19 crisis exacerbates this problem creating an acute threat to the health of those in custody and those who staff our jails. The pandemic reveals that even during “ordinary times” the pretrial detention system fundamentally miscalculates public safety interests to the detriment of both detainees and the communities they leave behind. Simply put, current pretrial detention models fail to account for the risks defendants face while incarcerated and pit defendants’ interests against the very communities that depend on them.

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INTRODUCTION

The impact of COVID-19 cannot be overstated. As of July 23, 2020, the new strain of coronavirus, which causes COVID-19, has infected over ten million people, leading to 633,369 deaths worldwide.<sup>1</sup> The death toll in the United States alone exceeds 125,000.<sup>2</sup> On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic.<sup>3</sup> In response, governments across the world declared states of emergency and urged citizens to distance themselves from one another, a practice now called social distancing.<sup>4</sup> Schools, bars, restaurants, and entertainment venues closed.<sup>5</sup> Nonessential workers were ordered to stay at home.<sup>6</sup> Group gatherings were prohibited<sup>7</sup> and the frightened public was told that staying

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<sup>1</sup> *COVID-19 Coronavirus Pandemic*, WORLDOMETER, <https://www.worldometers.info/coronavirus/> [<https://perma.cc/RE74-JHDX>] (updated regularly).

<sup>2</sup> *Daily Updates of Totals by Week and State*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> [<https://perma.cc/6ANQ-NQ4Q>] (updated regularly).

<sup>3</sup> WHO Director-General, Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [<https://perma.cc/M57R-HE3H>].

<sup>4</sup> *White House Adviser Warned of Risks of Pandemic; Trump Misleads on Testing*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/world/coronavirus-live-news-updates.html> [<https://perma.cc/2XCG-86XF>] (chronicling the worldwide response to the disease).

<sup>5</sup> *See C.D.C. Gives New Guidelines, New York to Close Restaurants and Schools and Italian Deaths Rise*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/world/coronavirus-live.html> [<https://perma.cc/QD33-PHT7>].

<sup>6</sup> *See Coronavirus: What You Need to Know*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/coronavirus/#states> [<https://perma.cc/D7LC-8TQY>] (tracking each state’s orders regarding nonessential workers).

<sup>7</sup> *See, e.g., Interim Guidance: Get Your Mass Gatherings or Large Community Events Ready for Coronavirus Disease 2019 (COVID-19)*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents\\_FINAL.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/Mass-Gatherings-Documents_FINAL.pdf)

home in isolation is the only way to defeat the virus and “flatten the curve” of the infection.<sup>8</sup> Even as nations and states begin to “reopen,” fear persists that such actions may be premature as infections rates continue to climb<sup>9</sup>—and these rates are unreliably low, as access to testing remains elusive.<sup>10</sup>

In the United States, daily briefings from the White House COVID-19 Task Force stoked the unease. The public was told a vaccine remains elusive and distant;<sup>11</sup> there is insufficient personal protective equipment for healthcare providers<sup>12</sup> and insufficient ventilators and hospital beds for the infected.<sup>13</sup> Medical experts note that while COVID-19 can prove fatal across

[<https://perma.cc/F5BV-HAWC>] (recommending canceling or postponing gatherings of ten or more people).

<sup>8</sup> Siobhan Roberts, *Flattening the Coronavirus Curve*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/11/science/coronavirus-curve-mitigation-infection.html> [<https://perma.cc/X26P-JY4J>].

<sup>9</sup> See Ramsey Archibald & Anna Claire Vollers, *Alabama Coronavirus Cases Surge to New High as State Reopens*, AL.COM (May 29, 2020), <https://www.al.com/news/2020/05/alabama-coronavirus-cases-surge-to-new-high-as-state-reopens.html> [<https://perma.cc/5TB9-ZNHY>]. But see Eric Levenson, Nick Valencia & Jason Morris, *A Month After Reopening, Georgia Coronavirus Cases Continue Slow and Steady*, CNN (May 26, 2020), <https://www.cnn.com/2020/05/26/us/georgia-coronavirus/index.html> [<https://perma.cc/8WL6-TABP>] (suggesting that reopening has not caused a spike, though infection rates continue to rise steadily).

<sup>10</sup> See Sarah Kliff & Julie Bosman, *Official Counts Understate the U.S. Coronavirus Death Toll*, N.Y. TIMES (Apr. 5, 2020), <https://www.nytimes.com/2020/04/05/us/coronavirus-deaths-undercount.html> [<https://perma.cc/R3ZY-6KHD>]. According to the CDC and international epidemic experts—based on the characteristics of the COVID-19 virus—“[b]etween 160 million and 214 million people in the United States could be infected over the course of the epidemic,” and “[a]s many as 200,000 to 1.7 million people could die.” Sheri Fink, *Worst-Case Estimates for U.S. Coronavirus Deaths*, N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html> [<https://perma.cc/SK8T-LYET>]. The overall fatality rate, factoring in demographic and health factors, is 0.3%–3.5%, “which is 5–35 times the fatality associated with influenza infection.” Declaration for Pers.’s in Det. & Det. Staff, Chris Beyrer, MD, MPH, Professor of Epidemiology, Johns Hopkins Bloomberg Sch. of Pub. Health (Mar. 16, 2020) (on file with author); see also Nick Wilson et al., *Case-Fatality Risk Estimates for COVID-19 Calculated by Using a Lag Time for Fatality*, 26 EMERGING INFECTIOUS DISEASE J. 1339, 1340 (2020) (estimating a “broad range of 0.25%–3.0% for COVID-19 case-fatality risk estimates”).

<sup>11</sup> See Zeke Miller, *Government Official: Coronavirus Vaccine Trial Starts Monday*, ASSOCIATED PRESS (Mar. 15, 2020), <https://apnews.com/8089a3d0ec8f9fde971bddd7b3aa2ba1> [<https://perma.cc/A7NM-Y7RG>] (explaining that “[p]ublic health officials say it will take a year to 18 months to fully validate any potential vaccine”); Laura Spinney, *When Will a Coronavirus Vaccine Be Ready?*, GUARDIAN (Apr. 6, 2020, 4:55 PM), <https://www.theguardian.com/world/2020/apr/06/when-will-coronavirus-vaccine-be-ready> [<https://perma.cc/TD7J-6XNZ>].

<sup>12</sup> Andrew Jacobs, Matt Richtel & Mike Baker, *‘At War with No Ammo’: Doctors Say Shortage of Protective Gear Is Dire*, N.Y. TIMES (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html> [<https://perma.cc/AW63-E44Z>].

<sup>13</sup> Ken Alltucker & Nick Penzenstadler, *Too Many Coronavirus Patients, Too Few Ventilators: Outlook in US Could Get Bad, Quickly*, USA TODAY (Mar. 18, 2020, 6:43 AM), <https://www.usatoday.com/story/news/health/2020/03/18/coronavirus-ventilators-us-hospitals-johns-hopkins-mayo-clinic/5032523002/> [<https://perma.cc/UZH7-HXGD>]; Patti Neighmond, *As the Pandemic*

all age ranges, adults over sixty and people with chronic medical conditions are especially vulnerable.<sup>14</sup>

The nation's jails carry their own heightened risk.<sup>15</sup> Unlike free people, detainees cannot engage in “social distancing” and ‘self-quarantine’ and ‘flattening the curve’ of the epidemic—all of these things are impossible in jails . . . or are made worse by the way jails . . . are operated.”<sup>16</sup> Inmates in jails are often housed in large dormitories or shared cells with poor ventilation. They are denied freedom of movement. They eat in large dining halls and share shower and toilet facilities. They lack access to adequate medical care, soap, cleaning supplies, and personal protective equipment like face masks or gloves.<sup>17</sup> In addition, a greater percentage of detainees qualify as “high risk” for COVID-19 due to age and preexisting health conditions than the general population.<sup>18</sup> Each of these factors compound the risk for infection, severe symptoms, and death. Moreover, these facilities are not closed environments. Every day, across the nation, staff come to jails, and every day, at the end of their shifts, they return home to their families and communities.<sup>19</sup> Additionally, as courts across the nation reopen, inmates will

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*Spreads, Will There Be Enough Ventilators?*, NPR (Mar. 14, 2020, 7:00 AM), <https://www.npr.org/sections/health-shots/2020/03/14/815675678/as-the-pandemic-spreads-will-there-be-enough-ventilators> [https://perma.cc/GB6T-KGV7].

<sup>14</sup> People with underlying conditions are also more likely to die from the disease; for example, the mortality rate for people with cardiovascular disease is 13.2%, 9.2% for those with diabetes, 8.4% for those with hypertension, 8.0% for those with chronic respiratory disease, and 7.6% for those with cancer. WORLD HEALTH ORG., REPORT OF THE WHO-CHINA JOINT MISSION ON CORONAVIRUS DISEASE 2019 (COVID-19) 12 (2020), <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> [https://perma.cc/23CJ-G4UZ]; see also *People Who Are at Higher Risk for Severe Illness*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 12, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> [https://perma.cc/V93T-BZ4Y].

<sup>15</sup> See, e.g., Miranda Bryant, *Coronavirus Spread at Rikers Is a ‘Public Health Disaster’, Says Jail’s Top Doctor*, GUARDIAN (Apr. 1, 2020, 10:36 AM), <https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster> [https://perma.cc/DV6D-ZH5F] (estimating the rate of infection in New York City jails at 3.91% compared to the total New York City population at 0.5%); Megan Crepeau & Jason Meisner, *Cook County Jail Detainee Dies of COVID-19*, CHI. TRIB. (Apr. 7, 2020), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-cook-county-jail-death-20200406-42b3dkcqsbeyzflms06s2j4wi-story.html> [https://perma.cc/3M6V-F534] (reporting 234 detainees infected at Cook County Jail).

<sup>16</sup> Jennifer Gonnerman, *How Prisons and Jails Can Respond to the Coronavirus*, NEW YORKER (Mar. 14, 2020), <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus> [https://perma.cc/5TAQ-AH6P]. Homer Venters, former Chief Medical Officer of Rikers, explained that “it’s going to be very, very difficult to deliver a standard of care either in the detection or the treatment of people who are behind bars.” *Id.*

<sup>17</sup> See *infra* note 100.

<sup>18</sup> See *infra* note 85.

<sup>19</sup> See Cary Johnson, *As a Mom Working in a Prison, I Worry About Bringing Coronavirus Home*, MARSHALL PROJECT (Apr. 1, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/01/as-a->

leave jails for court appearances, meet with their attorneys and court staff, and then return.<sup>20</sup> These realities create an opportunity for COVID-19 to enter a facility and, once present, to spread to those who are incarcerated and all who have had contact with them. The Marion Correctional Institution in Ohio offers a chilling case study: An estimated 80% of the detained population has tested positive for COVID-19, and health experts warn that the contagion has begun to spread to the communities surrounding the prison where guards and other staff live.<sup>21</sup>

In many ways, the current COVID-19 crisis has revealed a criminal justice system that has always been broken and always teetered on the edge of some disaster. U.S. jails were particularly susceptible to contagions even before COVID-19.<sup>22</sup> These were not their only problems, though other problems from overcrowding to overpolicing to lack of reentry programs have contributed to this susceptibility. A discussion of each of these issues is beyond the scope of this brief Essay. Instead, this Essay focuses on the pretrial detention system and how the issues with it are exacerbated by the current pandemic.

Part I of this Essay considers the pretrial detention system outside of the context of the current crisis. Part II discusses the impact of COVID-19 on the pretrial detention system and raises the question of what endemic flaws this moment of crisis might reveal. It concludes that with or without a COVID-19 crisis, the pretrial detention system fundamentally miscalculates safety by failing to account for risks to defendants during periods of incarceration and by pitting defendants' interests against the very

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mom-working-in-a-prison-i-worry-about-bringing-coronavirus-home [https://perma.cc/RW5S-MWUM].

<sup>20</sup> See Jacqueline Thomsen, *Judiciary Prepares for Gradual Reopening During COVID-19, but Tells Courts to Heed Local Officials*, LAW.COM (Apr. 27, 2020, 7:32 PM), <https://www.law.com/nationallawjournal/2020/04/27/judiciary-prepares-for-gradual-reopening-during-covid-19-but-tells-courts-to-heed-local-officials/> [https://perma.cc/JG95-E4Z3] (describing the resumption of in-person court appearances in federal courts). Inmates and jail staff are not the only vulnerable populations. In Los Angeles, a public defender who contracted COVID-19 after meeting with clients has died. Matt Hamilton, *Los Angeles County Public Defender Dies from COVID-19*, L.A. TIMES (May 28, 2020, 7:48 PM), <https://www.latimes.com/california/story/2020-05-28/los-angeles-county-public-defender-dies-from-covid-19> [https://perma.cc/56BB-YD97].

<sup>21</sup> See Sarah Volpenhein, *Marion Prison Coronavirus Outbreak Seeping into Larger Community*, MARION STAR (Apr. 25, 2020, 4:16 PM), <https://www.marionstar.com/story/news/local/2020/04/25/marion-prison-ohio-coronavirus-outbreak-seeping-into-larger-community/3026133001/> [https://perma.cc/S9AZ-MPKT].

<sup>22</sup> Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047 (2007). For scientific reports on specific contagions in jails and prisons, see *Scientific Reports & MMWRs*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/correctionalhealth/SR-MMWR.html> [https://perma.cc/4EVQ-KSJU].

communities that depend on them.<sup>23</sup> The current public health crisis demonstrates in stark terms the interconnected nature of a defendant's and the community's safety interests. This, in turn, implicates not only due process concerns regarding the protection of the detainees' fundamental liberty interests, but also Eighth Amendment concerns about the burdens of pretrial detention in the face of a public health crisis and beyond.

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

Even during the best of times, the nation's pretrial detention system has been the subject of repeated criticism and reform movements.<sup>24</sup> The Constitution references pretrial detention only once, prohibiting excessive bail in the Eighth Amendment.<sup>25</sup> Despite this singular reference, other components of due process—such as the presumption of innocence and the burden of proof—implicate and support pretrial release. Historically pretrial release was the default,<sup>26</sup> and the original purpose of bail was to ensure the defendant's presence in court at future proceedings.<sup>27</sup> Time and bail reform expanded that purpose to focus on the nature of the offense alleged and, later, on whether or not the defendant posed a risk to the community if released pretrial.<sup>28</sup>

These entwined considerations—flight risk and future dangerousness—make up the modern pretrial release calculation. And, except for defendants who are statutorily ineligible for pretrial release,<sup>29</sup> courts can only impose pretrial conditions on a defendant upon a finding that it is necessary to mitigate the risk identified by the state.<sup>30</sup> Determining when release is

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<sup>23</sup> See *infra* Section II.B.

<sup>24</sup> See, e.g., Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 599–606 (2017) (describing community bail fund organizing efforts).

<sup>25</sup> U.S. CONST. amend. VIII.

<sup>26</sup> See Judiciary Act of 1789, 1 Stat. 73, § 33 (providing that “bail shall be admitted[] except where the punishment may be death”); SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 20 (2018) (noting that denying bail in noncapital cases was historically seen as a denial of the presumption of innocence).

<sup>27</sup> See *Ex parte* Milburn, 34 U.S. 704, 710 (1835) (explaining that “[a] recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon”).

<sup>28</sup> This shift began in earnest in the 1940s and progressed through the 1980s with the passage of the Bail Reform Act of 1984. See *United States v. Salerno*, 481 U.S. 739, 739–43 (1987); *Schall v. Martin*, 467 U.S. 253, 253 (1984); BAUGHMAN, *supra* note 26, at 19–27.

<sup>29</sup> See *Salerno*, 481 U.S. at 755.

<sup>30</sup> See *id.* at 746–47; *Stack v. Boyle*, 342 U.S. 1, 1–2 (1951); see also CRIMINAL JUSTICE SECTION STANDARDS: PRETRIAL RELEASE STANDARD 10-1.2 (AM. BAR ASS’N 2002), [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pretrialrelease\\_blk/](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk/) [<https://perma.cc/2THN-5Y8C>] (explaining how courts should undergo pretrial release decisions). This is not to say that courts are the only actors who may affect pretrial

appropriate and what that release will look like is a multistep predictive balancing act.

Courts first weigh the defendant's liberty interests against the state's prediction of flight risk or dangerousness if the defendant were to be permitted to remain free while awaiting trial.<sup>31</sup> To do this, courts use predictive proxies to determine the probability that the defendant will pose a risk if released and to determine what conditions, if any, might mitigate that risk.<sup>32</sup> Increasingly, courts rely on pretrial assessment tools (PSAs) to calculate this probability.<sup>33</sup> Like their human counterparts, PSA determinations attempt to predict future behavior based on known and knowable information such as the nature of the alleged offense, the defendant's criminal history, the defendant's ties to the community as evidenced by work history or residence, and the defendant's criminal history.<sup>34</sup> Courts are then left to balance the defendant's interest in freedom against the predicted risks the defendant poses if released pretrial. The process is imperfect at best and catastrophic at worst.

Moreover, though financial incentives and constitutional and statutory mandates should minimize pretrial detention, there is a disconnect between the articulated goals of the system and the reality of how it works. High rates

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release decisions. As noted, legislators may designate particular offenses or defendants as ineligible for bail. In addition, discretionary decisions by police, sheriffs, and prosecutors may also affect pretrial detention. Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 29 (2017).

<sup>31</sup> 18 U.S.C. § 3142(e)–(f) (2012).

<sup>32</sup> Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 865–71.

<sup>33</sup> Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 61 (2017); Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 344–45 (2018). These PSAs utilize algorithms to determine the probability that a defendant will either fail to appear or pose a danger if released. See Eaglin, *supra*, at 64; Stevenson, *supra*, at 304–05. Risk assessment tools were originally touted as decreasing the influence of bias in pretrial decision-making, yet, as will be discussed next, recent critiques of such tools suggest that they promote the very bias they were designed to eliminate. See, e.g., Sandra G. Mayson, *Bias in, Bias Out*, 128 YALE L.J. 2218, 2218 (2019) (arguing that predictive techniques are inherently unequal and racialized).

<sup>34</sup> Kate Patrick, *Arnold Foundation to Roll Out Pretrial Risk Assessment Tool Nationwide*, INSIDE SOURCES (Sept. 3, 2018), <https://www.insidesources.com/arnold-foundation-to-roll-out-pretrial-risk-assessment-tool-nationwide/> [https://perma.cc/GA4B-TYYQ]. These factors are consistent with those used by courts in making pretrial detention decisions. See, e.g., FLA. R. CRIM. P. 3.131 (explaining that “the court may consider the nature and circumstances of the offense charged and the penalty provided by law; the weight of the evidence against the defendant . . . the defendant’s past and present conduct, including any record of convictions, previous flight to avoid prosecution, or failure to appear at court proceedings; the nature and probability of danger that the defendant’s release poses to the community; [and] the source of funds used to post bail”); PA. R. CRIM. P. 523 (providing that “the bail authority shall consider all available information as that information is relevant to the defendant’s appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with the conditions of the bail bond, including information about:” the nature of the offense, the defendant’s employment, the defendant’s ties to the community, and whether the defendant complied with the relevant conditions).

of pretrial detention contribute to jail and prison overcrowding<sup>35</sup> and strain county and community resources that are often stretched perilously thin already.<sup>36</sup> The following Sections will, in turn, discuss the due process concerns, inherent biases, and problematic downstream consequences that make the problem worse. Though COVID-19 has certainly exacerbated issues inherent in the pretrial detention system, the system was deeply flawed from the start. In many ways, the current public health crisis has simply laid bare the troubling and devastating reality of a broken system.

#### A. *The Due Process Problems with Pretrial Hearings*

The Supreme Court has required a nexus between the state's articulated interest and its proposed condition of release or detention in federal pretrial detention hearings.<sup>37</sup> Under this rule, if a federal court makes a finding that a defendant poses a flight risk or presents a danger to the community if released, it can set conditions necessary to mitigate that risk without running afoul of the Due Process Clause.<sup>38</sup>

The problem with this due process analysis is multifaceted. Setting aside the question of whether federal due process analysis is even applicable to state pretrial detention hearings, such hearings—including those in federal courts—lack many of the robust procedural safeguards of a trial.<sup>39</sup> These hearings tend to be remarkably short—often less than two minutes in length—and, in state court, may occur prior to appointment of counsel for a

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<sup>35</sup> Margaret Elizabeth Sparks, *Bailing on Bail: The Unconstitutionality of Fixed, Monetary Bail Systems and Their Continued Use Throughout the United States*, 52 GA. L. REV. 983, 1004 (2018) (explaining that pretrial detainment leads to “the overcrowding of jails”). Pretrial detainees are more likely accept a plea deal than a released defendant. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713–14 (2017). Pretrial detention also likely worsens case outcomes by hindering the defendant's ability to prepare his defense. *Id.*

<sup>36</sup> Alexi Jones, *Does Our County Really Need a Bigger Jail?*, PRISON POL'Y INITIATIVE (May 2019), <https://www.prisonpolicy.org/reports/jailexpansion.html> [<https://perma.cc/S5S4-UPEY>]; Natalie Ortiz, *Pretrial Population and Costs Put County Jails at a Crossroads*, NAT'L ASS'N OF COUNTIES (June 29, 2015), <https://www.naco.org/articles/pretrial-population-and-costs-put-county-jails-crossroads-0> [<https://perma.cc/PR8V-ZZ76>].

<sup>37</sup> See *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990); *United States v. Salerno*, 481 U.S. 739, 750–51 (1987); *Stack v. Boyle*, 342 U.S. 1, 5 (1951). While the Court has established process requirements in the context of federal proceedings, it has provided little guidance as to whether or not such protections are also constitutionally mandated for state systems. Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1107 (2019).

<sup>38</sup> *Salerno*, 481 U.S. at 746–52.

<sup>39</sup> See BAUGHMAN, *supra* note 26, at 109; Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1353–55 (2012); Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 428 (2011). This is not to say the defendant enjoys no procedural protections, but it is to say that these protections are significantly curtailed at the pretrial detention stage. See Appleman, *supra*, at 1353–55.



defendant.<sup>40</sup> The absence of counsel and the brevity of these hearings raises significant questions regarding the level of rigor courts employ in considering whether to impose detention.<sup>41</sup>

Arguably, the actuarial analysis of PSAs has rendered such brief hearings sufficient. PSAs, after all, offer an efficient analysis of probable risks.<sup>42</sup> Such an argument, however, overlooks the reality of how PSAs actually work. PSAs are static in their analysis and susceptible to economic and racial bias.<sup>43</sup> They fail to account for voices outside of their constructed consideration and they assign a permanent meaning to factors they consider without context.<sup>44</sup> To PSAs, a criminal history signals danger, rather than hard times, hopelessness, or police harassment,<sup>45</sup> and a failure to appear signals a flight risk, rather than competing obligations or the lack of economic resources that render missed work a financial catastrophe rather than a mere inconvenience.<sup>46</sup> While PSAs may represent an efficient means to collect data and assign it some meaning, they cannot and should not replace human analysis and the context human analysis can provide.

Alternatively, one might argue that a brief and unrepresented pretrial hearing—even one that lacks procedural protections and fails to fully consider risks and the potential mitigation of those risks—is sufficient given the brevity of pretrial detention. Such an argument assumes that speedy trial clocks will indeed limit periods of pretrial detention.<sup>47</sup> This assumption is belied by the reality that modern pretrial detention periods often extend to nearly a year and are sometimes longer than, or as long as, any sentence imposed.<sup>48</sup>

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<sup>40</sup> See EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 37 (2019); Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1755 (2002) (observing that pretrial detention hearings in Baltimore City with counsel lasted “on average, two minutes and thirty-seven seconds, versus one minute [and] forty-seven seconds without counsel”).

<sup>41</sup> See Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 21–32 (Erik Luna ed., 2017); Dorothy Weldon, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2420–21 (2018).

<sup>42</sup> Stevenson, *supra* note 33, at 305.

<sup>43</sup> See Mayson, *supra* note 33, at 2259; Stevenson, *supra* note 33, at 305.

<sup>44</sup> Stevenson, *supra* note 33, at 314–17.

<sup>45</sup> See *id.* at 317–18.

<sup>46</sup> See *id.*

<sup>47</sup> See 130 CONG. REC. 1821 (1984) (statement of Senator Grassley) (noting that the Speedy Trial Act would prevent lengthy periods of pretrial detention); Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 739 n.310 (2018).

<sup>48</sup> See PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, THE HAMILTON PROJECT, THE ECONOMICS OF BAIL AND PRETRIAL DETENTION 5 (2018),

Another problem with this due process analysis is that defendants often operate at a distinct disadvantage in pretrial proceedings. Prior to making a charging decision, the state, through police investigation, has had the opportunity to amass evidence that a newly charged defendant has not.<sup>49</sup> This not only means that a defendant, even one represented by counsel, will be at a distinct disadvantage, but also that the prosecutor assumes an outsized role once she makes a decision to charge a defendant. This is because both PSAs and courts rely on the prosecutor's allegation or charge as a factor to guide pretrial risk calculations.<sup>50</sup> Defense counsel, if present, may refute an allegation; however, fear of self-incrimination may counsel against robust defense participation—especially if defense counsel has had little time to speak to the defendant prior to the pretrial hearing. Further, if the prosecutor can establish probable cause exists for a charge that precludes bail, the prosecutor can literally control the bail proceedings through charging discretion.<sup>51</sup> And once a pretrial detention decision is made, federal and state procedural rules often preclude reconsideration of detention or the conditions of release absent a demonstration of a change in circumstances not apparent at the time of the original determination.<sup>52</sup>

Finally, pretrial detention often occurs not because of a genuine risk of flight or future dangerousness, but because a defendant is unable to satisfy conditions of release. A defendant may lack the money for bail.<sup>53</sup> Or they may be unable to comply with nonmonetary conditions of release because they lack funds for electronic home monitoring (EHM), access to mental health or substance counseling, or stable housing located a sufficient distance from a complaining witness.<sup>54</sup> In making a finding that some condition will sufficiently mitigate the risk the defendant poses, courts may permit pretrial release upon satisfaction of the conditions.<sup>55</sup>

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[https://www.hamiltonproject.org/assets/files/BailFineReform\\_EA\\_121818\\_6PM.pdf](https://www.hamiltonproject.org/assets/files/BailFineReform_EA_121818_6PM.pdf)  
[<https://perma.cc/8MQ3-NFTS>].

<sup>49</sup> See BAZELON, *supra* note 40, at 37.

<sup>50</sup> See *supra* note 33.

<sup>51</sup> One could argue that it is the legislature, not the prosecutor, controlling this aspect of pretrial decision-making. And, in part, that is true. However, given that prosecutors frequently choose between and among charges as part of permissible (and even desirable) prosecutorial charging discretion, it is more accurate to consider such legislative designations as merely creating opportunities for prosecutorial control of the pretrial detention process.

<sup>52</sup> See, e.g., 18 U.S.C. § 3142(f) (2012) (providing a judge may reopen a pretrial detention question only when there is new evidence that is material to the decision of whether detention is appropriate). Admittedly, COVID-19 might constitute such a new condition.

<sup>53</sup> Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, 1652–53 (2020).

<sup>54</sup> Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. (forthcoming 2021) (manuscript at 33–34) (on file with author).

<sup>55</sup> See, e.g., 18 U.S.C. §§ 3142(c)(B)(iv), 3146 (permitting restrictions on travel to prevent flight risk); *id.* § 3142(g) (permitting courts to set conditions of release to mitigate risk to the community).

However, the courts often engage in little consideration of the defendant's ability to meet the conditions—monetary or otherwise.<sup>56</sup> In other words, a defendant may be held pretrial not because they pose some insurmountable risk, but because they are too poor to meet the conditions of their release or because resources, such as treatment beds or secure housing, do not exist for them. Thus, in practice, the balance of risk required by due process is superseded by structural barriers that are unrelated to the defendant's supposed flight risk or dangerousness.

### *B. Bias*

Accusations of bias in the criminal justice system are neither new nor unique to pretrial detention.<sup>57</sup> Overpolicing of poor and minority populations; disproportionate rates of arrests, prosecutions, and convictions; and inequity in sentencing all translate into higher rates of pretrial and posttrial detention among marginal populations.<sup>58</sup> Bias by early decision-makers fuel these high rates of detention.<sup>59</sup>

Bias in pretrial decision-making has long been the subject of critique.<sup>60</sup> Early pretrial detention reformers argued that judicial discretion increased detention rates among poor and minority defendants because judges often failed to consider indigency, and so they often set bail and conditions of release that marginal defendants could not meet.<sup>61</sup> These early reformers

<sup>56</sup> Carroll, *supra* note 54, at 28–29.

<sup>57</sup> See, e.g., Edward Green, *Race, Social Status, and Criminal Arrest*, 35 AM. SOC. REV. 476, 476–77 (1970) (describing bias in arrest rates between 1942 and 1965).

<sup>58</sup> See Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1185–87 (2012).

<sup>59</sup> See Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 200–10 (2013). It is also worth noting that each early actor may not engage in decision-making equally. Judges may defer to police and prosecutors in assessing risk, either explicitly in the form of hearings that emphasize evidence in support of the charge, or implicitly as the relationship between pretrial hearing judges and law enforcement fosters reliance. The Supreme Court has urged court deference to police in the Fourth Amendment context, *Terry v. Ohio*, 392 U.S. 1, 27 (1968), and scholars have noted such a deference in the context of credibility assessments. See, e.g., Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1997 (2017). Additionally, rules of procedure often promote deference to prosecutorial decision-making by requiring or allowing courts to consider both present and past charges in making pretrial detention decisions. See, e.g., PA. R. CRIM. P. 523 (providing that “the bail authority shall consider all available information as that information is relevant to the defendant’s appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with the conditions of the bail bond, including information about:” the nature of the offense, the defendant’s employment, the defendant’s ties to the community, and whether the defendant complied with the relevant conditions).

<sup>60</sup> In the 1960s, the Vera Institute argued that judges in New York City were overdetecting poor and minority defendants based on miscalculations of the risk that they would fail to appear at future court dates. See WAYNE H. THOMAS, JR., *BAIL REFORM IN AMERICA* 2–11 (1976).

<sup>61</sup> *Id.*

argued that courts could reduce bias by analyzing a series of known factors, such as criminal history and community ties, that could assess the risk a defendant might pose if released with reasonable accuracy.<sup>62</sup> They argued that, through this method, unnecessary conditions including bail could be avoided and release rates would increase.<sup>63</sup> The wide adoption of these proposed reforms—including the Bail Reform Act of 1966—led to increasing rates of pretrial release, but the shift was short-lived.<sup>64</sup> The 1980s, with the passage of the Bail Reform Act of 1984 and its state analogs, saw another reversal in pretrial policy with a renewed embrace of money bail and outright detention of individuals pretrial.<sup>65</sup> Since then, rates of pretrial detention across the nation have continued to rise and to disproportionately affect poor and minority populations.<sup>66</sup>

In response, actuarial risk assessment tools were introduced to reduce arbitrary and inaccurate calculations of risk by decreasing the amount of discretion in pretrial release decisions.<sup>67</sup> Such tools generate a risk assessment score for each defendant, which is then used by a court, or the legislature, to set the criteria for release.<sup>68</sup> A defendant who receives a low score is unlikely to pose either a risk of flight or a risk of danger to the community and may be released. In contrast, a defendant who receives a high score may pose a greater risk and merit detention.<sup>69</sup> By shifting pretrial assessments away from judges toward machine-generated evaluations, advocates hoped the bias that had long plagued pretrial detention processes would be mitigated. It was not.

Despite the promise of accurate and neutral findings, risk assessment tools quickly displayed the same bias as the system they sought to improve.<sup>70</sup> There are different possible explanations for these results: The PSAs may

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 20–22.

<sup>64</sup> BAUGHMAN, *supra* note 26, at 23–25.

<sup>65</sup> *Id.* at 25–26.

<sup>66</sup> See Albert W. Alschuler, *Preventative Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 515 (1986); Baradaran, *supra* note 59, at 184–85, 193.

<sup>67</sup> Gouldin, *supra* note 47, at 713; see also text accompanying notes 42–46 (discussing how these risk assessment tools work).

<sup>68</sup> Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 494–95 (2018).

<sup>69</sup> For a discussion of how risk scores are calculated and the significance of risk scores, see BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PRETRIAL RISK ASSESSMENT: RESEARCH SUMMARY I (2010).

<sup>70</sup> See Mayson, *supra* note 33, at 2251–54; Mayson, *supra* note 68, at 508–10; Stevenson, *supra* note 33, at 344–45.

carry their own embedded biases<sup>71</sup> or they may be susceptible to user bias through inconsistent interpretation of risk assessment scores.<sup>72</sup> Coupled with the lack of information about how such scores are generated, these risk assessment tools have done little to mitigate inherent biases in the pretrial detention process.<sup>73</sup> In the end, despite multiple reform movements, poor and minority defendants are still more likely to be subjected to pretrial detention.<sup>74</sup>

### C. *The Downstream Consequences of Pretrial Detention*

Even in the best of times, the line between pretrial detention and punishment has always been a murky one. While the Supreme Court has repeatedly drawn a boundary between detention that punishes and detention which merely promotes compelling state interests prior to trial,<sup>75</sup> significant downstream consequences of even brief periods of pretrial detention render the practice effectively punitive.<sup>76</sup>

In custody prior to trial, accused people not only suffer the “ordinary” indignities of jail, they also lose wages, homes, child custody, and the opportunity to meaningfully assist in their own defense.<sup>77</sup> They are also less likely to receive mental health and addiction treatment and are more likely to plead guilty to their charges.<sup>78</sup> These downstream consequences of pretrial detention affect the defendants as well as their communities. The community a defendant leaves behind during pretrial detention not only loses one of its own, but also loses all of the benefits of that defendant’s presence. In custody, defendants do not earn a wage to support their families or pay their rent. They are absentee parents, partners, and mentors. Whatever

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<sup>71</sup> See Mayson, *supra* note 33, at 2251–54; Mayson, *supra* note 68, at 508–10; Stevenson, *supra* note 33, at 344–45.

<sup>72</sup> See Stevenson, *supra* note 33, at 305, 327–33.

<sup>73</sup> See Eaglin, *supra* note 33, at 94–97; Mayson, *supra* note 33, at 2251–54; Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/9G99-E83U>].

<sup>74</sup> See Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL’Y INITIATIVE (Oct. 9, 2019), [https://www.prisonpolicy.org/blog/2019/10/09/pretrial\\_race/](https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/) [<https://perma.cc/MC7J-B639>].

<sup>75</sup> See *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015); *United States v. Salerno*, 481 U.S. 739, 747–48 (1987); *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

<sup>76</sup> See BAUGHMAN, *supra* note 26, at 82–91; Heaton et al., *supra* note 35, at 713–14; Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1417–27 (2017).

<sup>77</sup> Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235, 241, 246–47, 277–279 (2018); see also Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), [http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?\\_r=1](http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=1) [<https://perma.cc/PB6X-5GD2>] (describing the consequences of pretrial detention on poor defendants in New York’s criminal justice system).

<sup>78</sup> See Heaton et al. *supra* note 35, at 722.

investment they have made in their community prior to their detention is halted or limited while detained.

Moreover, pretrial detention serves to disrupt and destroy the very ties between defendants and their communities that might, in the long run, protect and promote community safety. In this way, what the Court declines to refer to as punishment may nonetheless feel punitive to those who suffer it.<sup>79</sup>

## II. COVID-19 AND PRETRIAL DETENTION

Whatever failings the pretrial detention system suffers in the best of times are further complicated by COVID-19. Detention in the face of a pandemic skews the calculation of the liberty interests at stake and alters incentives for pretrial actors. In the midst of a public health crisis, pretrial detention determinations raise more than the possibility of confinement, indignity, and the downstream consequences described above; these decisions raise the possibility that a person will be exposed to a known fatal contagion as a result of an accusation. Beyond this, closures of courts in the wake of the public health crisis<sup>80</sup> raise the specter that speedy trial rights will no longer serve (if they ever did) as a backstop to indefinite periods of pretrial detention.<sup>81</sup>

This Part will discuss each of these issues in turn. Section II.A begins by explaining why jail populations are more susceptible to contagions, leading to the conclusion that defendants should be released pretrial rather than detained. Section II.B then explains how pretrial decision-makers fail to adequately weigh defendants' liberty and safety interests in making their detention decisions, using COVID-19 as a lens through which to show how fundamentally flawed these pretrial detention calculations are. Section II.C builds upon this discussion by arguing that the calculation also misunderstands the community's interests in pretrial release. Altogether, these complications suggest that an alternative calculation of pretrial detention is necessary—a calculation that recognizes that pretrial release may in fact promote public safety.

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<sup>79</sup> See Appleman, *supra* note 39, at 1336; Carroll, *supra* note 54, at 12.

<sup>80</sup> Jacob Gershman & Byron Tau, *Coronavirus Disrupts U.S. Court System; Trials Are Delayed and Courthouses Are Limiting Public Access Across the Country*, WALL ST. J. (Mar. 17, 2020), <https://www.wsj.com/articles/coronavirus-disrupts-u-s-court-system-11584445222> [<https://perma.cc/QD2S-KPVU>].

<sup>81</sup> See Simone Weichselbaum, *Can't Make Bail, Sit in Jail Even Longer Thanks to Coronavirus*, 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/4SWR-CSB8>].

### A. Jails and Contagions

Even before the current health crisis, the conditions of the nation's jails and prisons rendered their occupants susceptible to contagions in ways that members of the free world were not.<sup>82</sup> Jails and prisons are infamous for overcrowding and lack of medical care.<sup>83</sup> In 2016, the DOJ issued two reports on the Bureau of Prisons (BOP) confirming these concerns in federal prisons, finding that BOP experienced chronic medical staff shortages and failed to take adequate measures to address them.<sup>84</sup>

In many ways, local jails fare worse when it comes to medical care and contagion control. First, jails are composed of pretrial detainees and individuals on parole or probation violation holds, which means that jail populations fluctuate more than prison populations as inmates move in and out of the facilities.<sup>85</sup> Second, “the [healthcare] crisis is particularly acute in jails” as those booked into jail often enter in a state of medical or emotional distress and may require monitoring or specialized care that jails lack the resources to provide.<sup>86</sup> The proliferation of private jail management that

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<sup>82</sup> Bick, *supra* note 22, at 1047.

<sup>83</sup> See, e.g., U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., U.S. ATTORNEY'S OFFICES FOR THE NORTHERN, MIDDLE, AND SOUTHERN DIST. OF ALA., INVESTIGATION OF ALABAMA'S STATE PRISONS FOR MEN 8–12 (2019), <https://www.justice.gov/opa/press-release/file/1150276/download> [<https://perma.cc/EZ5C-SUU4>] [hereinafter ALABAMA NOTICE] (noting chronic overcrowding in Alabama prisons); Glenn Ellis, *Examining Health Care in U.S. Prisons*, PHILA. TRIB. (Mar. 25, 2017), [https://www.phillytrib.com/news/examining-health-care-in-u-s-prisons/article\\_43520055-789e-52a9-aed5-eaf1c75c7c36.html](https://www.phillytrib.com/news/examining-health-care-in-u-s-prisons/article_43520055-789e-52a9-aed5-eaf1c75c7c36.html) [<https://perma.cc/FAP8-ZRKB>]; see also Talha Burki, *Prisons Are “In No Way Equipped” to Deal with COVID-19*, 395 LANCET 1411, 1412 (May 2, 2020), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2930984-3> [<https://perma.cc/S2A9-WEHX>] (explaining how jails and prisons are unprepared to cope with the medical needs of prisoners during the COVID-19 pandemic); Laura Hawks, Steffie Woolhandler & Danny McCormick, *COVID-19 in Prisons and Jails in the United States*, JAMA INTERNAL MED. (Apr. 28, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2765271> [<https://perma.cc/TU5S-TKXN>] (same).

<sup>84</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MEDICAL STAFFING CHALLENGES (2016). This deficiency led to problems meeting the medical needs of prisoners. *Id.* The DOJ also reported that BOP facilities and services, including medical services, were particularly inadequate to meet the needs of an aging prison population. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS (2016). State prison facilities fare no better. See, e.g., ALABAMA NOTICE, *supra* note 83, at 1, 8–9.

<sup>85</sup> Steve Coll, *The Jail Health-Care Crisis*, NEW YORKER (Feb. 25, 2019), <https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis> [<https://perma.cc/Y5XE-V3NN>]; Lipi Roy, *Infections and Incarceration: Why Jails and Prisons Need to Prepare for COVID-19 Now*, FORBES (Mar. 11, 2020, 5:08 PM), <https://www.forbes.com/sites/lipiroy/2020/03/11/infections-and-incarceration-why-jails-and-prisons-need-to-prepare-for-covid-19-stat/#1fa6b08e49f3> [<https://perma.cc/JQ6P-X2M2>].

<sup>86</sup> Coll, *supra* note 85.

prioritizes profit over care has heightened this problem.<sup>87</sup> A 2019 CNN exposé of one such management company reported that, “[a]cross the country, the same themes have been found: doctors and nurses [in jails] have failed to diagnose and monitor life-threatening illnesses and chronic diseases . . . allow[ing] common infections and conditions to become fatal.”<sup>88</sup> The result is “prolonged suffering, ongoing complications, shortened life expectancy and debt” among jail populations.<sup>89</sup> Publicly managed jails suffer similar deficiencies. For example, in 2018, the Department of Justice (DOJ) declared the medical program at the Hampton Roads Regional Jail unconstitutional.<sup>90</sup> The report noted that inmate requests for medical care were ignored or not taken seriously by jail staff, resulting in serious harm or death.<sup>91</sup>

In turn, this lack of medical care within jail facilities taxes local communities. Inmates, unable to receive adequate medical care in jail, may present at local hospitals for emergency treatment.<sup>92</sup> Jails, unable or unwilling to bear the financial burden of treatment, may also release inmates untreated, burdening already strained local communities.<sup>93</sup>

Contagions compound problems created by inadequate medical care. In jail, detainees share spaces such as toilets, laundry, and meal facilities.<sup>94</sup> The close and shared quarters render social distancing impossible, allowing infections to spread more easily.<sup>95</sup> Poor air circulation,<sup>96</sup> high rates of older and medically compromised individuals,<sup>97</sup> the treatment of hand sanitizer as

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<sup>87</sup> See Blake Ellis & Melanie Hicken, ‘PLEASE HELP ME Before it’s Too Late,’ CNN (June 25, 2019), <https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs/> [<https://perma.cc/3JAG-JU9D>].

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., U.S. ATTORNEY’S OFFICE EASTERN DIST. OF VA., NOTICE REGARDING INVESTIGATION OF THE HAMPTON ROAD REGIONAL JAIL (PORTSMOUTH, VIRGINIA) 1 (2018), <https://www.justice.gov/opa/press-release/file/1121221/download> [<https://perma.cc/PA3L-AW48>].

<sup>91</sup> *Id.* at 1, 6.

<sup>92</sup> See, e.g., Coll, *supra* note 85.

<sup>93</sup> See *id.*

<sup>94</sup> Burki, *supra* note 83, at 1411.

<sup>95</sup> Gonnerman, *supra* note 16.

<sup>96</sup> Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html> [<https://perma.cc/Y246-XM2Z>].

<sup>97</sup> Gonnerman, *supra* note 16.



contraband,<sup>98</sup> and the lack of access to personal hygiene or sanitizing products<sup>99</sup> all further susceptibility to infection.

Lack of medical care and contagion-friendly environments in jails are troubling in the best of times; in the face of the current health care crisis these circumstances combine to create a high-risk roulette in which inmates, unable to practice best the preventative guidelines, await infection and, for some, death.

Practitioners, activists, and scholars across the nation have renewed their call for detention reform in light of the current COVID-19 crisis.<sup>100</sup> The response has been mixed. While some jurisdictions have failed to release inmates,<sup>101</sup> others have released those close to the completion of their sentences, those held as a result of administrative probation or parole violations (such as failure to make curfew, failure to check in with a parole or probation officer, or failure to pay a fine), and those detained for nonviolent or misdemeanor offenses.<sup>102</sup> For example, six counties in North

<sup>98</sup> Roy, *supra* note 85 (explaining that “[h]and sanitizers [] are often considered contraband because they contain alcohol”).

<sup>99</sup> See Bick, *supra* note 22, at 1047.

<sup>100</sup> See, e.g., Hannah Cox, *Coronavirus Will Turn Our Prisons into Death Zones Without Reform*, WASH. EXAMINER (Mar. 17, 2020, 12:02 PM), <https://www.washingtonexaminer.com/opinion/coronavirus-will-turn-our-prisons-into-death-zones-without-reform> [https://perma.cc/Y9MD-RAN4]; Nancy Gertner & John Reinstein, *Compassionate Release Now for Prisoners Vulnerable to the Coronavirus*, BOS. GLOBE (Mar. 23, 2020, 12:00 AM), <https://www.bostonglobe.com/2020/03/23/opinion/compassionate-release-now-prisoners-vulnerable-coronavirus/> [https://perma.cc/6NXP-VLTJ]; Peter Wagner & Emily Widra, *No Need to Wait for Pandemics: The Public Health Case for Criminal Justice Reform*, PRISON POL’Y INITIATIVE (Mar. 6, 2020), <https://www.prisonpolicy.org/blog/2020/03/06/pandemic/> [https://perma.cc/5743-G5H8].

<sup>101</sup> See, e.g., Andrea Woods, *Dallas County Officials Are Leaving Vulnerable People to Catch COVID-19 in Jail*, ACLU (May 12, 2020), <https://www.aclu.org/news/prisoners-rights/dallas-county-officials-are-leaving-vulnerable-people-to-catch-covid-19-in-jail/> [https://perma.cc/689V-CJQQ]. This is occurring not only at the local jail level, but at the federal level as well. While Attorney General Barr “asked the [BOP] to identify and release all inmates who were eligible for home confinement, no longer posed a threat to the public and were particularly vulnerable to the coronavirus,” citing the “emergency conditions” created by COVID-19 as the impetus for his request in March, he has also faced recent criticism for secret policies that made release more difficult. Katie Benner, *Barr Expands Early Release of Inmates at Prisons Seeing More Coronavirus Cases*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/us/politics/barr-coronavirus-prisons-release.html> [https://perma.cc/F739-HJG6]; Ian MacDougall, *Bill Barr Promised to Release Prisoners Threatened by Coronavirus—Even as the Feds Secretly Made it Harder for Them to Get Out*, PROPUBLICA (May 26, 2020, 5:00 AM), <https://www.propublica.org/article/bill-barr-promised-to-release-prisoners-threatened-by-coronavirus-even-as-the-feds-secretly-made-it-harder-for-them-to-get-out> [https://perma.cc/Q6ZZ-9JN5].

<sup>102</sup> See, e.g., NYC MAYOR’S OFFICE OF CRIMINAL JUSTICE, *NEW YORK CITY JAIL POPULATION REDUCTION IN THE TIME OF COVID-19* (2020), <http://criminaljustice.cityofnewyork.us/wp-content/uploads/2020/04/MOCJ-COVID-19-Jail-Reduction.pdf> [https://perma.cc/ACH4-M8HT] (breaking down release data for New York City); Cheryl Corley, *The COVID-19 Struggle in Chicago’s Cook County Jail*, NPR (Apr. 13, 2020, 6:09 PM), <https://www.npr.org/2020/04/13/833440047/the>

Carolina affirmed that they will release detainees charged with “low-level offenses” after an individual review confirming that “release does not constitute a public safety concern.”<sup>103</sup> Still other jurisdictions have adopted “cite and release”<sup>104</sup> or non-policing policies with regard to nonviolent misdemeanors.<sup>105</sup> Finally, some have offered alternative forms of detention, including release to a family member, house arrest, or EHM.<sup>106</sup>

District attorneys have also weighed in on the debate. Some have voiced support for these temporary reforms, hailing them as an appropriate balance between law enforcement and public health.<sup>107</sup> Others have been less supportive—urging aggressive policing,<sup>108</sup> seeking continuances in pending criminal cases while opposing pretrial release,<sup>109</sup> and advocating that certain

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covid-19-struggle-in-chicagos-cook-county-jail [https://perma.cc/P6BW-HNBB] (describing release considerations for Cook County jails). For data on release rates across multiple institutions, see *Monitoring Jail Populations During COVID-19*, VERA INST. JUST., https://www.vera.org/projects/covid-19-criminal-justice-responses/covid-19-data [https://perma.cc/G3KG-4UE5].

<sup>103</sup> Jordan Wilkie, *UPDATED: Coronavirus Raises Health, Legal Concerns for NC Jails*, CAROLINA PUB. PRESS (Mar. 20, 2020), https://carolinapublicpress.org/30039/coronavirus-raises-health-legal-concerns-for-nc-jails/ [https://perma.cc/J7TM-AH43].

<sup>104</sup> A cite and release policy allows a police officer to issue a citation or ticket to an offender in lieu of arresting him or her. Similarly, nonpolicing policies allow police departments to simply deprioritize enforcement of some minor offenses. Even if the police are aware that the offense occurred, they will either decline to investigate it, or decline to arrest the suspected offender. Both policies tend to be limited in scope—often affecting only misdemeanors and nonviolent offenses—and both reduce pretrial detention by never placing a suspect within the jail system. A recent example of this was the decision in New York City to not arrest those suspected of simple possession of marijuana. Benjamin Mueller, *New York Will End Marijuana Arrests for Most People*, N.Y. TIMES (June 19, 2018), https://www.nytimes.com/2018/06/19/nyregion/nypd-marijuana-arrests-new-york-city.html [https://perma.cc/JG7X-GLGY].

<sup>105</sup> See, e.g., Liz Kellar, *Cite and Release, not Jail, for Some over COVID-19 Concerns*, UNION (Mar. 18, 2020), https://www.theunion.com/news/cite-and-release-not-jail-for-some-over-covid-19-concerns/ [https://perma.cc/2ZNW-LZAA]; Nichole Manna, *Fort Worth Police Will Give Citations for Low-Level Crimes Amid Coronavirus Outbreak*, FORT WORTH STAR-TELEGRAM (Mar. 17, 2020, 5:00 AM), https://www.star-telegram.com/news/coronavirus/article241254951.html [https://perma.cc/7YP8-S2A5].

<sup>106</sup> See, e.g., Lucas Wright, *Amy Fleming Now on House Arrest Due to COVID-19*, 8 NEWS NOW (May 1, 2020, 9:16 PM) https://www.8newsnow.com/news/local-news/amy-fleming-now-on-house-arrest-due-to-covid-19/ [https://perma.cc/6DLS-JBP3].

<sup>107</sup> See, e.g., *Coronavirus Latest: Philadelphia DA Larry Krasner Urges Leaders to Reduce Prison Populations Due to COVID-19 Pandemic*, CBS NEWS (Mar. 19, 2020, 5:29 PM), https://philadelphia.cbslocal.com/2020/03/19/coronavirus-latest-philadelphia-da-larry-krasner-urges-leaders-to-reduce-prison-populations-due-to-covid-19-pandemic/ [https://perma.cc/3SKD-4DBY].

<sup>108</sup> See, e.g., Andrew Mark Miller, *Police Groups Slam Cities and States Releasing Jail Inmates to Mitigate Coronavirus Fears*, WASH. EXAMINER (Mar. 21, 2020, 10:43 AM), https://www.washingtonexaminer.com/news/police-groups-slam-cities-and-states-releasing-jail-inmates-to-mitigate-coronavirus-fears [https://perma.cc/SWE6-T6Z4].

<sup>109</sup> See, e.g., David J. Mitchell, *DA Hillar Moore: State Prosecutors Seeking Orders, Bill to Suspend Criminal Legal Deadlines*, ADVOCATE (Mar. 16, 2020, 11:31 AM),

people remain detained because they are less able to comply with CDC handwashing and social distancing guidelines.<sup>110</sup> For their part, federal district courts have ordered release in the face of overwhelming infection rates.<sup>111</sup>

The scope of the crisis within the criminal justice system has become increasingly apparent as the number of confirmed cases and deaths grow. Pretrial detainees already make up a disproportionate segment of jail populations,<sup>112</sup> where they face potential exposure to a fatal contagion. In this, the COVID-19 crisis highlights failures inherent in the determinations made by the pretrial detention system, most notably the inability to properly assess the competing interests at stake in determining whether to detain an individual. In leaving prisoners to the care of the county jail systems, defendants and their communities are left vulnerable to COVID-19.<sup>113</sup>

### *B. Detainees' Constitutional Interests in the Crisis and Beyond*

In making pretrial detention decisions, various actors weigh the interest of the defendant in pretrial release against the state's interests in safety, reducing the risk of flight and, for later pretrial actors, fiscal burdens associated with detention. This consideration, however, fails to account for risks a defendant may face in custody, which raises both due process and Eighth Amendment concerns.<sup>114</sup>

Turning first to the risks a defendant faces during pretrial detention, admittedly, the Bail Reform Act and its state law analogs do not specifically address how public health should affect pretrial detention decisions.<sup>115</sup> While

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[https://www.theadvocate.com/baton\\_rouge/news/coronavirus/article\\_a74ad19a-67a3-11ea-8bbd-57cce1edae6c.html](https://www.theadvocate.com/baton_rouge/news/coronavirus/article_a74ad19a-67a3-11ea-8bbd-57cce1edae6c.html) [<https://perma.cc/H3TW-AU6R>].

<sup>110</sup> See, e.g., Mark Joseph Stern, *New Orleans Prosecutors Argue the Coronavirus Is a Reason to Keep People in Jail*, SLATE (Mar. 18, 2020, 4:28 PM), <https://slate.com/news-and-politics/2020/03/new-orleans-prosecutors-jail-coronavirus.html> [<https://perma.cc/AWQ4-NAC6>].

<sup>111</sup> See, e.g., *Wilson v. Williams*, No. 4:20-cv-00794 (N.D. Ohio filed Apr. 22, 2020) (granting partial habeas relief in the form of release for inmates at the Elkton Federal Correctional Institution in light of COVID-19).

<sup>112</sup> See Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 551 (2012).

<sup>113</sup> The concerns noted above are not the only concerns that arise out of the COVID-19 crisis in the context of the criminal justice system. From a constitutional perspective, detainees suffer denial of speedy trial and jury rights, a lack of access to counsel now excluded from jails, and the risk of cruel and unusual conditions of punishment if detained following conviction. This Essay touches on some of these concerns briefly, though without the full attention they deserve.

<sup>114</sup> While fully unpacking each of these is beyond the scope of this Essay, I can recommend a reading list for anyone who wants one, but I would start with Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098 (2019), and Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643 (2020).

<sup>115</sup> See 18 U.S.C. §§ 3141–56 (2012).

lower courts have recognized health and safety claims relating to pretrial detention in contexts outside of the Excessive Bail Clause,<sup>116</sup> the Supreme Court has provided little guidance as to what conditions of release or detention might violate the Excessive Bail Clause of the Eighth Amendment by creating too great a health or safety risk to a pretrial detainee.<sup>117</sup>

The Court has, however, provided guidance regarding the health and safety risks to detainees in other contexts. For instance, the Court has employed the Cruel and Unusual Punishment Clause of the Eighth Amendment to prohibit “barbarous punishment.”<sup>118</sup> This includes prohibiting prison officials from failing to provide medical care,<sup>119</sup> behaving with deliberate indifference to the medical needs of inmates,<sup>120</sup> or knowingly exposing inmates to serious and communicable diseases.<sup>121</sup> At their core, these cases recognize that even during periods of incarceration, the detainee maintains an interest in safety from physical harm.<sup>122</sup>

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<sup>116</sup> *Miranda v. County of Lake* arguably comes closest to addressing cruelty in the context of pretrial detention. 900 F.3d 335 (7th Cir. 2018). In *Miranda*, the court recognized a claim brought by the estate of Lyvita Gomes, who was detained for failing to report for jury duty. *Id.* at 341. During her confinement, Ms. Gomes refused to eat or drink, and jail medical officials simply monitored her in her cell as she grew increasingly weaker. *Id.* By the time she was transported to the hospital, her condition was beyond treatment, and she died of dehydration. *Id.* at 341–42. The court allowed the claim to go forward under the post-conviction line of cases despite the fact that Ms. Gomes was a pretrial detainee. *Id.*

<sup>117</sup> The Court has tied the analysis of “excessiveness” to the Due Process Clause, finding that bail (or more accurately the lack of bail) is neither excessive nor punitive so long as the decision to detain is reasonably related to the articulated and compelling state interest, a point reiterated by Justice Scalia in his *Kingsley v. Hendrickson* dissent. 135 S. Ct. 2466, 2477 (2015) (Scalia, J., dissenting) (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)) (explaining that “if the condition of confinement being challenged ‘is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment’”). In *Bell*, the Court also noted that if extreme overcrowding amounts to punishment, that too might violate a pretrial detainee’s liberty interests. 441 U.S. at 535.

<sup>118</sup> *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). In *Estelle*, the Court recognized an inmate’s civil rights claim after he was denied adequate medical care following an injury sustained while “performing [his] prison work assignment.” *Id.* at 98. In drawing this analogy, I recognize that the Court has indicated that bail is not meant to be a punishment. *United States v. Salerno*, 481 U.S. 739, 755 (1987) (holding that pretrial detention does not violate the Fifth or Eighth Amendments); *Bell*, 441 U.S. at 535 (holding that pretrial detention may not be punitive).

<sup>119</sup> *Estelle*, 429 U.S. at 102.

<sup>120</sup> *Id.* at 104.

<sup>121</sup> *Helling v. McKinney*, 509 U.S. 25, 33 (1993). In *Helling*, the Court recognized McKinney’s claim that the prison’s failure to protect him from environmental tobacco smoke violated the Eighth Amendment’s prohibition on cruel and unusual punishment by posing an unreasonable risk to his health. *Id.* at 35.

<sup>122</sup> *See Hope v. Pelzer*, 536 U.S. 730, 737–38 (2002). In *Hope*, the Court held that handcuffing Hope to a hitching post for prolonged periods of time constituted cruel and unusual punishment not only because it failed to promote any penological purpose, but because it demonstrated that the prison officials acted with “‘deliberate indifference’ to the inmates’ health or safety.” *Id.* (quoting *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)).

While this may not obligate the state to provide optimal medical care, the state may not ignore the medical needs of detainees, particularly critical medical protection.<sup>123</sup> In *Brown v. Plata*, the Court explained that a prisoner “may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”<sup>124</sup> The current crisis brings the Court’s reasoning directly into play. For detainees who are not outwardly sick, adequate medical care means having the ability to abide by social distancing and isolation guidelines, having the ability to wash their hands frequently and carefully, and having access to medical professionals to assess the severity of potential symptoms.<sup>125</sup> It also means access to protective face masks, as the CDC has recommended all people wear face masks when social distancing guidelines cannot be met.<sup>126</sup> For those who are experiencing severe symptoms, it means access to adequate medical professionals, hospitals, and perhaps even ventilators.<sup>127</sup> Thus, while punishment may infringe on a detainee’s personal liberty, the infringement must not include exposure to contagions or denial of medical care.<sup>128</sup> While *Brown v. Plata* involves punishment as opposed to pretrial detention, it would seem odd that a detainee should have more rights after conviction than before. Rather it seems clear that a pretrial detainee, like post-conviction detainees, has a liberty interest in physical safety during periods of pretrial detention.<sup>129</sup>

Certainly, detainees held as flight risks as opposed to those considered unsafe should be eligible for release, as concern that a defendant will not return to a future court date cannot and should not outweigh the detainee’s

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<sup>123</sup> *See id.*

<sup>124</sup> 563 U.S. 493, 510–11 (2011).

<sup>125</sup> CTRS. FOR DISEASE CONTROL, PREVENT THE SPREAD OF COVID-19 IF YOU ARE SICK (2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/sick-with-2019-nCoV-fact-sheet.pdf> [<https://perma.cc/HKW9-T2GY>].

<sup>126</sup> *Recommendation Regarding the Use of Cloth Face Covers*, CTRS. FOR DISEASE CONTROL (Apr. 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html> [<https://perma.cc/RFK3-EQ4L>].

<sup>127</sup> *Coronavirus: What Are Ventilators and Why Are They Important?*, BBC (Apr. 16, 2020), <https://www.bbc.com/news/health-52036948> [<https://perma.cc/J5ME-MXJ5>].

<sup>128</sup> The key point is that if we recognize these rights post-conviction, surely they also hold for individuals who have not yet been convicted.

<sup>129</sup> Pretrial detainees’ Eighth Amendment protections are, perhaps, less expansive than one might expect, but their liberty interest is greater. The Court’s decision in *Salerno* confirms this, holding that there is a higher standard for detention when depriving pretrial detainees of liberty (by, say, moving them to solitary confinement or taking away privileges) than there is when depriving prisoners of the same liberty. *See United States v. Salerno*, 481 U.S. 739, 755 (1987).

liberty interest in remaining alive and healthy.<sup>130</sup> This argument seems particularly salient in light of overwhelming infection rates present in jail facilities.<sup>131</sup> In many jails, infection rates remain obscure due to lack of testing.<sup>132</sup> Still, new cases in jails appear daily.<sup>133</sup> As the Court has noted in the context of the Eighth Amendment’s prohibition against cruel and unusual punishment, detention facilities must accommodate the basic human need of reasonable safety.<sup>134</sup> For many detained in jails across the country, such a reasonable guarantee of safety is impossible during this pandemic.

To be sure, questions about pretrial release in the face of COVID-19 raise broader logistical questions. Not all pretrial detainees are the same—some pose different levels of risk in terms of safety or flight, and some have few resources that might ensure their own safety upon release. These differences, however, can be addressed in terms of the release decisions themselves and conditions of release. Some jurisdictions have limited release to those accused of nonviolent offenses or have placed conditions on release, including home monitoring, curfew requirements, or maintaining residence in a particular jurisdiction.<sup>135</sup>

Discussion of release in the time of COVID-19 also highlights a more fundamental issue—the lack of support services for marginalized individuals regardless of a health care epidemic. As courts purport to base release decisions on factors such as a detainee’s ability to return to employment,

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<sup>130</sup> See, e.g., *United States v. Adams*, No. 6:19-mj-00087-MK, 2019 WL 3037042, at \*1, \*3 (D. Or. July 10, 2019) (holding that a defendant charged with violation of the Mann Act and possession of child pornography who suffered from diabetes, heart conditions, and open sores should be released on home detention because of his medical conditions); *United States v. Scarpa*, 815 F. Supp. 88, 90 (E.D.N.Y. 1993) (holding that a defendant with AIDS who was charged with murder should be released on bail given the “unacceptably high risk of infection and death on a daily basis inside the MCC”).

<sup>131</sup> See Bryant, *supra* note 15; Crepeau & Meisner, *supra* note 15 (describing infection rates at Riker’s Island and Cook County jails). These infection rates are consistent with those in prisons. See Volpenhein, *supra* note 21 (reporting infection rates as high as 80% at the Marion Correctional Institute in Ohio).

<sup>132</sup> See, e.g., Eddie Burkhalter, *Less Than 1 Percent of Alabama Inmates Have Been Tested for COVID-19*, ALA. POL. REP. (May 29, 2020), <https://www.alreporter.com/2020/05/29/less-than-1-percent-of-alabama-inmates-have-been-tested-for-cov> [<https://perma.cc/ES49-3GNF>]; Elise Schmelzer, *22 Inmates at Denver’s Two Jails Under Observation After Showing Coronavirus Symptoms, None Have Been Tested*, DENVER POST (Mar. 20, 2020, 6:30 PM), <https://www.denverpost.com/2020/03/20/denver-jail-coronavirus-observation/> [<https://perma.cc/RBH4-HHPZ>].

<sup>133</sup> See, e.g., *COVID-19 Infection Tracking in NYC Jails*, LEGAL AID SOC’Y (Apr. 13, 2020), <https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/> [<https://perma.cc/3ET4-PCWV>].

<sup>134</sup> See *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

<sup>135</sup> See, e.g., Keith L. Alexander, Dan Morse & Spencer S. Hsu, *As Inmates in D.C., Maryland and Virginia Test Positive for the Coronavirus, Jail Officials Scramble to Reduce the Risk*, WASH. POST (Apr. 1, 2020, 7:13 PM), [https://www.washingtonpost.com/local/public-safety/as-inmates-in-dc-maryland-and-virginia-test-positive-for-the-coronavirus-jail-officials-scramble-to-reduce-the-risk/2020/04/01/b0d9cfd8-7363-11ea-85cb-8670579b863d\\_story.html](https://www.washingtonpost.com/local/public-safety/as-inmates-in-dc-maryland-and-virginia-test-positive-for-the-coronavirus-jail-officials-scramble-to-reduce-the-risk/2020/04/01/b0d9cfd8-7363-11ea-85cb-8670579b863d_story.html) [<https://perma.cc/EFU2-JPTU>].

education, or even a stable home, the lack of jobs, exclusion from school upon arrest, inequities in education opportunities, widespread housing and food insecurity, lack of mental health facilities, and lack of addiction treatment facilities in marginal communities become a pathway to the criminal justice system, a basis to detain, and an impediment to release. This is clear in a time of crisis, but it is equally clear that one cannot have a conversation about meaningful pretrial detention reform (or criminal justice reform), without addressing the reality that we use our jails and prisons to house the very people that we fail to support in other contexts.

### *C. Considering Safety and Communities in Crisis*

When weighing the interest of the defendant in pretrial release against the state's interests in safety, pretrial actors consider the defendant's interests as *distinct* from the community's interests protected by the state. Yet, the recognition of a detainee's interest in safety squarely raises questions about how "community safety" is calculated, both in terms of which communities count for this calculation and, more fundamentally, why a defendant's interests are separated from the community's in pretrial decision-making. These are linked inquiries and they are inquiries made simultaneously more visible and more complex in the context of COVID-19.

The current health crisis confirms, in ways previously obscured or ignored, that a defendant's community is shifting and multifaceted. A defendant may call a particular community his home, but during periods of detention the community he shares contact with includes jail staff. Fully contemplating community safety in this time of crisis, therefore, requires consideration of the risk pretrial detention may pose to those people a detainee comes into contact with as a product of his detention. Put another way, a COVID-19 outbreak in a jail affects not only those detained, but jail staff and their families.<sup>136</sup> The calculation of community safety during this public health crisis must therefore shift to consider more effects on communities than simply a defendant's predicted risk of future dangerousness.

Beyond this, the current crisis highlights the false dichotomy promoted by the pretrial detention system between the defendant's liberty interests and

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<sup>136</sup> Infection among jail staff makes this plain. See, e.g., Bernadette Hogan, *NY State Prison Guards Beg Cuomo to Protect Workers from Coronavirus*, N.Y. POST (Mar. 30, 2020, 4:53 PM), <https://nypost.com/2020/03/30/ny-state-prison-guards-beg-cuomo-to-protect-workers-from-coronavirus/> [<https://perma.cc/8L2Y-A7DE>] (noting that fifty-six New York correctional officers tested positive for the virus); Deanna Paul & Ben Chapman, *Rikers Island Jail Guards Are Dying in One of the Worst Coronavirus Outbreaks*, WALL ST. J. (Apr. 22, 2020, 8:19 AM), <https://www.wsj.com/articles/rikers-island-jail-guards-are-dying-in-one-of-the-worst-coronavirus-outbreaks-11587547801> [<https://perma.cc/EY6B-673H>].

the community's safety interests. Prosecutors and courts tend to focus on the community interest in the defendant's detention, rather than the threat a defendant may face if detained or the community interest in keeping the defendant out of custody.<sup>137</sup> Yet, the Court's decisions with regard to punishment suggest at least a shared constitutional concern over the detainee's safety while in custody and the community's interest.<sup>138</sup> Even if one does not believe the community has an interest in a detainee's safety during ordinary times, it certainly does now, given the threat of COVID-19. For inmates, the threat of infection while detained during this time of crisis is high.<sup>139</sup> For the community, there is an imperative to reduce the rate of infection among all populations.<sup>140</sup> In order to accomplish this goal of reduced infection rates, the community has an interest in maintaining the health and safety of vulnerable populations—including those made vulnerable by lack of medical care or ability to comply with safety precautions as a result of pretrial confinement. In this way, the interest in the safety of the inmate and the community align.

This alignment is even more apparent when we consider that detainees are released daily regardless of what pretrial decisionmakers do. The majority of jailed detainees don't have life sentences.<sup>141</sup> They serve a term of imprisonment (often as pretrial detainees) and are released (assuming they survive). Others are acquitted or have their charges dropped.<sup>142</sup> Some are detained for short periods before their bail hearings and then released. While a full discussion of the reality of this cycle of reentry is beyond the scope of this Essay, the fact that it exists further underscores the need for sensible pretrial decision-making during this time of crisis. As jail populations move in and out of facilities and back to their communities, they carry with them contagions from their places of incarceration. The failure to enact sensible policies that preserve inmate safety create avoidable community risk regardless of the point of release.

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<sup>137</sup> See Gouldin, *supra* note 32, at 891–92.

<sup>138</sup> See *supra* notes 117–18.

<sup>139</sup> This claim is true for all defendants, but particularly those who fall into high-risk categories: the elderly, immunocompromised, and pregnant.

<sup>140</sup> See Roberts, *supra* note 8 (explaining that reducing the number of COVID-19 cases overall is essential so that hospitals and other necessary responders are not overwhelmed).

<sup>141</sup> THE SENTENCING PROJECT, THE FACTS OF LIFE SENTENCES (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/12/Facts-of-Life.pdf> [<https://perma.cc/K7TU-6VJJ>].

<sup>142</sup> Richard M. Aborn & Ashley D. Cannon, *Prisons: In Jail, but not Sentenced*, AM. Q. (Jan. 16, 2013), <https://www.americaquarterly.org/fulltextarticle/prisons-in-jail-but-not-sentenced/#:~:text=In%20the%20U.S.%2C%20which%20has,case%20dismissed%20or%20were%20acquitted> [<https://perma.cc/DR8C-PYB6>].



Moreover, when considering public safety concerns pretrial decision-makers tend to speak in terms of the public as one body and the defendant as another—as if a defendant lives in complete isolation without a community or family of his own.<sup>143</sup> The “community” requires protection from the defendant—his past criminal record, or his lack of resources or a home, counseling toward some lurking future danger from which the court must insulate the community.<sup>144</sup> This calculation, however, makes assumptions about the community that often fail to take into account the community’s own perceptions of the risk the defendant poses or the hardship that the loss of the defendant may produce in the lives of those around him.<sup>145</sup> In fact, the community interest in safety is often not separate from the defendant’s, but entwined with it. This is not to say that in every case the community is better off when a defendant is released, or that every member of the community may benefit or suffer in the same ways when a defendant is detained, but it is to say that separating a defendant’s and a community’s interest may fail to properly appreciate the complex dynamics of “community safety.”

The COVID-19 crisis heightens the potential harm of detention and highlights the importance of calculating community safety in terms that take the defendant into account—not only as a matter of the defendant’s safety but as a matter of the community’s. The current public health crisis raises the hard question of whether detaining a defendant for any period creates so significant a communal risk that community safety counsels toward release in all but extreme cases. This risk presents itself in multiple scenarios: A detained defendant may never come home, and their community may suffer the long-term effects of their permanent absence. Or, if left to linger in a highly susceptible jail facility, the detainee may bring the contagion back to the community, creating a new infection source. Or, an outbreak in a jail might send sick and dying detainees to already overtaxed hospitals, creating further resource scarcity in an already overburdened system.<sup>146</sup> In any of these scenarios, pretrial release becomes a means of preserving not just the defendant’s health and safety but the community’s. Likewise, fiscal concerns may counsel toward release as a means to reduce overcrowding not only in jails, but in medical facilities.

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<sup>143</sup> See Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 251–52, 255 (2019) (describing this phenomenon in the context of prosecution).

<sup>144</sup> See Gouldin, *supra* note 32, at 850; Mayson, *supra* note 33 at 2221, 2281; Mayson *supra* note 68, at 495 n.18, 523–24, 568.

<sup>145</sup> See Carroll, *supra* note 54, at 11.

<sup>146</sup> See, e.g., Connor Sheets, *Alabama Prison System’s COVID-19 Plan Anticipates Widespread Infection, Deaths, National Guard Intervention*, AL.COM (Apr. 5, 2020), <https://www.al.com/news/2020/04/alabama-prison-systems-covid-19-plan-anticipates-widespread-infection-deaths-national-guard-intervention.html> [<https://perma.cc/EG7Q-2GEX>].

For pretrial decision-makers, these public safety concerns coupled with the financial implications of closed courts, prisons declining transfers from local jails, infection risk for inmates and jail staff, and rising costs of medical care all counsel towards a reconsideration of the risks a defendant's release poses.

Despite these claims, one response might be for courts to decline to release any defendant once detained as a way to stop the virus from spreading to the community. Indeed, this argument has been floated by state prosecutors and police as an appropriate response to COVID-19, and by DOJ as a necessary component of the current state of emergency.<sup>147</sup> On April 1, 2020, BOP locked inmates in their cells for two weeks in hopes of halting or slowing the spread of COVID-19 in an already compromised system.<sup>148</sup> Some local actors have followed suit, declining to release pretrial detainees citing public safety concerns.<sup>149</sup>

Such a plan follows a particular logic: if you fear that the virus will spread rapidly in jails and may be undetectable in some of those infected,<sup>150</sup> detaining all persons indefinitely will effectively insulate the remaining population from any risk of infection. This logic, however, ignores the Court's own doctrine on pretrial release—a doctrine that presumes freedom as a default and detention as a last resort.<sup>151</sup> It runs contrary to fundamental constitutional principles that the accused do not forfeit all rights in the face of arrest, detention, or even a pandemic and the fear it generates.

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<sup>147</sup> See Betsy Woodruff Swan, *DOJ Seeks New Emergency Powers Amid Coronavirus Pandemic*, POLITICO (Mar. 21, 2020, 1:01 PM), <https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023> [<https://perma.cc/RYA2-WSAX>]. Congress has pushed back on this request but will likely grant some additional powers. Riley Beggin, *DOJ Asks Congress for Broad New Powers amid COVID-19. Schumer Says, "Hell No."*, VOX (Mar. 22, 2020, 2:00 PM), <https://www.vox.com/policy-and-politics/2020/3/22/21189937/coronavirus-department-justice-doj-powers> [<https://perma.cc/KTB4-4Y4T>].

<sup>148</sup> Anastasia Tsioulcas, *Prisoners Across U.S. Will Be Confined for 14 Days to Cut Coronavirus Spread*, NPR (Mar. 31, 2020, 8:25 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/31/824917318/prisoners-across-country-will-be-confined-for-14-days-to-cut-coronavirus-spread> [<https://perma.cc/QB6T-BBSR>].

<sup>149</sup> See, e.g., Alice Speri & Akela Lacy, *Louisiana's Coronavirus Plan for Prisons Could Create Death Camps*, INTERCEPT (Apr. 7, 2020, 2:49 PM), <https://theintercept.com/2020/04/07/louisiana-coronavirus-prisons/> [<https://perma.cc/S7EK-BPGE>].

<sup>150</sup> See Jing Cai et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 CTRS. FOR DISEASE CONTROL & PREVENTION: EMERGING INFECTIOUS DISEASES 1343, 1343, 1345 (2020); Melissa Healy, *How 'Silent Spreaders' Are Fueling the Coronavirus Pandemic*, L.A. TIMES (Mar. 17, 2020, 4:00 AM), <https://www.latimes.com/science/story/2020-03-17/how-silent-spreaders-are-fueling-the-coronavirus-pandemic> [<https://perma.cc/2A6M-LH2H>] (both noting asymptomatic carriers pose a high risk for transmission given that COVID-19 carries a long phase of "silent" viral shedding before symptoms actually develop).

<sup>151</sup> See *supra* note 75 and accompanying text.

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

It is also a logic that will tax already strained medical facilities. As Governor Andrew Cuomo laments the lack of hospital beds and ventilators in the state,<sup>152</sup> and inmates at Rikers Island are offered \$6 an hour to dig graves,<sup>153</sup> the impact of mass infection in jails and prisons is starkly apparent. As of July 23, 2020, the Marshall Project reported 70,717 cases and 681 deaths in prisons.<sup>154</sup> In a closed environment with no opportunity for effective social distancing, infection and mortality rates will continue to rise. For medical facilities this translates to the introduction of even more patients into a system that is already overburdened.<sup>155</sup>

A system that defaults to detention to house, feed, and treat the marginal—whether through indefinite and lawless detention in this time of crisis or finite detention beyond—is destined to create a carceral cycle that, in the end, fails us all. A continued system that imagines an all-or-nothing proposition in which the most vulnerable among us must either be detained pretrial or be released without support, and in which the interest of our community is diametrically opposed to that of the accused, is likewise unsustainable and cruel. Instead, in the face of this crisis and beyond we should recognize what is surely and fundamentally true: a defendant is part of the very community pretrial decisionmakers seek to preserve and protect. The borders of that community may shift and change, but what does not

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<sup>152</sup> Alexandra Villarreal, *New York: Makeshift Hospitals Set Up as Cuomo Warns 'Tsunami is Coming,'* GUARDIAN (Mar. 30, 2020, 4:35 PM), <https://www.theguardian.com/us-news/2020/mar/30/new-york-coronavirus-andrew-cuomo-makeshift-hospitals> [https://perma.cc/YT34-BDLM].

<sup>153</sup> Ryan Grim, *Rikers Island Prisoners Are Being Offered PPE and \$6 an Hour to Dig Mass Graves,* INTERCEPT (Mar. 31, 2020, 11:54 AM), <https://theintercept.com/2020/03/31/rikers-island-coronavirus-mass-graves/> [https://perma.cc/4JTZ-3DAD].

<sup>154</sup> *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> [https://perma.cc/J2S8-RURB] (updated regularly).

<sup>155</sup> See, e.g., Chuck Goudie et al., *Illinois Prisoners Sick with COVID-19 "Overwhelm" Joliet Hospital,* ABC EYEWITNESS NEWS (Mar. 30, 2020), <https://abc7chicago.com/coronavirus-illinois-chicago-cases/6064085/> [https://perma.cc/MCW9-SJBQ].

change is the reality that a defendant's detention will create a void in that community that may well value his presence and his life.

#### CONCLUSION

This Essay began as a warning. In the face of a burgeoning health crisis, it sought to chart a path forward in which pretrial detainees might be released rather than remain in custody while the infection spreads throughout the nation's jails. In the weeks of its writing, this Essay has borne witness—like so many others—to the awful collision between the criminal justice system and COVID-19. In New York, one of the epicenters of the crisis, officials moved to release many inmates, including pretrial detainees.<sup>156</sup> And yet, among those remaining, COVID-19 infection rates are nine times the rate of the free population.<sup>157</sup> As confirmed cases and deaths mount, the prediction of the susceptibility of incarcerated populations has proven horrifically accurate.

Of course, the current COVID-19 crisis did not break the pretrial detention system. The system has long suffered all the cracks and deterioration of a system built on inequity and injustice. The crisis, however, highlights the failings of the system in new ways. The overcrowding in jails that makes the spread of COVID-19 so likely highlights how many are held in jails not because they present a true risk but because they are poor, targeted by discriminatory laws and policing practices, unable to make bail, pay for a condition of release, or simply have nowhere else to go.<sup>158</sup>

Pretrial detention is not the only aspect of the criminal justice system affected by COVID-19. As the crisis has heightened, procedural safeguards within the system have collapsed. Court closures have delayed trials, suspended jury rights, and delayed appellate processes.<sup>159</sup> Closed jails have excluded not only in-person visitation of family members but also access to

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<sup>156</sup> See, e.g., Zusha Elinson & Deanna Paul, *Jails Release Prisoners, Fearing Coronavirus Outbreak*, WALL ST. J. (Mar. 22, 2020, 10:00 AM), <https://www.wsj.com/articles/jails-release-prisoners-fearing-coronavirus-outbreak-11584885600> [<https://perma.cc/UL5N-6ZQA>].

<sup>157</sup> Jonathan Stempel, *Rikers Island Jail Officers Union Sues New York City over Coronavirus*, REUTERS (Apr. 2, 2020, 7:18 PM), <https://www.reuters.com/article/us-health-coronavirus-new-york-rikersis/rikers-island-jail-officers-union-sues-new-york-city-over-coronavirus-idUSKBN21K3KR> [<https://perma.cc/SX3S-BCQF>] (explaining that The Legal Aid Society found that “the 5.1% infection rate [in Rikers Island] was nine times higher than in all of New York City, 11 times higher than in Italy’s Lombardy region, and 44 times higher than in China’s Hubei province, all major areas for the coronavirus outbreak”).

<sup>158</sup> See Carroll, *supra* note 54, at 26–27; Mayson, *supra* note 68, at 1652–53.

<sup>159</sup> See, e.g., Sarah Jarvis, *Coronavirus: The Latest Court Closures and Restrictions*, LAW360 (Mar. 12, 2020, 11:19 PM), <https://www.law360.com/articles/1252836/coronavirus-the-latest-court-closures-and-restrictions> [<https://perma.cc/WZ5M-G9EG>] (updated regularly).

in-person meetings with counsel.<sup>160</sup> Sentenced defendants are facing risks not contemplated at the time of sentencing, raising Eighth Amendment concerns. Finally, court decisions to sentence even in the face of the epidemic subject defendants to unnecessary and unwarranted risks in the name of business as usual during a time that is anything but usual.

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

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<sup>160</sup> See, e.g., Kimberly Kindy, Mark Berman & Julie Tate, *Jails and Prisons Suspend Visitation to Keep Coronavirus from Spreading*, WASH. POST (Mar. 17, 2020, 6:00 AM), [https://www.washingtonpost.com/national/jails-and-prisons-suspend-visitation-to-keep-coronavirus-from-spreading/2020/03/16/0cae4adc-6789-11ea-abef-020f086a3fab\\_story.html](https://www.washingtonpost.com/national/jails-and-prisons-suspend-visitation-to-keep-coronavirus-from-spreading/2020/03/16/0cae4adc-6789-11ea-abef-020f086a3fab_story.html) [<https://perma.cc/35NR-W3NM>].