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Federal Detention and “Wild Facts” During the COVID-19 Pandemic

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FEDERAL DETENTION AND “WILD FACTS” DURING THE COVID-19 PANDEMIC

GABRIEL A. FUENTES*

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INTRODUCTION

Whether to detain or release a defendant in a federal criminal case can be among the most challenging decisions federal judges face. Detention hearings present courts with a wide variety of factual circumstances

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surrounding defendants and their personal histories, their charged offenses, the evidence against them, the ways in which their detention or release might bear upon the community's safety, and the likelihood that they will appear in court. At least that much is the black letter law.¹ But as the novel coronavirus known as SARS-CoV-2 raced through the United States in the winter and spring of 2020, touching off widespread infections of the disease labeled COVID-19, a new challenge arose with respect to federal arrestees and defendants already in detention. Citing the threat of COVID-19 infection, many defense attorneys began aggressively pushing for release of their clients. Certainly, they argued, the situation had changed: detaining new defendants in jail environments could put both defendants and jail staff at greater risk of infection, and potentially trigger a mass outbreak that could affect not only individual jails but the communities and health-care systems around them. In the first weeks of the pandemic, early decisions indicate that judges are responding to the challenge in different ways. This Article offers a framework for considering defendants' arguments for release based on the COVID-19 pandemic. It suggests that the shifting landscape of facts and scientific knowledge about this disease, as well as governmental responses to it, challenge practitioners and courts to grapple with an additional layer of complexity in applying the Bail Reform Act and the Constitution to federal detention decisions. It is now crucial for courts to push past the parties' representations and into the facts and science behind them. The challenge is to try to rely on our experience to search for the line between the known and unknown about the risk this new virus poses in jail environments, by venturing past the open grasslands in a hunt for the less visible "wild facts" lurking in the forest. The lore of "wild facts," an abstract concept first articulated in the early twentieth century by philosopher William James, tells us that "wild facts" are "subtle, unexpected particulars" that lie not in law but in human experience, and that militate against the mechanical and impersonal application of a society's laws.² Now that COVID-19 has injected a new level of complexity into federal detention decisions, this Article uses the "wild facts" concept as an inspiration for meeting the new challenge of complexity in federal detention. Using Richard Posner's modern take on "realism" versus "formalism" as a guide to defining today's "wild facts," this Article proposes an intellectually inquisitive approach, which bases decisions on science and facts, including facts that may require effort to unearth, as they may be, if not transformative, at least significant enough to affect

¹ See generally 18 U.S.C. § 3142 (2018).

² Edmond Cahn, *Jerome Frank's Fact-Skepticism and Our Future*, 66 *YALE L.J.* 824, 827 (1957).

decisions materially.³ Tested against judges’ experience, this brand of “wild facts” might lead to decisions that withstand the daily onslaught of new information about the virus, because these facts are tethered to the reality, to the extent it can be known, of COVID-19’s impact on prisoners, jail populations, and surrounding communities.

I. VIRUSES AND THE COVID-19 PANDEMIC

Before discussing how judges may respond to bail arguments based on the novel coronavirus, we should have a basic understanding of how viruses, and the virus that causes COVID-19 in particular, work. Viruses are all around us. They are part of an unseen world that teems with microbes so tiny that researchers barely knew about them before the first half of the 20th Century.⁴

[I]magine that you have powerful glasses allowing you to perceive any and all microbes. If you were to put on such magical bug-vision specs, you would instantly see a whole new, and very active, world. The floor would seethe, the walls would throb, and everything would swarm with formerly invisible life. Tiny bugs would blanket every surface—your coffee cup, the pages of the book on your lap, your actual lap. The larger bacteria would themselves teem with still smaller bugs. This alien army is everywhere, and some of its most powerful soldiers are its smallest. These smallest of bugs have integrated themselves, quite literally, into every stitch of the fabric of earthly life They are viruses.⁵

These tiny viruses attach themselves to cells, including those of humans. They invade those cells and “hijack[] the cellular processes to produce virally encoded protein that will replicate the virus’s genetic material.”⁶ To complete their life cycle, viruses spread to infect the cells of new hosts.⁷ As viruses move from host to host, their genetic makeup mutates with remarkable frequency, thus increasing the odds of evading their hosts’ immune systems and anti-viral drugs.⁸ Meanwhile, their genetic makeup may reassort or recombine, creating entirely new viruses and thus “a rapid and radical way” for viruses “to create novelty.”⁹ The word “novel,” when used to describe coronaviruses and humans’ vulnerability to them, means that

³ RICHARD A. POSNER, REFLECTIONS ON JUDGING 5–6, 92 (2013).

⁴ NATHAN WOLFE, THE VIRAL STORM 19–21 (2011).

⁵ *Id.* at 21–22.

⁶ Fredric S. Cohen, *How Viruses Invade Cells*, 110 BIOPHYSICAL J. 1028, 1028 (2016)

⁷ WOLFE, *supra* note 4, at 26–28.

⁸ *Id.*

⁹ *Id.* at 35; *Evolution of Viruses*, KHAN ACAD. (2020), <https://www.khanacademy.org/science/biology/biology-of-viruses/virus-biology/a/evolution-of-viruses> [<https://perma.cc/UJM2-3TJV>].

the virus is new to humans, whose immune systems do not immediately recognize it as an invader.¹⁰

SARS-CoV-2, the novel coronavirus that causes COVID-19, is thought to spread between people primarily “through respiratory droplets produced when an infected person coughs, sneezes, or talks.”¹¹ These droplets can then enter nearby people through contact with their mouths or nose; if the droplets are not inhaled, they can land on nearby surfaces.¹² When new persons touch those surfaces and then touch their own mouths, noses, or eyes, the virus continues to spread.¹³ SARS-CoV-2 has been found to be detectable in aerosols for up to three hours, on copper for up to four hours, on cardboard for up to 24 hours, and on plastic and stainless steel surfaces for up to two to three days.¹⁴

The capacity of a virus to spread from one person to another is measured by its “basic reproductive number,” or R_0 , which is calculated by the number of new victims per prior victim.¹⁵ The R_0 for SARS-CoV-2 has been

¹⁰ Katie Kerwin McCrimmon, *Viruses 101: Why the new coronavirus is so contagious and how we can fight it*, UCHEALTH TODAY (Mar. 17, 2020), <https://www.uchealth.org/today/viruses-101-why-the-new-coronavirus-is-so-contagious-how-to-fight-it/> [<https://perma.cc/XR42-Q8RP>]

¹¹ *How COVID-19 Spreads*, CENTERS FOR DISEASE CONTROL AND PREVENTION: CORONAVIRUS DISEASE 2019 (COVID-19) (last reviewed Apr. 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> [<https://perma.cc/6BL4-FG76>].

¹² The Centers for Disease Control has said that close contact, or a distance of less than about six feet, produces a risk of transmission of the virus. *Id.* But experts also have said that although six feet is a “sensible and useful minimum distance,” the farther away the better, because aerosolized respiratory droplets may carry more than six feet in some environments, and some persons may be more vulnerable to infection from such aerosols. Knuvl Sheikh et al., *Stay 6 Feet Apart, We’re Told. But How Far Can Air Carry Coronavirus?*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/health/coronavirus-six-feet.html> [<https://perma.cc/649M-3KDF>].

¹³ See *supra* note 11.

¹⁴ *New coronavirus stable for hours on surfaces*, NAT’L INSTITUTES OF HEALTH (Mar. 17, 2020) (citing Neeltje van Doremalen et al., *Aerosol and Surface Stability of SARS-CoV-2 compared to SARS-CoV-1*, 382 NEW ENG. J. OF MED. 1564 (2020)), <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> [<https://perma.cc/QAX6-9Z99>]. But see Euan Tovey, *Can You Get the Coronavirus from Receiving Parcels or Having Your Smartphone Out?*, SCI. ALERT, <https://www.sciencealert.com/can-you-get-the-coronavirus-from-receiving-parcels-or-having-your-smartphone-out> [<https://perma.cc/5QL3-S9HG>] (stating that viral stability estimates in van Doremalen et al., *supra*, “might be underestimates” and that the “virus may survive even longer on these surfaces, depending on conditions,” because “these studies looked at how long the virus would survive when in a ‘buffer’ (a solution in which viruses live in the lab) [instead of] [i]n real life, [where] they would be in mucous and would be more stable.”)

¹⁵ WOLFE, *supra* note 4, at 30. The expression is pronounced “r (naught).”

described as between 1.5 and 3.5, meaning that each infected person can be expected to infect roughly two or three people.¹⁶ If the R_0 for an outbreak drops to below one, the virus will be unable to sustain itself and will die out.¹⁷ The virus’s ability to induce symptoms (like coughing or sneezing) in its hosts—so that it may spread to new hosts—is one way it persists.¹⁸

Not all viruses are deadly, but SARS-CoV-2 is. As of early May 2020, COVID-19 had killed more than 80,000 persons in the United States as infections exceeded 1.3 million.¹⁹ The World Health Organization has labeled the global COVID-19 outbreak a “pandemic,” a word used by health experts to describe a new infectious agent that has spread to all continents except Antarctica.²⁰ The SARS-CoV-2 virus can kill by attacking the lungs, triggering an immune-system response that can give rise to a condition known as Acute Respiratory Distress Syndrome, in which cells in the lungs leak fluid, become inflamed, and smother the lungs’ ability to pass vital oxygen into the bloodstream.²¹ Researchers continue to learn more about the virus and its effects, which reportedly also can include potentially fatal strokes.²² As the state of our collective knowledge about SARS-CoV-2 continues to evolve, even at this writing, the unprecedented nature of this pandemic has affected virtually all facets of American life, including the legal system.

¹⁶ Joseph Eisenberg, *How Scientists Quantify the Intensity of an Outbreak Like COVID-19*, U. OF MICH. HEALTH LAB (Mar. 17, 2020), <https://labblog.uofmhealth.org/rounds/how-scientists-quantify-intensity-of-an-outbreak-like-covid-19> [<https://perma.cc/CZ2T-KFG9>]. The R_0 for the highly infectious measles disease is in the range of 12 to 18. *Id.*

¹⁷ WOLFE, *supra* note 4, at 30.

¹⁸ *Id.*

¹⁹ *COVID-19 Dashboard*, JOHNS HOPKINS U. AND MED. (last updated May 11, 2020), <https://coronavirus.jhu.edu/map.html> [<https://perma.cc/KQ48-WVQS>].

²⁰ Bill Chappell, *Coronavirus: COVID-19 Is Now Officially A Pandemic, WHO Says*, NPR (Mar. 11, 2020), <https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/coronavirus-covid-19-is-now-officially-a-pandemic-who-says> [<https://perma.cc/VBN6-TQYT>]; WOLFE, *supra* note 4, at 99.

²¹ David Heinzmann, *When COVID-19 Attacks the Lungs, Ventilators Can Be a Patient’s Only Chance of Survival*, CHI. TRIB. (Apr. 5, 2020), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-ventilators-20200403-f5tmrqpmf53a6nezqlykjrvy-story.html> [<https://perma.cc/TKX2-6KRC>].

²² Robert Glatter, *Why Is COVID-19 Coronavirus Causing Strokes In Young And Middle-Aged People?*, FORBES (Apr. 27, 2020) <https://www.forbes.com/sites/robertglatter/2020/04/27/why-is-covid-19-coronavirus-causing-strokes-in-young-and-middle-aged-people/#4a0c17ec34df> [<https://perma.cc/YJB8-3CES>].

II. THE BAIL REFORM ACT, THE CONSTITUTION, AND THE COMPLEXITY OF COVID-19

The Bail Reform Act of 1984²³ governs the release of pre-trial detainees on bail. Under the Act, a judicial officer may order the release or detention of a defendant pending trial, depending on whether the government, in moving for detention at a detention hearing, has established either (1) by a preponderance of the evidence, that no condition or set of conditions of release will reasonably assure the appearance of the defendant in court as required; or (2) by clear and convincing evidence, that no condition or set of conditions of release will reasonably assure the safety of any other person and the community.²⁴ In making that determination, courts are to consider a set of statutory factors that include the nature of the offense, the defendant's history, the weight of the evidence, and the potential impact release might have on public safety in light of the "available information."²⁵ The Act also erects a rebuttable presumption of detention under certain circumstances, most commonly when the judge finds probable cause to believe the defendant committed an offense with a maximum term of incarceration of 10 years or more under the Controlled Substances Act.²⁶ The presumptions of

²³ See generally 18 U.S.C. § 3142.

²⁴ 18 U.S.C. § 3142(e)(1); *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985).

²⁵ 18 U.S.C. § 3142(g). The statute sets forth the "(g) factors" as follows:

The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of Section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

Id.

²⁶ 18 U.S.C. § 3142(e)(2)–(3). The maximum sentence is more than ten years in prison for drug offenses charged in United States courts where the drug quantities trigger statutory minimum sentences. See 21 U.S.C. § 841(b)(1)(B) (requiring minimum of five years and

dangerousness and flight risk are rebutted when defendants meet a burden of production by coming forward with at least some evidence that they will not flee or endanger the community if released.²⁷

The Bail Reform Act generally expresses a “preference for release,” in that Section 3142(e) requires the Court to consider the possibility of less restrictive alternatives to detention.²⁸ In addition, Section 3142(b) provides that judges “shall” order release “unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.”²⁹

The Act also must be applied within constitutional limits. Bail plainly may not be “excessive” under the Eighth Amendment.³⁰ But the Supreme Court has also signaled that pretrial detention, where it is punitive, may violate the Constitution. In *United States v. Salerno*, which held that detention under the Act does not violate due process, the Court cautioned that “[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”³¹ Without expressing a particular view, the Supreme Court added in *Salerno* that there could be a “point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress’ regulatory goal.”³² Punishment, therefore, is beyond what the constitution permits in pretrial detention.³³ Constitutional protections for pretrial detainees remain, no

maximum of forty years for person convicted of possessing with intent to distribute 100 grams or more of mixtures and substances containing heroin, or more than 500 grams or more of mixtures and substances containing cocaine).

²⁷ *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986). Although the defendant’s burden of production is “not a heavy one to meet,” a defendant’s meeting it does not erase the probable cause finding or the rebutted presumption, which “remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to factors listed in Section 3142(g).” *Id.*; *United States v. Quartermaine*, 913 F.2d 910, 917 (11th Cir. 1990); *United States v. Perez-Franco*, 839 F.2d 867, 870 (1st Cir. 1988). The burden of persuasion remains with the government once the defendant meets his burden of production to rebut the presumptions. *Dominguez*, 783 F.2d at 707.

²⁸ *United States v. Fattah*, 351 F. Supp. 3d 1133, 1136–37 (N.D. Ill. 2019) (citing *United States v. Infelise*, 934 F.2d 103, 105 (7th Cir. 1991)).

²⁹ 18 U.S.C. § 3142(b).

³⁰ U.S. CONST. amend. VIII.

³¹ 481 U.S. 739, 755 (1987).

³² *Id.* at 747 n.4.

³³ *See Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (“Due process requires that a pretrial detainee not be punished.”). The Supreme Court stated in *Bell* that “[i]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to ‘punishment.’” *Id.* at 539. Challenges to bail alleged to constitute punishment are reviewed as due process claims. *Ziglar v. Abbasi*, 137 S. Ct. 1843,

matter how difficult the task of jail administration might be during a pandemic.³⁴

Similarly, federal courts have held, in limited circumstances, that pretrial detention may constitute punishment when jail officials place detainees in situations that pose specific threats to their life or health. These decisions have commonly arisen in the context of civil rights actions alleging that conditions of pretrial detention amounted to punishment as a constitutional tort.³⁵ When distilled, these cases suggest that pretrial

1864 (2017). In *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 2473 (2015), the Supreme Court held that the standard for pre-trial detainees' Due Process claims for excessive force was objective reasonableness and did not include a subjective intent or deliberate indifference element. The circuit courts of appeal are split on whether *Kingsley* extends to pre-trial detainees' conditions of confinement claims. Compare *Hardeman v. Curran*, 933 F.3d 816, 822–23 (7th Cir. 2019) (extending *Kingsley* to conditions claims and not requiring deliberate indifference showing); *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017) (same); *Mays v. Dart*, No. 20 C 2134, 2020 WL 1987007, at *25 (N.D. Ill. Apr. 27, 2020) (following *Hardeman* to issue preliminary injunction requiring Cook County sheriff to undertake additional preventative measures to protect Cook County Jail prisoners from COVID-19) with *Swain v. Junior*, No. 20-11622-C, 2020 WL 2161317, at *4–5 (11th Cir. May 5, 2020) (holding that Eighth Amendment two-pronged standard, including deliberate indifference, applied to pre-trial detainees Due Process claim based on jail conditions amid the COVID-19 pandemic); *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 420 n.4 (5th Cir. 2017) (declining to extend *Kingsley* beyond excessive force claims by pre-trial detainees).

³⁴ The enormity of the pandemic's challenges to jail administration "does not mean, however, that constitutional protections fall by the wayside":

Government officials in our country are bound by constitutional requirements even when they are dealing with difficult and unfamiliar challenges to public health and safety. Persons accused of crimes who are detained pending trial do not shed their constitutional rights at the jailhouse door. The government has determined to lock them up pending determination of their guilt or innocence, and by doing so the government takes on an obligation to protect their health and safety. And it cannot be forgotten that by requiring this, we safeguard the health and safety of the community at large—from which the detainees have come and to which they and the officers guarding them will return.

Mays v. Dart, No. 20 C 2134, 2020 WL 1812381, at *2 (N.D. Ill. Apr. 9, 2020).

³⁵ Again, the circuits are split as to whether deliberate indifference to allegedly punitive jail conditions is a necessary hurdle for pre-trial detainees' Due Process claims. See *supra* note 33. If deliberate indifference is required for pre-trial detainees' conditions claims, Due Process challenges to detention during the COVID-19 will almost never be successful. See *Mays*, 2020 WL 1987007, at *25 (plaintiffs raising Due Process challenge to conditions at Cook County Jail amid COVID-19 pandemic would be unlikely to prevail if deliberate indifference were required for such claims). Courts that have extended *Kingsley* to pre-trial detainees' conditions claims have done so by reasoning that pre-trial detainees do not stand in the same shoes as convicted prisoners, so the standard for pre-trial detainees' Due Process claims that they are being subjected to punishment must not be the same as the more stringent standard for convicted prisoners, who may be punished but not cruelly or unusually. See *Hardeman*,

detention cannot be used to inflict harm or an unreasonable risk of harm upon detainees.

Two additional aspects of the Act bear noting. First, once a defendant is detained under Section 3142(e), Section 3142(i) provides that “[t]he judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal *or another appropriate person*, to the extent that the judicial officer determines such release to be *necessary* for the preparation of the person’s defense *or for another compelling reason*.”³⁶ The Act does not define any of Section 3142(i)’s key terms, including “appropriate person,” “necessary,” or “another compelling reason.” Second, the Act allows defendants to re-open their detention hearings so that an earlier finding of detention may be revisited before trial if new information arises “bearing on the issue [of] whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.”³⁷

Thus the Bail Reform Act instructs judges to consider whether the government has met its applicable burden on the issues of whether release conditions can be fashioned to reasonably assure (1) the defendant’s appearance or (2) the safety of the community, considering the factors under Section 3142(g) and any applicable presumption. The confluence of facts, including the release conditions proposed by the defendant, their efficacy, and the degree to which they might counterbalance facts weighing against release, can make for difficult calls.

COVID-19, however, adds a new layer of complexity. The pandemic challenges judges to decide detention motions not just through a traditional application of the Act, but with consideration of the state of quickly developing scientific findings about COVID-19 and its possible effect on jail

933 F.3d at 824. Imposing a deliberate indifference requirement in pre-trial detainees’ Due Process conditions claims allows courts to deny such claims mechanistically, by a mere showing that jail officials earnestly sought to protect them from harm, even if the resulting conditions remained objectively and unreasonably harmful. Judging the pre-trial detainees’ claims under a standard of objective reasonableness is, on the other hand, anything but mechanistic, because objective reasonableness turns on individualized facts and circumstances. *Kingsley*, 135 S. Ct at 2473 (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Whether or not extending *Kingsley* to conditions cases is the better approach, requiring a deliberate indifference showing from pre-trial detainees in these cases is the more mechanistic approach and smacks of the kind of judicial “formalism” that this article counsels against. *See infra* note 38, Part III(C).

³⁶ 18 U.S.C. § 3142(i) (emphasis added).

³⁷ 18 U.S.C. § 3142(f)(2); *see also* *United States v. Lee*, No. 19-cr-298 (KBJ), 2020 WL 1541049, at *4 (D.D.C. Mar. 30, 2020) (finding that the worldwide spread of COVID-19 as a basis for re-opening detention determination under Section 3142(f) “cannot reasonably be disputed”).

populations and beyond.³⁸ The Act itself directs judges to consider facts bearing on the consequences that detention or release might have, not only on the safety of individual detainees, but on the entire community. The Act's directive that courts consider the safety of any other person and the community leaves much room for judicial pragmatism in determining what is known and unknown about the novel coronavirus and its community spread in and from jail settings. Some courts might hold that, taken to its logical conclusion, allowing COVID-19 to serve as a basis for release opens the floodgates and is a move best left to Congress.³⁹ Others might grant a motion for release in light of COVID-19 based on a set of individualized factual determinations, such as the severity of a prisoner's underlying medical conditions, and explicitly state that the decision "should not be construed as a determination by this Court that pretrial detention is unsafe or otherwise inappropriate as a general matter or in any other specific case."⁴⁰ Still others may take stock of the public health risks said to be associated with detention and conclude that release is appropriate under the Bail Reform Act's analysis of danger (from COVID-19) to the community, without expressing a concern about how their orders might affect other cases or open any floodgates.⁴¹ These are but a few of the approaches taken so far.

Reversing a district court's dismissal of a lawsuit asserting that officials at the Brooklyn Metropolitan Detention Center had violated prisoners' Sixth

³⁸ In this respect, detention decisions amid the COVID-19 pandemic push judges from what Judge Posner called "formalism"—the idea that judges can decide matters in a more mechanistic fashion—to his brand of "realism":

The realist places emphasis on the consequences of judicial rulings, and in that regard is pragmatic but only if the realist considers systemic as well as case-specific consequences and thus avoids shortsighted justice—justice responsive only to the "equities" of the particular case—and is analytical and empirical rather than merely intuitive and political.

POSNER, *supra* note 3, at 5.

³⁹ *United States v. Villegas*, No. 19-cr-568-AB, 2020 WL 1649520, at *3 (C.D. Cal. Apr. 3, 2020). The court in *Villegas* stated:

Judges cannot responsibly—much less legally—make what would essentially be momentous public health decisions for prisons under the pretense of individual pretrial release determinations. Defendants' unbounded argument for pretrial release because of the COVID-19 pandemic, if accepted and extended to its logical conclusion, would mean the release—en masse—of all federal pretrial detainees. So it is up to Congress, not the courts, to legislate in the current crisis a comprehensive solution for the federal prison system at large.

Id.

⁴⁰ *United States v. Perez*, No. 19 CR 297 (PAE), 2020 WL 1329225, at *1 (S.D.N.Y. Mar. 19, 2020).

⁴¹ See *United States v. Davis*, No. ELH-20-09, 2020 WL 1529158, at *8–10 (D. Md. Mar. 30, 2020) (granting release on motion to re-open bail hearing under Section 3142(f), in partial reliance on letter from more than 200 public health experts about the risks of incarceration during the COVID-19 pandemic).

Amendment rights by restricting or cancelling attorney visits, the Second Circuit foreshadowed the gravity of the coming challenge posed by COVID-19:

As we write this opinion, a different and even more dramatic challenge is presented by COVID-19, a novel and easily transmitted viral disease that has prompted a rapid reorientation of workplace practices and social life in support of public health. The impact of this recent emergency on jail and prison inmates, their counsel (in the lead, the Federal Defenders), the United States Attorneys, and the BOP, including the individual Wardens and the personnel of each facility, is just beginning to be felt. Its likely course we cannot foresee. Present information strongly suggests, however, that it may be grave and enduring.⁴²

III. RISING TO THE CHALLENGE OF COMPLEXITY IN FEDERAL COVID-19 BAIL DECISIONS

Despite the new challenges presented by COVID-19, the analyses mandated under the Bail Reform Act withstand this time of pandemic. Courts must still weigh the rebuttable presumption of detention, if any, and consider the Section 3142(g) factors to decide whether a set of release conditions might reasonably assure the safety of any other person and the community. The difference is that now, COVID-19 becomes a part of that analysis.⁴³ For persons already confined under a detention order and seeking temporary release under Section 3142(i), courts must still determine whether release has become necessary to allow defendants to prepare their defenses or “for another compelling reason.” Now, courts must consider whether COVID-19 could amount to such a reason.⁴⁴ And as they did before, courts

⁴² Fed. Defenders of New York v. Fed. Bureau of Prisons, No. 19-1778, 2020 WL 1320886, at *12 (2d Cir. Mar. 20, 2020).

⁴³ See, e.g., United States v. Lee, No. 19-cr-298 (KBJ), 2020 WL 1541049, at *4 (D.D.C. Mar. 30, 2020) (finding that the pandemic did not change the nature and circumstances of the offense, the weight of the evidence, or the personal history and characteristics of a defendant who did not allege a particular medical vulnerability to COVID-19, and rejecting defendant’s argument that the potential dangerousness of his incarceration during the pandemic altered the court’s earlier detention finding based on the fourth 3142(g) factor requiring consideration of the nature and seriousness of the danger that release would pose to any person or the community); United States v. Fellela, No. 19-cr-79, 2020 WL 1457877, at *1 (D. Conn. Mar. 20, 2020) (noting that under Bail Reform Act provision applicable to convicted defendants awaiting sentencing, “[i]n any event, Fellela’s motion requires me to consider whether he has established by clear and convincing evidence that he will not flee or pose a danger to any other person or to the community”).

⁴⁴ In *Lee*, the court denied temporary release by concluding that COVID-19 was not a “compelling reason” under Section 3142(i), but the court left open the possibility of finding that it could be a “compelling reason” under different facts. 2020 WL 1541049, at *6.

must consider defendants' due process protection from punishment.⁴⁵ The question now, in light of COVID-19, is the degree to which the pandemic could or should affect the outcomes of bail decisions.

This Article does not advocate for any particular outcome under any particular set of facts. Rather, it examines how judicial decisions to date have treated relevant facts about detainees and the virus and suggests a legal realist's holistic focus on facts and science, as the pandemic places judges under tremendous pressure to protect the public's safety from the virus as well as from the risk associated with the release of certain defendants.

A. THE BASIC ARGUMENTS FOR RELEASE BASED ON COVID-19

Arguments for release based on COVID-19 can take several forms, summarized here:

Section 3142(g) Arguments:

(1) Personal risk of death or suffering based on underlying conditions:

Defendants with medical infirmities or vulnerabilities might argue that they are more likely to die or endure greater suffering in the event they contract COVID-19 while in custody. This argument might also include a claim that these defendants are more likely to

And it might well be the case that *certain* defendants—and here the Court is thinking primarily of those who have underlying medical conditions that make them especially vulnerable to the virus—could become eligible for temporary release under the “another compelling reason” prong of section 3142(i) in light of the threat that the COVID-19 pandemic poses to them in particular.

Id.

⁴⁵ See *United States v. Villegas*, No. 19-cr-568-AB, 2020 WL 1649520, at *2 (C.D. Cal. Apr. 3, 2020) (rejecting due process punishment claim, stating, “there is no evidence of such arbitrary purpose and punitive intent here. To the contrary, the Bureau of Prisons is by all objective accounts responding to the COVID-19 pandemic as any reasonable observer could expect under the circumstances to prevent infectious outbreak, protect inmate health, and preserve internal order – all legitimate governmental aims”); *United States v. Cox*, No. 19-cr-271, 2020 WL 1491180, at *6 (D. Nev. Mar. 27, 2020) (rejecting due process argument by concluding that notwithstanding a threat of COVID-19 infection in custody, “the Fifth Amendment’s Due Process Clause simply asks whether the pretrial condition is reasonably related to a legitimate government interest”). *Mays* appears to have the better of that argument, not only because it accounts for *Kingsley*, but also because unlike convicted prisoners, whose punishment cannot be cruel or unusual, pre-trial detainees cannot be punished at all. The standard for evaluating their conditions claims should be less demanding than Eighth Amendment standards. See *Hardeman v. Curran*, 933 F.3d 816, 824 (7th Cir. 2019) (referring to Eighth Amendment standard as “more demanding” than Due Process standard for pre-trial detainees’ conditions claims).

contract the disease or suffer more severe consequences from it because of their underlying conditions.⁴⁶

(2) Personal risk of harm based on living in a jail environment:

Whether or not defendants have underlying medical conditions, they might argue that their detention, in and of itself, poses an unacceptable risk of actual harm to them because they are more likely to contract COVID-19 in a jail environment, which is arguably more conducive to the spread of the virus than other environments, including a home confinement they propose in lieu of detention.⁴⁷

(3) Risk of harm to jail staff and the surrounding community

Defendants may also argue that their detention poses an unacceptable risk not just to their safety, but to the safety of jail staff who circulate in and out of the facilities and to the safety of other community members. Members of the public might be exposed to jail staff or might suffer the consequences of local medical care systems becoming stressed or overwhelmed by infected prisoners or those infected by them.⁴⁸

Section 3142(i) arguments:

(1) Risk posed by the virus constitutes a “compelling reason”

For any or all of the above reasons, defendants who previously were detained might argue that they should be permitted to re-open their bail hearings or be granted “temporary” release into the custody of an appropriate person under Section 3142(i) because the risks associated with the virus add up to a “compelling reason.”

⁴⁶ See *United States v. Michaels*, No. SACR 16-76-JVS, 2020 WL 1482553, at *1 (C.D. Cal. Mar. 26, 2020) (granting temporary release to defendant who was “of an age and has medical conditions that place him in the group most susceptible to Covid-19.”); *United States v. Perez*, No. 19 CR 297 (PAE), 2020 WL 1329225, at *1 (S.D.N.Y. Mar. 19, 2020) (granting temporary release to defendant amid COVID-19 pandemic “based on the unique confluence of serious health issues and other risk factors” that included defendant’s “serious progressive lung disease and other significant health issues”).

⁴⁷ *United States v. Stephens*, No. 15-cr-95 (JAN), 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (“Although there is not yet a known outbreak among the jail and prison populations, inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop.”).

⁴⁸ See *United States v. Little*, No. 20 CR 57, 2020 WL 1439979, at *4 (S.D.N.Y. Mar. 24, 2020) (considering the total harm and benefit to prisoner and society from continued detention of detainee, and noting that “part of the ‘danger to the community’ calculus ha[s] to include the risk of a new inmate bringing the virus into the facility”) (citing *United States v. Raihan*, 20 CR 68 (BMC) (E.D.N.Y. Mar. 12, 2020)).

(2) Necessary for preparation of a person's defense

If new measures implemented to prevent the spread of COVID-19 have impacted defendants' access to their attorneys, defendants may also argue that release is necessary for preparation of their defense.⁴⁹

All but one of these arguments are premised on the idea that jail facilities are more conducive, or highly conducive, to the spread of COVID-19. They posit that detainees face a higher generalized risk of infection or of severe consequences from an infection, and that the public faces a risk from the prospect of an outbreak within a jail. This generalized risk stems from the crowded and cramped nature of jail facilities, which are contended to be unsuited to “social distancing,” frequent hand-washing, and other preventive measures that local and/or federal officials have urged the general public to undertake to reduce their risk of contracting or spreading COVID-19.⁵⁰

In some cases, defendants have been able to point to existing infections within their area of confinement.⁵¹ It is possible that by the time this Article is published, more persons opposing detention or moving for release might be arguing that outbreaks inside their facilities justify release. The number

⁴⁹ See *Stephens*, 2020 WL 1295155, at *3 (granting release under Section 3142(i) because of the impact of BOP restrictions on the defendant's ability to meet with his attorney).

⁵⁰ A district court that granted injunctive relief directed at conditions and infection-control measures at Cook County Jail in Chicago referred to expert testimony and affidavits submitted by the prisoner plaintiffs as having reiterated an assertion by the live plaintiffs' expert in that case, former New York City jails medical director Dr. Homer Venters, that the design of correctional facilities “promotes transmission of the coronavirus because it densely packs large groups of people together.” *Mays*, 2020 WL 1987007, at *12. The court further summarized the plaintiffs' expert affiants' assertions, including those of Yale University epidemiologist Dr. Gregg Gonsalves, as follows:

Dr. Gonsalves stated that although correctional facilities are like cruise ships in that they are enclosed environments, they present an even higher risk of rapid transmission of the coronavirus because of “conditions of crowding, the proportion of vulnerable people detained, and often scant medical care resources.” In a joint declaration, five medical doctors with experience working in a correctional setting—including three doctors who had worked at the [Cook County] Jail—similarly observed that the “crowded congregate housing arrangements” of jails and prisons promote the transmission of respiratory illnesses like the coronavirus disease.

Id. (citations omitted).

⁵¹ See *United States v. Guerra Castillo*, No. 1:16-cr-00259-JKB-6, 2020 WL 1540508, at *1 (D. Md. Mar. 27, 2020) (requesting federal marshals to provide defense counsel with health status update and next steps where defendant asserted that his cellmate in the federal jail had tested positive for COVID-19).

of U.S. Bureau of Prisons (BOP) prisoners who are reported to have tested positive for SARS-CoV-2 changes every day.⁵²

At this writing, federal judges are very early in formulating their responses to these arguments. These early judicial approaches provide a window into evaluating the various release arguments and their overall premise: that COVID-19 has made federal jails so dangerous that defendants should not be detained if their own safety or the community’s safety is to be protected. Because the Bail Reform Act directs an individualized assessment of the 3142(g) factors, decisions on COVID-19 release motions will depend heavily on individual movants’ situations, including their medical conditions, personal histories, criminal backgrounds, and charged offenses. The decisions will also turn on the factual content of the government’s opposition, which has maintained consistently that adequate measures are being taken to prevent the spread of COVID-19 in jails and detention centers, and to which we will now turn.

B. THE GOVERNMENT’S ARGUMENTS FOR DETENTION NOTWITHSTANDING COVID-19

In early April 2020, the U.S. Department of Justice issued a memorandum giving guidance to its prosecutors, urging them to continue to exercise their discretion, while considering COVID-19 risks to defendants, jails, and the general public within the framework of the Bail Reform Act.⁵³ The Attorney General directed federal prosecutors to give “controlling weight” to public safety:

We simply cannot agree to anything that will put the public at risk. COVID-19 presents real risks, but so does allowing violent gang members and child predators to roam free. When you believe a defendant poses a risk to the safety of any person or the community at large, you should continue to seek remand as zealously today as you would have before the pandemic began, in accordance with the BRA’s plain terms. Protecting the public from criminals is our paramount obligation.

⁵² As of early May 2020, BOP was reporting that more than 3,000 prisoners had tested positive, according to a website that the BOP states it updates every day at 3 p.m. Eastern time. See *COVID-19 Cases*, FED. BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/> [<https://perma.cc/B78G-9UEZ>] (last reviewed May 11, 2020). The BOP has said that only ten prisoners had tested positive as of March 26, 2020. Statement from BOP Director, FED. BUREAU OF PRISONS (Mar. 26, 2020), https://www.bop.gov/resources/news/20200326_statement_from_director.jsp [<https://perma.cc/7N8Q-TE47>].

⁵³ William P. Barr, Memorandum to All Component Department Heads and All United States Attorneys, “Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic,” UNITED STATES DEP’T OF JUSTICE (Apr. 6, 2020) [hereinafter Barr Pre-Trial Detention Memorandum], <https://www.justice.gov/file/1266901/download> [<https://perma.cc/WAF9-H39P>].

At the same time that the defendant's risk from COVID-19 should be a significant factor in your analysis, you should also consider any risk that releasing the defendant would pose to the public. This consideration will depend on the facts and circumstances of each defendant and the facility where he or she is being held, and you should factor this consideration into your analysis as appropriate. Our duty to protect the public extends to protecting it from contagion spread by someone released from our custody.⁵⁴

Also as of early April 2020, the BOP had already taken a number of steps to prevent or stem the spread of COVID-19 within its 122 institutions, which house some 146,000 prisoners. On March 13, 2020, the BOP undertook a series of measures including temporary restrictions on visitation, restrictions on inmate movement to only required and "mission-essential" transfers, increased health screening of staff and inmates, and increased sanitary measures. These measures include screening newly arriving inmates for COVID-19 exposure risk factors and symptoms, quarantining asymptomatic prisoners with exposure risk factors, and isolating and testing symptomatic inmates with exposure risk factors. These measures do not include a comprehensive testing program for asymptomatic prisoners or staff.⁵⁵

⁵⁴ *Id.* at 1–2. The memorandum ended with this instruction: "We must adapt to the current difficult circumstances, while also ensuring that we never deviate from our duty to keep the public safe from dangerous criminals. Please exercise your discretion appropriately." *Id.* at 2.

⁵⁵ The BOP described its preventive measures as of March 13, 2020 as follows, in full:

SOCIAL VISITS: Social visits will be suspended for 30 days, at which time the suspension will be reevaluated. To ensure inmates maintain social ties, the BOP will allow for additional inmate telephone communications. Inmates will be allowed 500 (vs. 300) telephone minutes per month.

LEGAL VISITS: Access to legal counsel remains a paramount requirement in the BOP but like social visiting, the BOP is mitigating the risk of exposure created by external visitors. As such, while in general, legal visits will be suspended for 30 days, case-by-case accommodation will be accomplished at the local level and confidential legal calls will be allowed in order to ensure inmates maintain access to counsel. Attorneys seeking an in-person visit with their client or a confidential call should contact the institution Executive Assistant (see email address on the relevant facility bop.gov page) or contact the appropriate Consolidated Legal Center for the BOP institution (see page 54 of the Legal Resource Guide). If approved for an in-person visit, the attorney will need to undergo screening using the same procedures as staff.

INMATE MOVEMENT: All inmate facility transfers will be suspended for 30 days, at which time the suspension will be reevaluated. Exceptions are allowed for forensic studies, writs, Interstate Agreements on Detainers (IAD), medical or mental health treatment, and release to pre-release custody. Other case-by-case exceptions (e.g. for judicial proceedings) may be approved by BOP Regional Counsel. Admission of new inmates will continue.

OFFICIAL STAFF TRAVEL: Official staff travel (with the exception of relocation) will be suspended for 30 days, at which time the suspension will be reevaluated. Any exceptions may be approved by the Deputy Director of the BOP.

On March 31, 2020, the BOP announced more measures, including the securing of all prisoners in their assigned cells for 14 days, although prisoners

TRAINING: All staff training, with the exception of basic staff training for new employees at the Federal Law Enforcement Training Center and the local facility, is suspended for 30 days at which time the suspension will be reevaluated. Any exceptions must be approved by the Deputy Director of the BOP.

STAFF HIRING: Staff hiring initiatives will continue.

CONTRACTORS: Contractor access to BOP facilities will be restricted for 30 days to only those performing essential services (e.g. medical or mental health care, religious, etc.) or those who perform necessary maintenance on essential systems. Contractors who require access will be screened using the same procedures as staff prior to entry.

VOLUNTEERS: Volunteer visits will be suspended for 30 days, at which time the suspension will be reevaluated. Exceptions will be approved by the Deputy Director of the BOP. Alternate means of communication (e.g. telephone calls) will be available for inmates who request to speak privately with a religious advisor. Volunteers who are approved for access will be screened using the same procedures as staff prior to entry.

SCREENING OF STAFF: Enhanced health screening of staff will be implemented in areas with “sustained community transmission” and at medical referral centers. Sustained community transmission is determined by the CDC and will be indicated on the map on this resource page where state community transmission indicates “Yes.” Such screening includes self-reporting and temperature checks for the next 30 days, at which time the process will be reevaluated.

SCREENING OF INMATES: The BOP manages an infectious disease management program as a matter of routine. To address the specific issues involving COVID-19, the BOP uses the following practices:

- All newly-arriving BOP inmates are being screened for COVID-19 exposure risk factors and symptoms.
- Asymptomatic inmates with exposure risk factors are quarantined.
- Symptomatic inmates with exposure risk factors are isolated and tested for COVID-19 per local health authority protocols.

TOURS: Tours will be suspended for 30 days, at which time the suspension will be reevaluated. Any exceptions will be approved by the Deputy Director of the BOP. If approved, participants will be screened using the same procedures as staff prior to entry.

MODIFIED OPERATIONS: For the next 30 days, the BOP will implement nationwide modified operations to maximize social distancing and limit group gatherings in our facilities. For example, depending on the facility’s population and physical layout, the institution may implement staggered meal times, recreation, etc. These modifications will be reevaluated in 30 days.

Federal Bureau of Prisons COVID-19 Action Plan, FED. BUREAU OF PRISONS, https://www.bop.gov/resources/news/20200313_covid-19.jsp [<https://perma.cc/VBQ3-GWTU>] (last updated Mar. 13, 2020); Press Release, Fed. Bureau of Prisons, Bureau of Prisons Update on COVID-19 (Mar. 24, 2020), https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf [<https://perma.cc/WYK4-L7US>] (describing measures announced March 13). On April 24, 2020, the BOP announced that it was expanding COVID-19 testing among asymptomatic prisoners, acknowledging that “asymptomatic or pre-symptomatic inmates can be positive for COVID-19 and can transmit the virus to other inmates. Press Release, Fed. Bureau of Prisons, Bureau of Prisons Expands COVID-19 Testing (Apr. 24, 2020), https://www.bop.gov/resources/news/20200424_expanded_testing.jsp [<https://perma.cc/5A93-NR52>].

would still have access to normal programs and services such as mental health treatment and education.⁵⁶

These measures, along with any additional steps the BOP may announce after this writing, can be expected to form the core of a governmental proffer that measures are being taken to prevent the spread of COVID-19 within a federal jail, possibly supplemented by whatever additional individual details prosecutors might present to argue that the local jail is not an unsafe place.⁵⁷ Courts, in the context of suits by state pretrial detainees challenging their

⁵⁶ The BOP described its “Phase 5” measures, effective April 1, 2020, as follows in full:

- For a 14-day period, inmates in every institution will be secured in their assigned cells/quarters to decrease the spread of the virus. This modification to our action plan is based on health concerns, not disruptive inmate behavior.
- During this time, to the extent practicable, inmates should still have access to programs and services that are offered under normal operating procedures, such as mental health treatment and education.
- In addition, the Bureau is coordinating with the United States Marshals Service (USMS) to significantly decrease incoming movement during this time.
- After 14 days, this decision will be reevaluated and a decision made as to whether or not to return to modified operations.
- Limited group gathering will be afforded to the extent practical to facilitate commissary, laundry, showers, telephone, and Trust Fund Limited Inmate Computer System (TRULINCS) access.

COVID-19 Action Plan: Phase Five FED. BUREAU OF PRISONS https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp [<https://perma.cc/VBQ3-GWTU>] (updated Mar. 31, 2020). Phase 6 of the BOP Action Plan extended Phase 5 to May 18, 2020. *Bureau of Prisons COVID-19 Action Plan: Phase Six* (Apr. 14, 2020), https://www.bop.gov/resources/news/pdfs/20200414_press_release_action_plan_6.pdf [<https://perma.cc/LC2P-A6P8>].

⁵⁷ For example, federal prosecutors in Maryland listed a similar set of measures implemented by the Maryland Department of Public Safety and Correctional Services, which houses federal prisoners at the Chesapeake Detention Facility (CDF), but added that:

- attorney visits were being done from the other side of a glass wall, with use of a telephone;
- few federal detainees were entering the CDF “at this time”;
- each detainee possesses his own supply of soap to wash hands “at any time throughout the day”;
- hand sanitizer has been “posted throughout the facility”;
- a group of CDF detainees has been trained and tasked with “disinfect[ing] and clean[ing] all surfaces that could be touched” on a full-time basis.

See Response in Opposition to Defendant’s Appeal of Detention Order at 9–11, *United States v. Martin*, No. 1:19-cr-00140-PWG (D. Md. Mar. 16, 2020) [hereinafter Government Opposition in *Martin*]. The court accepted the government’s proffer and denied the defendant’s appeal of a detention order in that case, but with no further comment on the merits or extensiveness of the proffer. *United States v. Martin*, No. PWG-19-140-13, 2020 WL 1274857, at *4 (D. Md. Mar. 17, 2020).

confinement in infection-ravaged county jails, also are providing some guidance as to possible minimum constitutional standards for protecting pretrial detainees from infection by the virus.⁵⁸

In addition, prosecutors can be expected to advance, or have advanced, some of the following arguments that speak to issues other than the conditions inside the jail:

⁵⁸ In *Mays v. Dart*, No. 20 C 2134, 2020 WL 1897007 (N.D. Ill. Apr. 27, 2020), the court converted its April 9, 2020 temporary restraining order into a preliminary injunction, in the class action arguing that conditions for pre-trial detainees violated constitutional due process because they were objectively unreasonable. The court ordered a sheriff, who operates the Cook County Jail, to:

- (1) require prompt coronavirus testing of symptomatic detainees and, “at medically appropriate times,” of detainees exposed to symptomatic persons or persons who have tested positive, while acquiring enough testing supplies so that the testing decision is made based on medical criteria and not the availability of the supplies;
- (2) enforce social distancing during the jail intake process, including continued suspension of the use of “bullpens” to hold groups of newly arriving prisoners;
- (3) provide soap and/or hand sanitizer to all detainees in quantities sufficient to permit them to frequently clean their hands;
- (4) provide sanitation supplies sufficient and adequate to enable all staff and detainees to regularly sanitize surfaces and objects on which the virus could be present, including in all areas occupied or frequented by more than one person (such as two-person cells, as well as bathrooms, showers, and other surfaces in common areas);
- (5) require sanitization between all uses of frequently touched surfaces and objects as well as monitoring and supervision to ensure that such sanitization takes place regularly;
- (6) provide facemasks to all detained persons who are quarantined—i.e., those who have been exposed to a detained person who is symptomatic (even if not coronavirus-positive), replacing them at medically appropriate intervals, and providing users with instruction on how to use a facemask and the reasons for its use;
- (7) establishing a policy precluding group housing or double celling of detained persons with a set of delineated exceptions; and
- (8) providing face masks, to be replaced at “medically appropriate” intervals, for detainees housed under the exceptions to (7) above, along with instruction on how to use a facemask, the reasons for its use, and the importance of social distancing.

Id. at *36–37; *see also* *Swain v. Junior*, No. 1:20-cv-21457-KMW, 2020 WL 2078580, at *21–22 (S.D. Fla. Apr. 29, 2020) (entering forty-five-day preliminary injunction ordering, among other measures, enforcement of six-foot interpersonal space “to the maximum extent possible” and provision, to prisoners, of adequate supplies of soap, disinfectant products, and toilet paper), *called into question*, No. 20-11622-C, 2020 WL 2161317, at *4–7 (11th Cir. May 5, 2020) (staying preliminary injunction pending appeal). Rulings like the order in *Mays*, coming on a motion for injunctive relief dependent on a showing of likelihood of success on the merits, and relating to a jail facility reported to be one of the largest known single source of COVID-19 infections in the nation, *see Mays*, 2020 WL 1987007, at *4, may set forth a guidepost for minimum constitutional standards that a court might expect for detention of pre-trial detainees during the COVID-19 pandemic, at least in jurisdictions that do not require detainees to make the nearly impossible showing of deliberate indifference in these cases.

(1) Section 3142(g) factors favor detention.

The application of the Section 3142(g) factors, before consideration of COVID-19, weigh heavily in favor of detention and thus outweigh the concerns a defendant might raise with respect to COVID-19, however valid those concerns may be.⁵⁹

(2) Release will burden pretrial services staff or endanger a third-party custodian.

Release into home confinement under electronic monitoring will put pretrial services staff members at risk because location monitoring “would require some interaction that is not consistent with personal distancing”⁶⁰ and will risk overburdening pretrial services staff where resources are already stretched thin.⁶¹ Or, in some cases, temporary release to a third-party custodian under Section 3142(i) might put the custodian at risk, particularly if defendant’s background includes a history of domestic violence.⁶²

(3) Releasing detainees will open the “floodgates.”

Granting various COVID-19 motions, or accepting defense arguments for release based on the risk of COVID-19 infection within jails, will cause courts to be “flooded” with bids for release by prisoners who are making little more than a “generic” argument that they should be released for their own safety or to avert a “speculative” outbreak at the jail.⁶³ This could lead to the release of “all” federal prisoners because they are subject to the same risk of COVID-19 infection. This argument should not be dismissed as extreme; some courts already have accepted it.⁶⁴

⁵⁹ Government Opposition in *Martin*, *supra* note 57, at 3–8; *see also* United States v. Lunnie, No. 4:19-cr-00180 KGB, 2020 WL 1644495, at *2 (E.D. Ark. Apr. 2, 2020) (denying COVID-19 motion for temporary release under Section 3142(i) of “high-risk defendant” for whom “[t]he need for detention is not even a close call”).

⁶⁰ *See* United States v. Sanders, No. 19-20037-01-DDC, 2020 WL 1528621, at *5 (D. Kan. Mar. 31, 2020) (citing *Martin*, 2020 WL 1274857, at *4); United States v. Clark, No. 19-40068-01-HLT, 2020 WL 1446895, at *7 (D. Kan. Mar. 25, 2020).

⁶¹ *See* Government’s Opposition in *Martin*, *supra* note 57, at 13. Prosecutors also might make a “floodgates” argument that releasing even one defendant temporarily into home incarceration with location monitoring would lead to many more such release arrangements that would overwhelm the courts’ pre-trial services staff. Government’s Response to Defendant’s Motion for Release at 19, United States v. Woodman, No. 20 CV 1792 (N.D. Ill. 2020) [hereinafter Government’s Opposition in *Woodman*].

⁶² *Id.* at 11.

⁶³ Government’s Opposition in *Martin*, *supra* note 57, at 13–14.

⁶⁴ United States v. Kerr, No. 3:19-cr-296-L, 2020 WL 1529180, at *3 (N.D. Tex. Mar. 31, 2020). The *Kerr* court stated: “Any detainee would be exposed to the same risk that Defendant presents, and, as other courts have also concluded, the court cannot not release every detainee who may be at risk of contracting COVID-19, as it would then be required to release *all*

(4) Prisoners’ risk of infection is too generalized to justify release.

Where there is no infection reported in the jail in question, prosecutors may argue that prisoners’ risk of infection is too generalized and speculative to be credited as a sufficient reason to shift the balancing of the Section 3142(g) factors in favor of temporary release under Section 3142(i).⁶⁵ One problem with this argument is that it has greater resonance when there are no reported infections in a jail. However, the number of reported infections has been changing daily.⁶⁶ Even where a jail has begun to see prisoners testing positive, prosecutors have argued that the BOP’s series of protective measures and the closed nature of jails themselves means that the jail “remains a safe place for defendants to be housed.”⁶⁷

(5) Prisoners may be safer in prison.

A prisoner moving for release under COVID-19 should be required, some prosecutors may argue, to show that the conditions of his release (including his home environment, his plans for getting there from the jail upon release, and his plan for obtaining health care if he were to be infected with COVID-19 while on release) would keep him safer than jail, where “he has access to around-the-clock medical care, the facility is staffed and trained to contain or treat the virus if necessary, and it collaborates with government partners and health agencies to keep its employees and those in its care safe and healthy.”⁶⁸ Or, prosecutors may argue that if there is no reported infection inside the jail, a defendant is safer

detainees.” *Id.* (emphasis in original) (citing *United States v. Fitzgerald*, No. 2:17-cr-00295-JCM-NJK, 2020 WL 1433932, at *2 (D. Nev. Mar. 24, 2020)) (“Defendant’s argument applies equally to every detainee in detention; however, the Court cannot release every detainee at risk of contracting COVID-19 because the Court would then be obligated to release every detainee.”).

⁶⁵ *Clark*, 2020 WL 1446895, at *5–6; Government’s Opposition in *Woodman*, *supra* note 61, at 12–13.

⁶⁶ Compare *United States v. Hamilton*, No. 19-CR-54-01 (NGG), 2020 WL 1323036, at *2 (E.D.N.Y. Mar. 20, 2020) (denying COVID-19 release motion, noting that “perhaps most importantly, as of this writing, there have been no reported incidents of COVID-19 within [the Brooklyn] MDC, and the Bureau of Prisons is taking system-wide precautions to mitigate the possibility of infection within its facilities”), with *COVID-19 Cases*, *supra* note 52 (disclosing, on same day as decision in *Hamilton*, that a prisoner at the Brooklyn MDC had tested positive).

⁶⁷ Government’s Response to Defendant’s Motion for Release at 11, *United States v. Flores*, No. 17 CR 822-1 (N.D. Ill. Apr. 15, 2020) [hereinafter Government’s Opposition in *Flores*].

⁶⁸ The court so held in *Clark*, citing to published information about responses to COVID-19 implemented at the federal jail in Leavenworth, Kansas. 2020 WL 1446895, at *6.

there than in a community where COVID-19 is continuing to spread.⁶⁹

The government will likely make many other arguments against release. Some might be specific to each case, while others may delve into greater detail regarding what is known about the pandemic and the particular risks it poses inside jails. Greater facts and data on all of those points ought to be welcomed by courts as they analyze the validity of COVID-19 release motions.

C. WHERE THE “WILD FACTS” ARE

In resolving the numerous motions for release from federal custody during the COVID-19 pandemic, judges will take different approaches. In some cases, judges may use what Judge Posner called “formalism,” which he defined as “the use of deductive logic to derive the outcome of a case from premises accepted as authoritative” in order to reach a “correct” result.⁷⁰ This approach might be appropriate in some cases. For example, in a case like *United States v. Lunnie*, the court determined that the evidence showed the defendant was so dangerous that the motion required little additional consideration beyond what already was done at the initial detention hearing.⁷¹ A paradigmatic example to think about is that of mass murderer Charles Manson. If Charles Manson were detained on federal charges, and he filed a motion to re-open his bail hearing or for temporary release under Section 3142(i) due to the COVID-19 outbreak and its threat to the jail population, few judges, if any, would find that the interest in his safety and the community’s safety from the risk of a COVID-19 infection overrode the public safety interest in his remaining behind bars.

But *Lunnie* and our Charles Manson hypothetical are the easy cases. In other cases, COVID-19 introduces much more complexity into the decision-making process. Consider, for example, non-violent elderly detainees with compromised respiratory systems who now seek release to a suitable third-party custodian. If there are no reported infections inside their particular jail

⁶⁹ See Government’s Opposition in *Woodman*, *supra* note 61, at 16 (“Defendant erroneously presumes that his risk of contracting COVID-19 is greater in custody than out; but currently defendant is in a detention facility where no known instances of the virus are present, where social contact with the outside world is suspended, and apparently where entrants (staff and inmates) to the facility are screened and measures to isolate high-risk individuals are in progress, compared to the general public in Illinois, where the risk of contracting the virus is arguably higher.”).

⁷⁰ See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1987).

⁷¹ *United States v. Lunnie*, No. 4:19-cr-00180 KGB, 2020 WL 1644495, at *2 (E.D. Ark. Apr. 2, 2020).

facility, is their risk of getting ill too “speculative” or “generalized” despite their personal circumstances? If these prisoners’ risk is generalized but cognizable enough to be considered, what must they show: that they will inevitably fall ill of COVID-19 in the jail? Or that the odds—however we might determine them, if we even could—are somehow too great to permit their incarceration?

The formalist approach applied in cases like *United States v. Kerr*, in which the court reasoned that one order releasing a detainee based on COVID-19 would require releasing all detainees (presumably even the Charles Mansons), risks bypassing the complexity of the individual facts of a case.⁷² Other formalist approaches, such as adhering to precedents to deny or grant release in view of COVID-19, without delving into the factual and scientific basis for what makes one precedent more compelling than another, also may miss the complexity that COVID-19 motions for release present. In this unique, unprecedented time, courts should try to avoid retreating into mechanisms that take them directly to a result without confronting the shortcomings of those mechanisms or addressing broader questions such as what the “safety of any other person or the community” actually means or should mean under the Bail Reform Act. According to Posner:

At the root of the refusal of many judges to confront, even to recognize, the challenge of complexity is a professional mind-set that often includes—along with impartiality, conscientiousness, and other traditional attributes of a good judge—lack of curiosity, a feeling of intimidation by science and technology, and a lack of interest in obtaining an empirical rather than merely intuitive grounding for one’s beliefs.⁷³

Consider Jerome Frank’s description of Judges Learned Hand and Oliver Wendell Holmes, who also emphasized the importance of engaging with the particular facts of each case—even when they do not fall neatly into any particular model or system:

Like Holmes, [Hand] delights in contriving generalizations while recognizing their pernicious character if not constantly in gear with particulars. Or, to paraphrase Kant, he knows that generalizations without particulars are empty and particulars without generalizations are blind. Both men have been sceptical [sic] of neat, closed, systems; like William James, they have sought the “wild facts” that escape any system.⁷⁴

Posner distinguished the early to mid-twentieth-century “legal realism” movement, of which Frank was a noted leader, from Posner’s own brand of

⁷² See *United States v. Kerr*, No. 19-cr-296-L, 2020 WL 1529180 (N.D. Tex. Mar. 31, 2020).

⁷³ POSNER, *supra* note 3, at 92.

⁷⁴ Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 669 (1956–57); see generally Jerome Frank, *Some Tame Reflections on Some Wild Facts*, in VISION AND ACTION 56 (Sidney Ratner ed., 1953).

realism, which he called “deeply skeptical of formalism, regarding it as more rhetoric than analysis—a rhetoric that conceals the actual springs of decision.”⁷⁵ While both types of realism emphasize “the consequences of judicial rulings,” Posner describes his realism as finding its origins in pragmatism and science, the affinity between the two, and “an openness to facts”:

The core of a defensible legal realism is the idea that in many cases, and those the most important, the judge will have to settle for a reasonable, a sensible, result, rather than being able to come up with a result that is demonstrably, irrefutably, “logically” correct. Law is not logic but experience, as Holmes famously put it. And experience is the domain of fact, and so the realist has a much greater interest in fact than the formalist, and in “fact” in a richer sense than what a judge can glean from a trial transcript. And today that richer sense encompasses the findings of science, along with statistical and other systemic data. But science and data will no more resolve every case than orthodox legal texts will. What is reasonable or sensible will often depend on moral feelings, common sense, sympathies, and other ingredients of thought and feeling that can’t readily be translated into a weighing of measurable consequences. But openness to facts not limited to those found in judicial records is what I want to stress.⁷⁶

Posner’s intimation that judges’ experiences and well of “common sense” must somehow be a part of their journey to a result relates to the abstract concept of “wild facts,” as that term was used by legal realists and by James before them. Wild facts have been described as “those which furnish so much of the spirited element in our existence and which our logical propositions and scientific laws simply fail to net. It takes a more alert and compassionate nature than most men possess to sense the presence of ‘wild facts’ and respect their worth and influence.”⁷⁷

As for what may be done with “wild facts,” Frank offered a theory he called “fact-skepticism” in an effort to describe or predict how judges decide cases: when assertions purporting to be facts are in conflict, one or more of those assertions must be wrong. To find which is wrong, judges exercise “fact discretion” to determine which are more reliable, based largely on an individual judge’s unique reaction to the conflicting evidence.⁷⁸ One might think of “fact discretion” as a lofty way of describing the ball-and-strike calls judges commonly make amid conflicting facts. To make these calls, judges need to have the facts before them, including the “wild” ones.

However, the fact of the matter is that more than 100 years after the writings of William James, scholars have not easily explained what he meant by the term “wild facts,” or how we might find and apply them. Some have

⁷⁵ POSNER, *supra* note 3, at 5.

⁷⁶ *Id.* at 6.

⁷⁷ Cahn, *supra* note 2, at 827.

⁷⁸ *Id.* at 825.

interpreted James as seeking to sort through a “quasi-chaotic” or “primordial” world of “concrete particulars” with a pragmatism borne of “pure” or “raw” experience.⁷⁹ Others have interpreted James’s form of pragmatism as requiring judges to “base their decisions on a subjective sense of certainty or a sentiment of rationality” and “verify [their decisions] by their consequences.”⁸⁰

In other words, judges should expose their minds to the full complexity of their cases and use their intuition or imagination to determine just decisions. As long as judges honor the pragmatic conditions which discipline hunches, this method of judicial decision making has the potential of improving the administration of justice despite the explosion of fact and the indeterminacy of law.⁸¹

Formulations like these begin to take the abstraction of “wild facts” well into the realm of the obvious. “Pragmatists” and “realists” may be judges who simply have the willingness and the energy to delve deeply into facts, internal and external to their cases, so that their decisions may account for the “full complexity” of those cases. That is not far from Posner’s urging, under his conception of “pragmatism” or “realism,” that judges maintain “an openness to facts not limited to those found in judicial records.” Posner has been described as “most often taken to represent legal pragmatism today,” but his forays into describing a pragmatic philosophy as an everyday “practice” for judges have been criticized as “leav[ing] one unsure not only who he thinks the pragmatist philosophers were and what he takes them to have said, but also whether he’s really only concerned, as he claims, with everyday rather than philosophical pragmatism.”⁸²

Whether or not that criticism is fair, Posner also offered a helpful analogy to battlefield communications in a time of war: if facially clear

⁷⁹ Douglas Lind, *The Mismeasurement of Legal Pragmatism*, 4 WASH. U. JURIS. REV. 213, 226–28 (2012); Douglas Lind, *Pragmatism and Anthropomorphism: Reconceiving the Doctrine of the Personality of the Ship*, 22 U.S.F. MAR. L.J. 39, 77–78 (2010).

⁸⁰ Mark C. Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. RICH. L. REV. 55, 88–89 (2001).

⁸¹ *Id.*

⁸² See Susan Haack, *The Pragmatist Tradition: Lessons for Legal Theorists*, 95 WASH. U. L. REV. 1049, 1069–71 (2018) (citing RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003)). Haack suggests that Posner’s discussion of philosophical approaches to the law “ties his audience in knots.” *Id.* at 1070. Posner’s characterizations of formalism and realism have, at the very least, evolved. In 1986, he compared formalism to following a mathematical calculation whose result could then be called correct or incorrect, and he described realism as a form of “policy analysis” that “decid[es] [a] case so that its outcome best promotes public welfare in nonlegalistic terms.” Posner, *supra* note 70, at 181. Posner then postulated that as he had defined them, neither formalism nor realism applies to statutory interpretation. *Id.* at 187. In 2013, he appeared to advocate for a form of “realism” that more fully accounted for facts. POSNER, *supra* note 3, at 92.

statutory language does not give judges adequate direction amid the complexities and unexpected obstacles of the battlefield, or becomes garbled on that battlefield, judges must interpret the statute as they would a battlefield communication.⁸³ They must seek to accomplish the statute’s objective, through their own interpretation of the statute’s language, even if that language is garbled, incomplete, or inadequate for the complexity of the case.⁸⁴

Rather than resolve the academic debate about what pragmatism means or who may have characterized it best, it is sufficient for our purposes to take Posner at his word when he proposes a sharper focus on facts and science as a means of navigating complexity or applying statutes to unexpected, fluid situations like the one presented by COVID-19. And, for our purposes, we define “wild facts” as those that might require effort to discover through such a sharpened focus on facts and science, and which, in our experience, should make a difference in decisions under the Bail Reform Act during this time of pandemic.

Committing to hunt for the “wild facts” means recognizing that answers are not likely to be found easily through a rigid application of the Bail Reform Act. At first blush, Section 3142(g)’s fourth factor concerning the impact of a person’s release upon the safety of the community might seem less material where a defendant is not a danger to the community and is sought to be detained only as a flight risk.⁸⁵ Courts will need to consider whether the fourth (g) factor truly is immaterial in that context, if detaining someone as a flight risk truly could have an incremental negative impact on public safety during COVID-19.⁸⁶

⁸³ Posner, *supra* note 70, at 190–91.

⁸⁴ *Id.*

⁸⁵ See *United States v. Yu Zhou and Li Chen*, No. 19-CR-163, 2020 WL 1643634 (S.D. Ohio Apr. 2, 2020). In *Zhou*, the court called the COVID-19 concerns raised by the defendants—not detained as dangers to the community—immaterial for purposes of their motions to re-open their bail hearings. *Id.* at *3–4, 7. The emergence of COVID-19 “plays no *material* role in as to whether there are conditions of release that will reasonably assure the future appearance” of the defendants in the wire fraud and trade secrets theft case in which the defendants had deep ties to China. *Id.* at *3. The government did not contend that either defendant was a danger to the community, a fact that persuaded the court that the community’s safety was simply not at issue in the motions to re-open bail. *Id.* at *4, 8.

⁸⁶ See, e.g., *United States v. Davis*, No. ELH-20-09, 2020 WL 1529158, at *4 (D. Md. Mar. 30, 2020) (agreeing with letter from public health experts asserting that “reducing the number of detained persons in Maryland will make the community safer”); *cf.* *United States v. Cox*, No. 19-cr-271, 2020 WL 1491180, at *4 (D. Nev. Mar. 27, 2020) (“[A]n individual citing ‘compelling reasons’ based on the threat of COVID-19 who is charged with a non-violent offense and who was previously detained as a flight risk may fare better in this analysis

A formalistic view of the Bail Reform Act, one that does not account for the facts and subtleties that COVID-19 release arguments may present, becomes a sort of “snipe hunt”—the apocryphal children’s summer camp prank where unwitting youths sit in the middle of a field holding open a bag, into which, they are told, the wild “snipe” birds will trap themselves, usually sometime between midnight and 1 a.m. While there is every reason to believe that wild facts exist, they will not be found by sitting and waiting for the parties to shoo them into the judge’s open bag. Judges may well have to wander into the forest to locate them, much as they might independently search for cases or other authorities that the parties have not called to their attention.

D. APPLYING “WILD FACTS” TO FEDERAL DETENTION IN THE PANDEMIC

Now that we have attempted to bring the concept of “wild facts” to earth, we can undertake the task of scrutinizing them more closely and applying them. Federal detention decisions always have turned on specific facts. COVID-19 does not change that truism, but the complexity the pandemic adds to the detention calculus challenges judges to look even harder for facts that make a difference. One of the factual issues arising again and again in the early judicial decisions on bail and COVID-19 is the number of infections reportedly existing in a jail. An emerging body of reports and research suggests that courts ought to give this brand of factual representation a close look.

Academic studies appear to contain growing evidence that asymptomatic persons (who are not currently being tested or isolated under the BOP action plan) may already be infected with COVID-19 and are already capable of spreading it.⁸⁷ And aside from the academic studies, news

than the individual charged with a violent offense who has been found to be both a danger to the community and a flight risk.”)

⁸⁷ As one group of researchers recently wrote:

Asymptomatic transmission of COVID-19 has been documented. The viral loads of asymptomatic carriers are similar to those in symptomatic carriers. A recent study concluded that asymptomatic and symptomatic carriers may have the same level of infectiousness. These findings demand a reassessment of the transmission dynamics of the COVID-19 outbreak that better account for asymptomatic transmission.

Jacob B. Aguilar, et al., *Investigating the Impact of Asymptomatic Carriers on COVID-19 Transmission*, CORONAVIRUS COVID-19 PUBLICATIONS BY UMMS AUTHORS (Mar. 31, 2020), <https://escholarship.umassmed.edu/cgi/viewcontent.cgi?article=1005&context=covid19> [http://perma.cc/3E66-PY8S] (citations omitted); see also Frank Diamond, *Asymptomatic Carriers of COVID-19 Make It Tough To Target*, 24 INFECTION CONTROL TODAY (Mar. 17,

articles have suggested that measures aimed at curbing the spread of coronavirus by focusing only on symptomatic persons are failing to account for the ability of asymptomatic persons to spread the disease.⁸⁸ Some researchers are suggesting that “pre-symptomatic” persons may be particularly prone to spreading the disease in the two to three days before they begin to show symptoms.⁸⁹ For its part, the CDC itself has stated publicly that “[s]ome people without symptoms may be able to spread the virus,” while the Bureau of Prisons acknowledges that asymptomatic persons may transmit the disease.⁹⁰ Asymptomatic persons may have no idea that they are infected or that they can spread the virus, and some researchers are proposing wider, more aggressive testing of the asymptomatic as a means of identifying contagious persons.⁹¹ These studies and reports suggest that the key question may turn on more than the mere number of prisoners confirmed to have tested positive for COVID-19 in a jail. The question of how prevalent the virus may be in a jail, and of the extent of infection risk to individual detainees or to the jail population and the community as a result of their

2020), <https://www.infectioncontroltoday.com/covid-19/asymptomatic-carriers-covid-19-make-it-tough-target> [<https://perma.cc/5EA8-H7YL>] (referencing Japanese study showing that of the 634 Diamond Princess cruise ship passengers who tested positive for the novel coronavirus, 17.9 % were asymptomatic).

⁸⁸ See Mike Stobbe, *More Evidence Emerges that Coronavirus Infections Can [be] Spread by People with No Clear Symptoms*, CANADIAN BROADCASTING CO. (Apr. 2, 2020), <https://www.cbc.ca/news/health/covid-19-singapore-symptoms-1.5518772> [<https://perma.cc/UEE9-MG5A>] (discussing recent China-based study estimating that about 10% of new COVID-19 infections may be spread by asymptomatic persons). In the town of Mount Vernon, Washington, where no stay-at-home order had issued as of early March 2020, a group of about sixty church choir members gathered for a rehearsal where the participants, wary of the virus, were offered hand sanitizer at the door and avoided hugs and handshakes, and no one showed symptoms—but by the end of March, forty-five of them had been diagnosed with COVID-19 and two had died of it. Richard Reed, *A Choir Decided to Go Ahead with Rehearsal. Now Dozens of Members Have COVID-19 and Two are Dead*, L.A. TIMES (Mar. 29, 2020), <https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak> [<https://perma.cc/WMC5-Z3MJ>]. “The outbreak has stunned county health officials, who have concluded that the virus was almost certainly transmitted through the air from one or more people without symptoms.” *Id.*

⁸⁹ Melissa Healy, *Everyone Infected with the Coronavirus is a Silent Spreader for At Least a While*, L.A. TIMES (Apr. 16, 2020), <https://www.latimes.com/science/story/2020-04-16/everyone-with-the-coronavirus-is-silent-spreader> [<https://perma.cc/WA87-556E>].

⁹⁰ See *How COVID-19 Spreads*, *supra* note 11; Bureau of Prisons Expands COVID-19 Testing, *supra* note 55.

⁹¹ Shan Soe-Lin & Robert Hecht, *Most Americans Who Carry the Coronavirus Don’t Know It*, N.Y. TIMES (Apr. 26, 2020), <https://www.nytimes.com/2020/04/26/opinion/coronavirus-test-asymptomatic.html> [<https://perma.cc/W4DN-333A>] (describing proposal by Yale University public health experts to test asymptomatic persons in high-risk groups for COVID-19 as often as every five days to “aggressively search for asymptomatic carriers”).

detention, might turn also on the etiology of the number of confirmed infections, considered in the context of what we know about how COVID-19 spreads.

Wild facts about the known spread of COVID-19 within a jail facility could help courts determine the weight to be attached to the facility’s compliance with CDC guidelines. Courts already have been asked to hold that jail administrators’ adherence to CDC guidelines should be enough to meet minimum constitutional standards for housing pre-trial detainees during the pandemic, or, alternatively, that the CDC guidelines are “not a surrogate for constitutional due process requirements.”⁹² Undoubtedly, CDC guidelines at least provide an important benchmark, even if adherence to them, without more, is not determinative.⁹³ Yet judges at the detention or bail hearing phase are not being asked to order jail officials to comply with a minimum constitutional standard. On the question of pre-trial detention, judges instead are evaluating the facts presented to them as they apply the Section 3142(g) factors. If the proffered facts include: (1) there is a specific number of prisoners confirmed as having tested positive for COVID-19 at a jail, and (2) per CDC guidelines, only symptomatic prisoners are being tested, or only a very limited number of asymptomatic prisoners are being tested; judges will need to evaluate what the confirmed number of infections says about existing risk at the jail and the risk of added incarceration there. The CDC guidelines for jails and prisons call for evaluation and testing of symptomatic persons and contain no regime for comprehensive testing of the asymptomatic.⁹⁴ When a state prison at Marion, Ohio, mass tested its prisoners for COVID-19, 80% tested positive, and 95% of those who tested positive had been asymptomatic; results were reported to be similar among prisoners mass tested in Arkansas, North Carolina, and Virginia.⁹⁵ When the

⁹² *Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at *26 (N.D. Ill. Apr. 9, 2020).

⁹³ *See id.* at *25–26 (viewing jail officials’ adherence to CDC guidelines as insufficient, standing alone to establish the constitutionality of conditions, while considering such adherence as an important factor in determining whether the conditions are objectively reasonable, particularly given that constitutional due process does not require “foolproof protection from infection,” quoting Eighth Amendment analysis in *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997)).

⁹⁴ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CENTERS FOR DISEASE CONTROL AND PREVENTION: CORONAVIRUS DISEASE 2019 (COVID-19) (last reviewed Apr. 29, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> [<https://perma.cc/GZH8-PUWG>].

⁹⁵ Linda So & Grant Smith, *In Four U.S. State Prisons, Nearly 3,300 Inmates Test Positive for Coronavirus – 96% Without Symptoms*, REUTERS (Apr. 25, 2020), <https://www.reuters.com/article/us-health-coronavirus-prisons-testing-in/in-four-u-s-state-prisons-nearly-3300-inm>

asymptomatic are not being tested, then, the fact may be that a number of prisoners in a jail are “confirmed” to have tested positive for COVID-19, but the wild fact lying behind it may be that the true number of infected persons inside that jail is simply not known. And if adherence to CDC guidelines contributes to a lack of knowledge about how many persons in a jail are infected, perhaps a jail’s adherence to those guidelines ought to be accorded less weight in the detention calculus. In any case, judges at least can ask hard questions about the parties’ representations and the depth of the facts underlying them.⁹⁶ Those questions might address not only a jail’s testing procedures but also the procedures for removing prisoners to local hospitals and the impact on the number of infected persons the institution is reporting.

The factual issues may go beyond the number of reported infections in a jail. They may include an institution’s knowledge about where “confirmed” infected persons were housed in a facility and the degree of exposure they had to others in the jail population before they were removed to a hospital. They may include state-imposed restrictions on movement or other aspects of daily living outside the jail, to the extent any of those might affect danger to the community or risk of flight under the Bail Reform Act. At the same time, courts ought to be ready to question broad medical pronouncements, such as those asserting that detainees, by virtue of their diabetes, lung disease, or heart disease, are at greater risk of *contracting* COVID-19 as opposed to at greater risk of suffering more severely if they contract COVID-19.⁹⁷ Courts may wish to explore the specificity and severity of asserted medical vulnerabilities, and how those vulnerabilities might particularly subject a detainee to risk from COVID-19. The medical vulnerability of a defendant to greater severity of illness from this disease has

ates-test-positive-for-coronavirus-96-without-symptoms-idUSKCN2270RX [https://perma.cc/VJ3R-C7ZG].

⁹⁶ There is a very old expression in the annals of Chicago journalism, attributed to the City News Bureau of Chicago, a now-defunct wire service whose reporters prowled the halls of city police stations, Chicago’s City Hall, and almost anywhere news could be found in Chicago dating to 1890: “If your mother says she loves you, check it out.” Newton N. Minow, *If Your Mother Says She Loves . . .*, CHI. TRIB. (Nov. 19, 2000), <http://www.chicagotribune.com/news/ct-xpm-2000-11-19-0011190214-story.html> [https://perma.cc/3CQL-LM6Y].

⁹⁷ This point may be generating some confusion. *United States v. Clark*, No. 19-40068-01-HLT, 2020 WL 1446895, at *4 (D. Kan. Mar. 25, 2020). *But see* Letter from Sen. Richard Durbin et al., to William P. Barr, Att’y Gen., & Michael Carvajal, Director of Fed. Bureau of Prisons, (Mar. 23, 2020), <https://www.durbin.senate.gov/imo/media/doc/Letter.%20to%20DOJ%20and%20BOP%20on%20COVID-19%20and%20FSA%20provisions%20-%20final%20bipartisan%20text%20with%20signature%20blocks.pdf> [https://perma.cc/AHU3-JSCG] (“The Centers for Disease Control and Prevention has issued guidance including that . . . individuals with chronic medical conditions, such as lung disease, heart disease, and diabetes, are at a higher risk of contracting COVID-19 and suffering more severe illness and death.”).

been persuasive to some courts, but others have not regarded it as a necessary condition for release.⁹⁸ Courts might also want to know more about detainees’ individual plans for home incarceration or other forms of release and the degree to which those plans make their release safer—for the community and those around them—than their continued detention. In addition, there is the problem of the infected detainee. If a detainee or arrestee already is infected or positive for COVID-19, releasing such a person into the community under conditions might risk harm to others, including a third-party custodian or a released person’s family members. Courts might try to learn more about the jail’s capacity to render appropriate medical care to infected detainees, whether the jail might be nearing that capacity, and the extent to which sick prisoners have been removed to local hospitals, if that has occurred.⁹⁹ Anecdotal evidence of adverse impacts on local hospitals is already being reported as the number of confirmed infections in some large state-operated jails and prisons swells.¹⁰⁰ Ultimately, the question is the very same one posed in the Bail Reform Act: whether there is a set of release

⁹⁸ See *United States v. Davis*, No. ELH-20-09, 2020 WL 1529158, at *4–6 (D. Md. Mar. 30, 2020); *United States v. Ramos*, 18-CR-300009-FDS, 2020 WL 1478307, at *1–2 (D. Mass. Mar. 26, 2020).

⁹⁹ There is every reason to believe that many judges are considering the number of infections in a given jail with a great deal of care. Judges may deny a COVID-19 release motion without prejudice while they monitor closely, on a daily basis, the situation in the jails within their districts for any reports of infection, and while they remain aware of the risks that infectious diseases may pose within jails. See *United States v. Baldwin*, No. 17-CR-00787 (N.D. Ill. Apr. 3, 2020) (Dkt. No. 165) (denying without prejudice a COVID-19 bail motion pending sentencing of a convicted fraud defendant, under 18 U.S.C. § 3143(a), and noting that BOP’s “significant” measures to guard against infection in Chicago’s Metropolitan Correctional Center, including barring “outside visitors for nearly three weeks, quarantining new admissions, and treating anyone with medical conditions” militated against finding that defendant could show by clear and convincing evidence that he was not likely to flee or pose a danger to other persons).

¹⁰⁰ Andrew Denney, *Number of NYC Inmates with Coronavirus Soars as Jail Population Dwindles*, N.Y. POST (Mar. 27, 2020), <https://nypost.com/2020/03/27/number-of-nyc-in-mates-with-coronavirus-soars-as-jail-population-dwindles/> [<https://perma.cc/D4TK-PBDX>]; Chuck Goudie et al., *Illinois Prisoners Sick with COVID-19 “Overwhelm” Joliet Hospital*, ABC7 CHI. (Mar. 30, 2020), <https://abc7chicago.com/coronavirus-illinois-chicago-cases/6064085> [<https://perma.cc/2TV8-AM4K>]; Jan Ransom & Alan Feuer, *‘A Storm Is Coming’: Fears of an Inmate Epidemic as the Virus Spreads in the Jails*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html> [<https://perma.cc/DV7T-G944>]; see also Josh McGee, *Stateville Prison Outbreak Signals COVID-19 Threat to Inmates, Surrounding Hospital Systems*, CHI. REPORTER (Apr. 3, 2020), <https://www.chicagoreporter.com/stateville-prison-outbreak-signals-covid-19-threat-to-inmates-surrounding-hospital-systems/?amp> [<https://perma.cc/Z64H-HJDN>] (reporting that Illinois National guard medics were dispatched to Stateville prison, that 167 Cook County Jail prisoners were then COVID-19-positive, and that emergency room physician at local hospital near Stateville described the hospital as “a war zone”).

conditions that will reasonably assure the safety of any other person and the community.

To augment their understanding of facts on the ground at the jail, courts have other options. They may exercise their discretion under the Bail Reform Act to conduct aspects of the detention hearing through live witness testimony under oath, rather than by proffer.¹⁰¹ Although the compressed time frame of a detention might make appointment of an independent expert seem impractical, courts might also consider how or whether expert opinion might be procured, as appropriate, to address factual issues about jail conditions or jails' vulnerability to infectious disease.¹⁰² They may also resort to more generalized literature already available.¹⁰³ Courts have relied on such articles in deciding COVID-19 bail motions, but they have not always analyzed how concerns about infections spreading in jails generally could be applied specifically to the jails where the defendants were headed.¹⁰⁴

¹⁰¹ *United States v. Delker*, 757 F.2d 1390, 1396 (3d Cir. 1985).

¹⁰² *See United States v. Michigan*, 680 F. Supp. 928, 987 (W.D. Mich. 1987) (appointing independent expert to address questions about conditions in Michigan prisons).

¹⁰³ Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047 (2007) <https://doi.org/10.1086/521910> [<https://perma.cc/WS4F-RZ7Y>] (“[T]he probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise.”).

¹⁰⁴ *See United States v. Stephens*, No. 15-cr-95 (AJN), 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (citing Bick article for proposition that “[a]lthough there is not yet a known outbreak among the jail and prison populations, inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop”). Importantly, the court in *Stephens* advanced, as an alternative ground for release before reaching COVID-19, the court’s conclusion that evidence of the defendant’s dangerousness had weakened significantly since the initial detention hearing. *Id.* at *1. In *United States v. Little*, the court relied on the Bick article as well as an open letter to government officials from some 800 public health and legal experts and advocates, urging that the national COVID-19 response include attention to the higher risk of the spread of the infection in jails and prisons. No. S3 20 CR 57. (GBD), 2020 WL 1439979, at *2 (S.D.N.Y. Mar. 24, 2020). But the court in *Little* also drew on its own knowledge and experience, referring to recent incidents at the Brooklyn federal jail (where prisoners were without power and heat for a week during a bitter cold snap in early 2019) and the Manhattan federal jail (where a recent incident involving a search for a gun in the jail led to breakdowns in sanitation and medical care) for the proposition that the two jails “have proven – recently and repeatedly – that they are unable to protect the health and safety of defendants in their custody.” *Id.* at *3. The *Little* court also cited other potentially helpful articles about COVID-19 and its effect on jails. *See, e.g.*, LAURA MARUSCHAK ET AL., MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES 2011–12 (2016), <https://bjs.gov/content/pub/pdf/mpsfj1112.pdf> [<https://perma.cc/ZBA8-U6Z9>] (discussing generally the greater medical vulnerabilities of persons in state and federal custody); Nicole Wetsman, *Prisons and Jails Are Vulnerable to COVID-19 Outbreaks*, THE VERGE (Mar. 7, 2020), <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbrea>

In *United States v. Little*, the court expressed these generalized concerns and then related them to specific incidents that the judge knew had occurred at the applicable jails.¹⁰⁵ As Posner has suggested, judges inevitably will draw on their own experience and knowledge base in deciding these motions.¹⁰⁶

Perhaps not surprisingly, outside the context of bail, some states have taken steps to grant early release to various classes of convicted prisoners to avoid larger outbreaks within their prison systems.¹⁰⁷ The U.S. Attorney General told the BOP in a March 2020 memorandum that “there are some at-risk inmates who are non-violent and pose minimal likelihood of recidivism and who might be safer serving their sentences in home confinement rather than in BOP facilities.”¹⁰⁸ This policy is premised on the idea that adding even one more incarcerated person to a potentially infection-prone jail setting adds to the risk to the public’s safety.¹⁰⁹ At least one court has explicitly

k-covid-19-flu-soap [<https://perma.cc/6X77-XNDL>] (“People regularly cycle in and out of jails and prisons, people who work in them leave and return daily, and visitors regularly stream through. Viruses of all kinds have multiple entry points, and those that enter tend to spread fast.”).

¹⁰⁵ 2020 WL 1439979, at *3.

¹⁰⁶ *United States v. Ramos*, 18-CR-30009-FDS, 2020 WL 1478307, at *1 (D. Mass. Mar. 26, 2020) (granting pretrial release to defendant with asthma and diabetes on grounds including jail conditions but also upon the disincentives to his flight and his further criminal activity because of the risks of catching COVID-19 from engaging in those activities). The notion that COVID-19 shifts the Bail Reform Act’s balancing of factors away from detention is a pragmatic approach that recognizes a lesser likelihood of flight or continued criminal conduct upon release. *See also* *United States v. Fellela*, No. 3:19-cr-79 (JAM), 2020 WL 1457877, at *1 (D. Conn. Mar. 20, 2020) (finding that travel and commercial restrictions brought on by the COVID-19 crisis made flight “enormously more risky and complicated” and made it “that much more difficult for any attempted fraud activities to succeed,” warranting release pending sentencing under Section 3143(a)).

¹⁰⁷ *See, e.g., In re* Request to Commute or Suspend County Jail Sentences, No. 084230 (N.J. Mar. 22, 2020) (ordering the release of certain county jail prisoners “based on the dangers posed by Coronavirus disease 19”).

¹⁰⁸ Memorandum from William P. Barr, Att’y Gen., to Dir. of Bureau of Prisons on Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020), <https://www.scribd.com/document/453777104/COVID-19-BOP-Memo-Re-Home-Confinement-2020-03-26> [<https://perma.cc/D6RQ-RF8T>] (emphasis added).

¹⁰⁹ In his memo encouraging federal prosecutors to exercise their discretion to consider COVID-19 risks in taking positions about detention or release, Attorney General Barr acknowledged that adding even one new prisoner to a jail population involves some level of risk:

Even with the extensive precautions we are currently taking, each time a new person is added to a jail, it presents at least some risk to the personnel who operate that facility and to the people incarcerated therein. It also presents risk to the individual being remanded into custody—risk that is particularly acute for individuals who are vulnerable to a serious infection under the Centers for Disease Control and Prevention (“CDC”) Guidelines. We have an obligation to minimize these

endorsed that theory, although not in the context of pretrial release, stating that no one else should be imprisoned “if it can be avoided.”¹¹⁰ The “if it can be avoided” pronouncement acknowledges that in some cases, detention perhaps cannot be avoided under all the facts, no matter the incremental additional risk that detention might impose on the community.

COVID-19 in the federal bail context puts courts in an unprecedented, quickly changing situation.¹¹¹ As some advocates argue that detaining more persons in a jail will “pose[] its own dangers to the community,”¹¹² courts can agree or disagree in an individual case, based on a richer factual record. In the end, this Article will not claim to have found any “wild facts” on its own. Nor does it claim to know precisely what James meant by that term more than 100 years ago. Instead, our working definition of “wild facts” as important ones that require energy and effort to bring to the fore leaves individual courts to find them, in their exercise of good judgment based on their experience. Courts will see many, many more motions seeking release based on COVID-19, under factual permutations that may change with the course of the pandemic and its effect on the federal jail population.

risks to the extent possible while remaining faithful to the BRA’s text and discharging our overriding obligation to protect the public.

Barr Pre-Trial Detention Memorandum, *supra* note 53, at 2.

¹¹⁰ See *United States v. Garlock*, No. 18-cr-00418-VC-1, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) (granting a convicted defendant additional time to report to serve a sentence of incarceration and stating that “[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided The chaos has already begun inside federal prisons—inmates and prison employees are starting to test positive for the virus, quarantines are being instituted, visits from outsiders have been suspended, and inmate movement is being restricted even more than usual”).

¹¹¹ Judicial decisions granting and denying COVID-19 release motions have acknowledged the unprecedented nature of the situation. See *United States v. Stephens*, No. 15-cr-95 (AJN), 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (referring to “the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic”); *United States v. Martin*, No. PWG-19-140-13, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020) (“[I]t is important to recognize the unprecedented magnitude of the COVID-19 pandemic.”); see also *supra* note 66 (noting how denial of bail by the court in *Hamilton*, based on the absence of positive-tested prisoners at Brooklyn MDC, occurred on the same day the BOP disclosed that a prisoner had tested positive there).

¹¹² Alison Siegler & Erica Zunkel, *Commentary: Don’t Let Chicago’s Federal Jail Become the Next Coronavirus Hot Spot*, CHI. TRIB. (Apr. 24, 2020), <http://www.chicagotribune.com/opinion/commentary/ct-opinion-coronavirus-jail-cook-county-mcc-20200424-zagv2nvjyzcrvknxbfasux63a-story.html> [<https://perma.cc/Q4HX-P6TX>].

CONCLUSION

Detention motions, and motions for release based on COVID-19, will always turn on their individual facts, under an individual assessment of the relevant factors under the Bail Reform Act.¹¹³ Judges will always have the benefit of the Act’s formalistic structure. But the variance of those facts from case to case, the existence of “wild facts” yet to be discovered, and the “fact skepticism” that Frank suggests all judges bring with them call for more than formalist logic. During this unprecedented time, judges can be pragmatic realists deeply conscious of their obligations under the Act and the Constitution, and deeply mindful of the wide-ranging consequences of their decisions for defendants and society during the COVID-19 pandemic.

¹¹³ See Barr Pre-Trial Detention Memorandum, *supra* note 53, at 2 (“Each case must be evaluated on its own and, where appropriate, the risks the pandemic presents should be part of your analysis, as elaborated further below.”)

