Pretrial Detention in the Time of COVID-19
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Abstract

It is hard to understate the impact of COVID-19. Yet, in many ways, the current COVID-19 crisis has simply shone a light on pre-existing flaws in the criminal justice system. Long before the first confirmed case in Seattle or elsewhere, America’s jails and prisons were particularly susceptible to contagions. These were not their only problems, though other problems from overcrowding to over policing to lack of reentry programs and more have contributed to this susceptibility. This essay focuses on one aspect of the challenges the criminal justice system faces in light of COVID-19 and beyond – that of a pretrial detention system that falls more harshly on poor and minority defendants, has swollen local jail populations and has incentivized pleas contributing in its own right to prison overcrowding.

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

INTRODUCTION

It is hard to understate the impact of COVID-19. As of April 3, 2020, the new strain of coronavirus, which causes COVID-19, has infected over one million people, leading to at over 50,000 deaths worldwide.¹ On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic.² Across the country and the world, governments have declared states of emergency and have urged citizens to distance themselves from one another, a practice now called social distancing.³ Schools, bars, restaurants, and entertainment venues are

¹ See https://www.worldometers.info/coronavirus/ (updating regularly).
closed. Non-essential workers are ordered to stay at home. Group gatherings have been prohibited. Across the globe the frightened public is told that the only way to defeat the virus is to flatten the curve of the infection by staying home in isolation.

In the United States, daily briefings from the White House COVID-19 Task Force stoke the unease: a vaccine remains an elusive and distant event; there is insufficient personal


protective equipment for care providers and insufficient ventilators and hospital beds for the infected; rates of infection and death tolls continue to rise at a dizzying pace—and even these rates are unreliably low, as access to testing remains elusive. Medical experts note that while COVID-19 can prove fatal across all age ranges, adults over 60 and people with chronic medical conditions are especially vulnerable.

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


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


13 The mortality rate for people with cardiovascular disease is 13.2%, for those with diabetes: 9.2%, for those with hypertension 8.4%, for those with chronic respiratory disease: 8%, and for
The nation’s jails and prisons carry their own heightened risk in the current health crisis. As one prison educator noted, “[i]f you think a cruise ship is a dangerous place to be during a pandemic, consider America’s jails and prisons.”¹⁴ Unlike free people, detainees in jails and prisons cannot engage in “‘social distancing’ and ‘self-quarantine’ and ‘flattening the curve’ of the epidemic—all of these things are impossible in jails and prisons, or are made worse by the way jails and prisons are operated.”¹⁵

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

Part one of this essay considers the pretrial detention system outside of the context of the current crisis. Even in the best of times this system is often punitive and fraught with bias, produces unnecessarily high rates of detention, and carries a myriad of downstream consequences both for the accused and the community at large. Part two considers the impact of COVID-19 on the pretrial detention system and raises the question of what endemic flaws this moment of crisis might reveal. Part two concludes that with or without a COVID-19 crisis, the pretrial detention system fundamentally miscalculates safety, by failing to account for risks to defendants during periods of incarceration and by pitting defendants’ interests against the very communities that depend on them. The public health crisis of COVID-19 demonstrates in very real terms the interconnected nature of a defendant’s and the community’s safety interests. This connection, however, is not unique to the current public health crisis; it has, in fact, always existed even as it remained underexplored.

I. PRETRIAL DETENTION IN THE BEST OF TIMES

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¹⁵ Jennifer Gonnerman, How Prisons and Jails can Respond to the Coronavirus, THE NEW YORKER, (March 14, 2020), https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus (quoting Homer Venters former Chief Medical Officer of Rikers). Venters also noted “it’s going to be very, very difficult to deliver a standard of care either in the detection or the treatment of people who are behind bars.” Id.
Even during the best of times, the nation’s pretrial detention system has been the subject of repeated criticism and reform movements.\(^{16}\) This part explores the pretrial detention system, briefly laying out an overview of the system before turning to the concerns that have plagued it. In the end, the pretrial detention system is a deeply flawed one. The systematic problems described here and elsewhere predate COVID-19, though COVID-19 has certainly exacerbated them. Even as it has placed increased stress on the pretrial detention system, the crisis has also brought to light the array of actors that make up the pretrial detention system and the power that later actors have to bring about responsive pretrial detention reform.

A. How the Pretrial Detention System Works

In describing the pretrial detention system, there is a temptation to imagine it as a singular system or moment (it would certainly be easier to write about if it were). In fact, it is a system that is driven by many decision-makers. Legislators, police, prosecutors, and judges constitute early decision-makers within this system. Legislators determine which behaviors are criminalized, and which defendants are eligible for pretrial release. Police arrest and detain suspects. Prosecutors make charging decisions that may affect detention. Judicial pretrial detention decisions at initial appearance and/or arraignment. Once a judicial detention decision is made, county jail officials may decide to release or detain a defendant based on a myriad of factors including the overall jail populations, the defendant’s medical needs and the scarcity of county resources. Finally, state or federal decision-makers may influence pretrial detention decisions through policies designed to reduce jail populations or prioritize particular types of detainees. Jail and prison administrators, as well as state and federal legislative and executive actors, make up the later decision-makers in the pretrial detention system.

Regardless of the actor, pretrial detention decisions are, at their core, an act of predictive balancing. Each actor attempts to predict the accused’s future behavior and then attempts weigh the defendant’s liberty interests against the risk that the defendant’s predicted future behavior poses to identified collective interests. These collective interests, depending on the actor weighing them, include the efficient administration of the justice system (facilitated by a defendant’s appearance at future court proceedings), community safety and the financial burdens of detention. In contemplating any systematic critique or reform in the face of COVID-19 or beyond recognizing these different actors, their motivations and their power to effectuate reform is critical.

1. Early Actors and Pretrial Detention

While not constitutionally guaranteed\(^ {17}\), early actors – particularly legislators and the judiciary – have long treated pretrial detention as a component of the American criminal justice system.\(^ {18}\) The Judiciary Act of 1789 stated “[b]ail shall be admitted except where the punishment

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\(^ {17}\) The Constitution references pretrial detention only once, prohibiting excessive bail in the Eighth Amendment. Despite its constitutional absence, other components of due process such as the presumption of innocence and the burden of proof implicate and promote pretrial release.

\(^ {18}\) Later actors likely engage in the same calculus though for different reasons, looking to effectuate reform to reduce jail overcrowding and to conserve resources.
may be death.” Denying bail in non-capital cases was historically seen as a denial of the presumption of innocence. The original purpose of bail was to ensure the defendant’s presence in court at future proceedings. Time, and bail reform, expanded that purpose to focus on the nature of the offense alleged and, later, on whether or not the defendant posed a risk to the community if released.

These entwined considerations – flight risk and future dangerousness – make up the modern pretrial release calculation for early actors – particularly judicial ones. Outside of defendants that are statutorily excluded by the legislature, pretrial release is the default and courts may only impose conditions on the defendant during the pretrial period upon a finding that the condition is necessary to mitigate the risk identified by the State.

In making this determination, courts engage in two important calculations. First, courts weigh the defendant’s liberty interests against the State’s claim of risk of either flight or future danger if the defendant is permitted to remain free. Second, courts rely on predictive proxies in an effort to determine the probability that, if released, the defendant will in fact pose a risk and to determine what conditions might mitigate that risk. For this second calculation, courts increasingly rely on pretrial assessment tools or PSAs to generate a risk score. These PSAs utilize algorithms to determine the probability that a defendant will either fail to appear and/or will pose a danger if released. Like their human counterparts, PSA determinations are predictive and courts...

19 See Judicial Act of 1789.
21 See Ex Parte Milburn, 34 U.S. 704 (1835).
24 See, e.g., 18 U.S.C. § 3142 (d) or (f) (which either prohibit release or flip the presumption that release is appropriate based on the defendant’s charge or status) and United States v. Salerno, 481 U.S. 739, 755 (1987) (noting that a statute may preclude consideration of bail for some defendants).
25 See Stack v. Bell, 342 U.S. 1 (1951); Salerno, 481 U.S. at 746-7; U.S. v. King, 849 F.2d 485 (1988) (overturning a denial of bail because the judge failed to make written findings to support his conclusion that pretrial detention was necessary).
26 These include the nature of the offense the defendant allegedly committed, the defendant’s criminal history and his ties to the community as evidenced by his work history or residence.
27 Gouldin, supra note 23.
29 Id. Such tools were originally touted as decreasing the influence of bias in pretrial decision making, yet, as will be discussed next, recent critiques of such tools suggest that they promote the very bias they were implemented to eliminate.
are always left, in the end, to balance the defendant’s interests against the predicted risks he poses pretrial. The process is imperfect at best, catastrophic at worst. In the next section, explores the problems inherent in the system.

For their part, executive actors such as prosecutors and police officers affect pretrial detention decisions in their own right. The police make everyday decisions to adopt “cite and release” or non-policing policies with regard to particular offenses, either collectively or as individual actors.\(^{30}\) Likewise, prosecutors make daily charging decisions. Given that some offenses are statutorily excluded from pretrial release, the decision of what charge will be brought against a defendant may short circuit any later actor’s, including a judge’s, decision to release. Prosecutors may also choose not pursue charges at all or to pursue an alternative disposition in the face of an arrest.\(^{31}\) For each of these early actors, community safety likely plays an outsized role in their decision-making processes – with the collected evidence of wrongdoing in the instant case driving those concerns.\(^{32}\) This, however, is not to say that interests in efficient administration of the process would not motivate either the police or prosecutor in their decision-making. For both actors, their discretionary decisions may drive pretrial detention.

It is also worth noting that each early actor may not engage in decision-making equally. Judges may defer to police and prosecutors in assessing risk. This may occur explicitly in the form of hearings that emphasize evidence in support of the charge and offer little opportunity for a defendant to challenge such evidence, or in the form of judges allowing prosecutors or police to set de facto conditions of release through recommendations. Or it may occur implicitly as the relationship between pretrial hearing judges and law enforcement fosters both a relationship and reliance that may give such actors an outsized influence over judicial decision makers.

2. Later Actors and Pretrial Detention

While these early actors play a vital and often decisive role in the pretrial detention system, later actors – from jail and prison officials to state and national executive actors – can also affect pretrial detention. At a local level, jail officials often enjoy the power to consider what property will suffice as collateral for bail and to make administrative decisions regarding release or conditions, either on an individual basis in cases such as medical bonds, admission to treatment or evaluation facilities, or work release, or on a more systematic basis in the case of overcrowding.

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\(^{30}\) A cite and release policy allows a police officer to issue a citation or ticket to an offender in lieu of arresting him or her. Similarly, non-policing policies allow police departments to simply deprioritize enforcement of some minor offenses. Even if the police are aware that the offense occurred they either will decline to investigate it, or in the alternative decline to arrest the suspected offender. Both policies tend to be limited in scope – often effecting only misdemeanors and nonviolent offenses – and both reduce pretrial detention by never placing a suspect within the jail system. A recent example of this was the decision in New York City to not arrest those suspected of simple possession of marijuana.

\(^{31}\) Such alternative dispositions might include a diversion or deferral whereby upon satisfaction of certain conditions charges would be dropped or dismissed or entry into a specialized court such as drug court or mental health court which similarly allow for dismissal of charges after conditions are satisfied.

\(^{32}\) Courts may also consider the weight of the evidence against a defendant in making a bail decision. See Fed. R. Crim Pro. 46.
alleviation. State and federal prison officials often exercise similar power that, while not pretrial release per se, can affect pretrial detention by reducing prison populations that may in turn facilitate transfer from local facilities to prisons, opening space for pretrial detainees in jails. Unlike their early actor counterparts, these later actors may be influenced by factors beyond flight risk and community safety. Fiscal concerns and the threat of litigation over inhumane detention conditions may drive such decisions.

Finally, state and federal executives have the power to order the adoption of alternative policing or charging decisions within their jurisdictions, reconsideration of pretrial conditions, and alteration of pretrial release policies. These actions by Governors, Attorneys General and the President are admittedly rare – with centralized actors often reserving such decisions for local actors – but the powers do exist. Like their local counterparts, these actors are often motivated by fiscal concerns, as well as concerns over pretrial flight risk and public safety.

In considering the endemic problems in the pretrial release system, the response of the system during the COVID-19 crisis and solutions going forward, different actors and the motivations of those actors within the system manifest different opportunities and challenges around potential reforms.

B. The Trouble with the Pretrial Detention System

The pretrial detention process should skew toward release in the majority of cases. Early actors, driven by constitutional and statutory mandates should favor release. Later actors should have a financial incentive to minimize pretrial detention, both in terms of the number of detainees and the length of detention. Release decisions on any level should be blind to race, gender, and socio-economic class.

In reality, there is a disconnect with the articulated goals of the system and the rates of pretrial detention. Pretrial detainees make up a disproportionate segment of jail populations and disproportionately effects minority and poor defendants. High rates of pretrial detention contribute to jail and prison overcrowding and tax county and community resources that are often stretched perilously thin already. This section explores the problems with the pretrial detention system that predate the COVID-19 crisis.

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33 The VERA Institute estimates that nationwide 62% of inmates in jails are pretrial detainees with a staggering $22.2 billion spent annually to detain. Vera Institution of Justice at: https://www.vera.org/ending-mass-incarceration/reducing-the-use-of-jails/bail. See also Shima Baradant and Frank L. McIntyre, Predicting Violence, 90 TEX. L. REV. 497, 551 (2012).


35 See Alexi Jones, Does Our County Really Need a Bigger Jail?, Prison Policy Initiative, May, 2019, at: https://www.prisonpolicy.org/reports/jailexpansion.html; Natalie Ortiz, Pretrial Population and Costs Out County Jails at a Crossroads, National Association of Counties, Jun. 29, 2015, at: https://www.naco.org/articles/pretrial-population-and-costs-put-county-jails-crossroads-0; Margaret Elizabeth Spark, Bailing on Bail: The Unconstitutionality of Fixed,
1. Bias

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

Judicial bias in pretrial decision making has long been the subject of critique. Early pretrial detention reformers argued that judicial discretion increased detention rates among poor and minority because judges often failed to consider the ability of poor defendants to make bail and often set unnecessary conditions of release that marginal defendants could not meet. These early reformers argued courts could reduce bias by analyzing a series of known factors such as criminal history and community ties that could predict with reasonable accuracy the risk that any individual would violate the terms of his release. In this, unnecessary conditions could be avoided and release rates would increase. Despite the wide adoption of these proposed reforms, rates of pretrial detention across the nation both continued to rise and continue to disproportionately effect poor and minority population.

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

Despite the promise of accurate and neutral findings, risk assessment tools quickly displayed the same bias as the system they sought to improve. There are different possible explanations for these results. The PSAs may carry their own embedded biases. They may fail to properly prioritize community perception of the alleged risk any defendant poses or the value a community places on release. They may be susceptible to user bias through inconsistent

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

37 Id.

38 Id.

39 See Vera Institute Information, https://www.vera.org/about.


41 See Mayson, Bias in, Bias Out, supra note 28, at 494-5.

42 See Mayson, Bias In, Bias Out, supra note 28; Stevenson, supra note 28, at 344; Mayson, Dangerous Defendants, supra note 28, at 509.

43 See Mayson, Bias In, Bias Out, supra note 28; Stevenson, supra note 28, at 344; Mayson, Dangerous Defendants, supra note 28, at 509.

44 See Carroll, supra note 23 and Eaglin, supra note 28, at 61.
interpretation of risk assessment scores.\textsuperscript{45} Coupled with the lack of information about how such scores were generated, risk assessment tools have done little to mitigate the critique that pretrial detention processes suffer from inherent bias.\textsuperscript{46} In the end, despite multiple reform movements, pretrial detention remains more likely for poor and minority defendants.

2. The Due Process Problems with Pretrial Hearings

In addition to concerns about bias, the pretrial detention system also implicates the Due Process Clause. In the context of pretrial detention, the Supreme Court has defined the process a defendant is due during pretrial detention hearings as limited to a determination that a condition of release or detention promotes the State’s articulated interest.\textsuperscript{47} If a court makes a finding at the hearing that a defendant poses a risk of flight or presents a danger to the community if released, then the court may set conditions necessary to mitigate that risk without running afoul of the Due Process Clause.\textsuperscript{48}

The problem with this due process analysis is multifaceted. First, pretrial detention hearings often lack many of robust procedural safeguards of a trial.\textsuperscript{49} This is not to say the defendant enjoys no procedural protections—he is innocent and his freedom pre-adjudication is presumed to be the norm\textsuperscript{50}—but it is to say that these protections are significantly curtailed at the pretrial detention stage.\textsuperscript{51} The absence of such procedural safeguards raises significant concerns about the adequacy of the process associated with such hearings. Historically, such concerns have been dismissed with the assurance that speedy trial clocks limited periods of pretrial detention. In reality, modern pretrial detention periods often extend to nearly a year—and sometimes are longer than or as long as any sentence imposed.

Second, and in contrast to pretrial detention periods, pretrial detention proceedings themselves tend to be remarkably short—often less than two minutes in length—and may occur prior to appointment of counsel for a defendant.\textsuperscript{52} The brevity of these hearings raises significant

\textsuperscript{45} See Stevenson, supra note 28, at 344.
\textsuperscript{46} Eaglin, supra note 28, at 61 and Mayson, Bias In, Bias Out, supra note 28.
\textsuperscript{48} Id.
\textsuperscript{50} See Bell v. Wolfish, 441 U.S. 520, 524 (1979) (holding that a person should be detained pretrial “only because no other less drastic means can reasonably assure his presence at trial.”) and 18 U.S.C. § 3142 (j).
\textsuperscript{51} Even the presumption of release is not a constitutionally absolute one. Legislative actors (or executive actors in some cases) may designate some offenses or some defendants as ineligible for bail or other types of pretrial release. See e.g. 18 U.S.C. §§ 3142 (d) or (f) (which either prohibit release or flip the presumption that release is appropriate based on the defendant’s charge or status) and United States v. Salerno, 481 U.S. 739, 755 (1987) (noting that a statute may preclude consideration of bail for some defendants).
\textsuperscript{52} See EMILY Bazelon, CHARGED 37 (2019); PROGRESSIVE MD. & COLOR OF CHANGE, PRINCE GEORGE’S COUNTY: A STUDY OF BAIL 4, 13 (2018).
questions regarding the rigor of the court’s consideration of the necessary prerequisites to imposing detention or other pretrial conditions.

Third, defendants often operate at a distinct disadvantage in pretrial proceedings. Prior to making a charging decision, the State, through police investigation, has had the opportunity to amass evidence that a newly charged defendant has not. For cases where bail is precluded, the prosecutor literally controls the bail proceedings through his charging discretion. Once a pretrial detention decision is made, federal and state procedural rules often preclude reconsideration of detention or the conditions of release absent a demonstration of a change in circumstances not apparent at the time of the original determination. In short, pretrial detention hearings are often stacked against the defendant, and whatever procedural protections exist tend to offer little shelter for defendants.

Finally, pretrial detention often occurs not because of a genuine risk of flight or future dangerousness, but because a defendant is unable to satisfy unrealistic conditions of release. In making a finding that some condition will sufficiently mitigate the risk the defendant poses, courts may permit release pretrial upon satisfaction of the conditions. With little consideration of the defendant’s ability to meet the condition, however, a defendant may remain detained pretrial. In this, the defendant’s pretrial status (detention) does not reflect the court’s determination that he should be released under some condition, but reflects the defendant’s inability to meet imposed conditions often as a result of lack of resources – monetary or otherwise. In other words, a defendant may be held pretrial not because he poses some insurmountable risk, but because he is too poor to meet the conditions of his release or because resources such as treatment beds or secure housing do not exist for him. {ADD CITES/FOOTNOTES TO YOUR FLORIDA ARTICLE?}

3. The downstream consequences of pretrial detention

Finally, pretrial detention carries significant downstream consequences for defendants and their communities, rendering such detention effectively punitive. Even in the best of times, the line between pretrial detention and punishment has always been a murky one. While the Supreme Court has repeatedly drawn a boundary between detention that punishes and that which merely promotes

https://static.colorofchange.org/static/v3/pg_report.pdf?akid=14740.3112990.hZo0eM&rd=1&t=8 (describing bail hearings in Prince George's County as quick affairs with “most lasting no more than five minutes, and some concluding within one minute”); Douglas L. Colbert, et al., Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail, 23 CARDOZO L. REV. 1719, 1755 (2002) (observing that pretrial detention hearings in Baltimore City with counsel lasted “on average two minutes and thirty-seven seconds versus one minute and forty-seven seconds without counsel”).

53 See also BAZELON, supra note Error! Bookmark not defined., at 37.

54 See e.g., See 18 U.S.C. § 3142(f) (providing a judge may reopen a pretrial detention question only when there is new evidence that is material to the decision of whether detention is appropriate). Courts have found that the statute limits a judge’s discretion to reopen bail issues. See, e.g., United States v. Rodriguez-Adorno, 606 F. Supp. 2d 232 (D.P.R. 2009); United States v. Cannon, 711 F. Supp. 602 (E.D. Va. 2010). Admittedly, COVID-19 might constitute such a new condition.
compelling State interests prior to trial,\textsuperscript{55} the downstream consequences of even brief periods of detention prior to conviction are well-documented and have fueled waves of bail reform.\textsuperscript{56}

In custody prior to trial, the accused not only suffer the “ordinary” indignities of jail, but they also often lose wages, homes, child custody, and the opportunity to meaningfully assist in their own defense.\textsuperscript{57} Defendants detained prior to trial are less likely to receive mental health and addiction treatment and more likely to plead guilty to their charges.\textsuperscript{58} These downstream consequences of pretrial detention affect not only the defendant but their community. The community a defendant leaves behind during pretrial detention not only loses one of its own, but loses all the benefits of that defendant’s presence. In custody, defendant’s do not earn a wage to support their families or pay their rent. They are absentee parents, partners and mentors. Whatever investment they have made in their community prior to their detention they cannot continue, or must continue in a more limited way, while detained. Pretrial detention serves to disrupt and destroy the very ties between the defendant and the community that might in the long run protect and promote community safety. In this, what the Court declines to refer to as punishment may nonetheless feel punitive to those who suffer it.\textsuperscript{59}

II. COVID-19 AND PRETRIAL DETENTION

Whatever failings the pretrial detention system suffers in the best of times, COVID-19 further complicates things. Detention in the face of the epidemic skews the calculation of the liberty interests at stake and alters incentives for various pretrial actors. In the midst of a public health crisis, pretrial detention determinations raise more than a possibility of a finite period of

\textsuperscript{55} See United States v. Salerno, 481 U.S. 739, 748 (1987) (“We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.”); Bell v. Wolfish, 441 U.S. 520, 539 (1979) (holding that pretrial detention is not punishment so long as the restriction on liberty is rationally connected to a legitimate government purpose) and Kingsley v. Hendrickson, 135 S. Ct. 2466, 2470 (2015), (“if the condition of [pretrial] confinement being challenged ‘is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment.’”).

\textsuperscript{56} See SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 82-91 (2018); Yang, supra note Error! Bookmark not defined., at 1416-38; Heaton, et al., supra note Error! Bookmark not defined., at 713-14; Simonson, supra note Error! Bookmark not defined., at 599-606 (describing the bail fund movement that was formed in response to downstream consequences of pretrial detention on defendants and their communities).


\textsuperscript{58} See Yang, supra note Error! Bookmark not defined. and Heaton, et al. supra note Error! Bookmark not defined..

confinement and indignity – they determine if a person will be exposed to a known fatal contagion as a result of an accusation. Beyond this, closures of courts in the wake of the public health crisis raise the specter that speedy trial rights will no longer serve (if they ever did) as a backstop to indefinite periods of pretrial detention. These complications suggest that an alternative calculation of pretrial detention is necessary in the face of this crisis and beyond – a calculation that recognizes that pretrial release may in fact promote public safety.

Even before the current health crisis, the conditions of our nation’s jails and prisons rendered their occupants susceptible to contagions in ways that members of the free world are not, making them “ticking time bombs” for the spread of infectious disease. Jails and prisons are infamous for overcrowding, lack of medical care, close and shared quarters, poor air

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63 See e.g., U.S. Dep’t of Justice Office of the Inspector General, Review of the Federal Bureau of Prisons’ Medical Staffing Challenges (Mar. 2016), https://oig.justice.gov/reports/2016/e1602.pdf (finding that the BOP experienced chronic medical staff shortages and failed to take adequate measures to address them, leading to problems meeting the medical needs of prisoners, requiring the use of outside hospitals, and endangering the safety and security of institutions); U.S. Dep’t of Justice Office of the Inspector General, The Impact of an Aging Inmate Population on the Federal Bureau of Prisons (Rev. Feb. 2016), https://oig.justice.gov/reports/2015/e1505.pdf (finding that BOP facilities and services, including medical services, were inadequate to meet the needs of an aging prison population leading to delays in medical treatment for prisoners with acute and chronic heart and neurological conditions, who wait an average of 114 days to see medical specialists.). State prison facilities do not fare better, see e.g. United States Dep’t of Justice Civil Rights Division, Investigation of Alabama State Prison For Men (April 2, 2019) at: https://www.justice.gov/opa/press-release/file/1150276/download (noting failure to provide adequate health care among the many unconstitutional and inhumane conditions in Alabama’s state prison system).

64 See Gonnerman, supra note 15 and Roy, supra note Error! Bookmark not defined.. Prisoner are housed in small cells and must share bathrooms, laundry and mean facilities. Toilets in cells usually have no lids and often double as sinks. See Motion and Memorandum in Support of Pretrial Release and in Support of Community Efforts to Limit the Spread of COVID-19, United States District Court, Western District of Washington at Seattle, on file with author (describing typical jail settings and facilities).
circulation, 65 and chronic understaffing. 66 The treatment of hand sanitizer as contraband, 67 high rates of older and medically compromised individuals, 68 and requiring marginalized inmates to pay for medical care and personal hygiene supplies 69 exacerbates the problem. In the face of the current health care crisis these circumstances combine to create a high-risk roulette in which detainees, unable to practice best preventive guidelines, await infection and, for some, death.

In light of the COVID-19 crisis, practitioners, activists and scholars across the nation have called for detention reform on multiple levels. 70 The response has been mixed. Some jurisdictions

65 Id.
67 See Dr. Lipi Roy, Infections And Incarceration: Why Jails And Prisons Need To Prepare For COVID-19 Now, FORBES, (March 11, 2020), https://www.forbes.com/sites/lipiroy/2020/03/11/infections-and-incarceration-why-jails-and-prisons-need-to-prepare-for-covid-19-stat/#1fa6b08e49f3 (“Hand sanitizers, for instance, are often considered contraband . . . . Other harsh realities of jail life that prevent proper application of CDC recommendations include limited access to toilet paper and paper towels; and handcuffs prohibit the use of hands to cover one’s mouth.”).

have adopted policies releasing those close to the completion of their sentences, those held as a result of administrative probation or parole violations (such a failure to make curfew, failure to check in with a parole or probation officer, or failure to pay a fine or fee), and non-violent and/or misdemeanor pretrial detainees.⁷¹ Others have adopted “cite and release” or non-policing policies with regard to non-violent misdemeanors.⁷² Still others have offered alternative forms of detention,

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including release to a family member, house arrest and/or electronic home monitoring (EHM).\textsuperscript{73} District attorneys and state courts have also weighed in on the debate, some supporting these temporary reforms hailing them as an appropriate balance between law enforcement and public health in light of the COVID-19 epidemic.\textsuperscript{74} Others, however, have been less supportive—urging rigorous arrest policies,\textsuperscript{75} seeking continuances in pending criminal cases while opposing pretrial release,\textsuperscript{76} and advocating that the homeless and the addicted should be detained as they are less able to comply with the CDC handwashing and social distancing guidelines.\textsuperscript{77}

As the number of confirmed cases and deaths in the jail and prison systems grow, the scope of the crisis within the criminal justice system has become increasingly apparent. Pretrial detainees already make up a disproportionate segment of jail populations.\textsuperscript{78} This burden will only grow as

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\textsuperscript{73} See supra note Error! Bookmark not defined..  
\textsuperscript{78} The VERA Institute estimates that nationwide 62% of inmates in jails are pretrial detainees with a staggering $22.2 billion spent annually to detain. Vera Institution of Justice at: https://www.vera.org/ending-mass-incarceration/reducing-the-use-of-jails/bail. See also Shima Baradant and Frank L. McIntyre, \textit{Predicting Violence}, 90 TEx. L. \textit{Rev}. 497, 551 (2012).
State prison officials halt intake, leaving prisoners to the care of the county systems. In this, the COVID-19 crisis highlights the pretrial detention system’s failure to properly calculate the competing interests at stake in detention determinations. Specifically pretrial detention decisionmakers fundamentally miscalculate safety concerns in two distinct ways. First, they fail to consider the hazard of incarceration to the defendant himself. Setting aside for a moment the above described downstream consequences of pretrial detention that ordinarily exist (don’t worry I’ll pick them up in a minute), the high risk of infection in a closed and close-contact system like a jail during the current crisis heightens the defendant’s substantive due process claim to be safe and receive adequate medical care. Second, the pretrial detention system bifurcates the defendant’s and the community’s interest. This is a mistake in ordinary times as the defendant is tied to a community and the community in turn may suffer in the defendant’s absence. In the context of the current crisis, this bifurcation may have catastrophic implications, as community interests in preventing the spread of COVID-19 counsel toward release rather than detention. While both of these miscalculations are not unique to the current pandemic, they are exacerbated by it.

A. Substantive Due Process Interests in Crisis and Beyond

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

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

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80 Before turning to a more in-depth consideration of these concerns, it is worth noting that they are not the only concerns that arise out of the COVID-19 crisis in the context of the criminal justice system. From a health and safety perspective, anyone connected to the criminal justice system from the accused to those who work within the system, COVID-19 poses a real public health threat. See Joseph Stern, American Courts’ Failure to Respond to the Coronavirus Could be Catastrophic, SLATE, March 16, 2020, at: https://slate.com/news-and-politics/2020/03/courts-coronavirus-spread.html. From a constitutional perspective, detainees suffer denial of speedy trial and jury rights, a lack of access to counsel now excluded from jails and the risk of cruel and unusual conditions of punishment if detained following conviction. This Essay will touch on some of these concerns briefly, though without the full attention they deserve. This is not to minimize or ignore them, but rather to focus on one topic at a time. The road to reform is a long one. This is Essay is a single step.
Bail Clause of the Eighth Amendment by creating too great a health or safety risk to a pretrial detainee.\textsuperscript{81}

The Court has, however, provided guidance in other contexts. The Court has employed the cruel and unusual punishment clause (the other clause in the Eighth Amendment) to prohibit “barbarous punishment.”\textsuperscript{82} This includes prohibiting prison officials from failing to provide medical care,\textsuperscript{83} behaving with deliberate indifference to the medical needs of inmates,\textsuperscript{84} and knowingly exposing inmates to serious and communicable diseases.\textsuperscript{85} At their core, these cases recognize that even during periods of incarceration, the detainee maintains substantive due process interests in safety from physical harm.\textsuperscript{86}

While this may not obligate the State to provide optimal medical care, the State may not ignore the medical needs of detainees, particularly critical medical protection.\textsuperscript{87} In \textit{Brown v. Plata}, the Court explained that a prisoner “may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”\textsuperscript{88} Thus, while punishment may infringe on an inmate’s personal liberty, the infringement must not include exposure to contagions or denial of medical care.

While these cases all involve punishment as opposed to pretrial detention, it would seem odd that a detainee should have more rights after conviction than before. Rather it seems clear, that a pretrial detainee, like post-conviction detainees, has a liberty interest in physical safety during periods of pretrial detention. This interest is particularly salient during this period of crisis, but it exists at all times and is clearly relevant to considerations of both the defendant’s individual liberty and the communal stake in safety.

And yet, pretrial detention decisionmakers appear to fail to take the potential detainee’s interests in safety into account when calculating pretrial release or describing community safety concerns. Instead, in assessing safety concerns, prosecutors and courts tend to speak of the community interest in the defendant’s detention rather than the threat a defendant may face if detained. As will be discussed in a moment, this draws a false division between a detainee’s and

\textsuperscript{81} The Court has tied the analysis of “excessiveness” to the Due Process Clause, finding that bail (or more accurately the lack of bail) is neither excessive nor punitive so long as the decision to detain is narrowly tailored to achieve an articulated and compelling state interest. \textit{Kingsley v. Hendrickson}, 135 S. Ct. 2466, 2470 (2015)(“ if the condition of confinement being challenged ‘is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment.’”); \textit{Salerno}, 481 U.S. at 755 and \textit{Bell}, 441 U.S. at 535 (holding that pretrial detention may not be punitive). In \textit{Bell} the Court noted that some level of overcrowding or intrusive searches might violated a pretrial detainees liberty interests. Bell, 441 U.S. at 542.

\textsuperscript{82} \textit{See} \textit{Estelle v. Gamble}, 429 U.S. 97, 102 (1976).

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{See Miranda v. Cty. of Lake}, 900 F.3d 335, 352 (7th Cir. 2018). While this may not obligate the State to provide optimal medical care, the State may not ignore the medical needs of detainees, particularly critical medical protection.


\textsuperscript{87} \textit{Id.}

the community’s interest. Beyond this, the Court’s decisions with regard to punishment suggest at least a shared constitutional concern over the detainee’s safety while in custody and the community’s interest. Even if one does not believe this shared concern exists during ordinary times, the threat of COVID-19 counsels toward changes in the calculus of safety concerns to include a defendant’s interests, both because the threat of infection inherent in detention is high and because the community has a particular interest in reducing the rate of infection among all populations. For both early and late pretrial decisionmakers, public safety concerns and the financial implications of closed courts, prisons declining transfers from local jails, infection risk for inmates and jail staff, and rising costs of medical care all counsel towards a reconsideration of the risks a defendant’s release poses.

Certainly, those held as flight risks as opposed to those considered unsafe should be eligible for release, as concern that a defendant will not return to a future court date cannot and should not outweigh the detainee’s liberty interest in remaining alive and healthy. Further, the fact that COVID-19 has not yet overwhelmed jails cannot and should not be a justification for further detention, particularly as new cases in jails appear daily. As the Court has noted in the context of the Eighth Amendment’s prohibition against cruel and unusual punishment, detention facilities must accommodate the basic human need of safety. It would seem an odd application of this right to deny a person the opportunity to avoid infection by requiring that they remain in jail until already exposed to the harm.

B. Considering Safety and Communities in Crisis

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

90 See e.g., United States v. Scarpa, 815 F. Supp. 88 (E.D.N.Y. 1993) (holding that a defendant with AIDS charged with murder should be released on bail given the “unacceptably high risk of infection and death on a daily basis inside the MCC”); United States v. Adams, No. 6:19-mj-00087-MK, 2019 WL 3037042 (D. Or. July 10, 2019) (holding that a defendant charged with violation of the Mann Act and possession of child pornography who suffered from diabetes, heart conditions and open sores should be released on home detention because of his medical conditions); United States v. Johnston, No. 17-00046 (RMM) 2017 WL 4277140 (D.D.C. Sept. 27, 2017) (holding that a defendant in need of colon surgery should be released to custody of his wife for 21 days to accommodate his medical needs); United States v. Cordero Caraballo, 185 F. Supp. 2d 143 (D.P.R. 2002) (holding that it was appropriate to release a badly wounded defendant to the custody of his relatives).


92 See Helling v. McKinney, 509 U.S. 25, 33 (1993). (holding that the cruel and unusual punishment clause requires that inmates’ basic human needs be met, including that for “reasonable safety.”)
The recognition of a detainee’s interest in safety also squarely raises the questions of how “community safety” is calculated, both in terms of which communities count for this calculation and, more fundamentally, why a defendant’s interests are separated from the community’s in pretrial decisionmaking. These are linked inquiries and they are inquiries made simultaneously more plain and more complex in the context of COVID-19.

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

Beyond this, the current crisis highlights the false dichotomy promoted by the pretrial detention system between the defendant’s liberty interests and the community’s safety interests. When pretrial decisionmakers consider public safety concerns, they tend to speak in terms of the public as one body and the defendant as another—as if a defendant lives in complete isolation without a community or family of his own. The “community” requires protection from the defendant – his past criminal record, or his lack of resources or a home, counseling toward some lurking future danger from which the court must insulate the community. With this perspective, pretrial decisionmakers detain defendants or subject them to conditions of release that will assure a presumably anxious public that dangerous defendants will be watched and their future wrongdoing checked.

This calculation, however, makes assumptions about the community itself that often fail to take to account the community’s own perceptions of the risk the defendant poses or the hardship that the loss of the defendant may produce in the life of those around him. In fact, the community interest in safety is often not separate from the defendant’s, but entwined. This is not to say that in every case the community is better off when a defendant is released, or that every member of the community may benefit or suffer in the same ways when a defendant is detained, but it is to say that separating defendant’s and a community’s interest may fail to properly appreciate the complex dynamics of “community safety.”

The COVID-19 crisis heightens the potential harm of detention and highlights the importance of calculating community safety in terms that take the defendant into account – not only as a matter of the defendant’s safety but as a matter of the community’s. The current public health crisis raises the hard question of whether detaining a defendant for any period creates so significant a communal risk that community safety counsels toward release in all but extreme cases. This risk presents in multiple scenarios. A detained defendant may never come home and

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93 Jocelyn Simonson has written of this in the context of trials, I think it is equally present in pretrial detention consideration. See Jocelyn Simonson, The Place of “the People” in Criminal Procedure, 119 Columbia L. Rev. 249 (2019).
95 Id.
his community may suffer the long-term effects of his permanent absence. Or, if left to linger in a highly susceptible jail facility, he may bring the contagion back to the community, creating a new infection source. Or, an outbreak in a jail will send sick and dying detainees to already overtaxed hospitals, creating further resource scarcity in an already overburdened system. In any of these scenarios, pretrial release becomes a means of preserving not just the defendant’s health and safety but the community’s. Likewise, fiscal concerns may counsel toward release as a means to reduce overcrowding not only in jails, but in medical facilities.

Despite these claims, one response might be for courts to decline to release any defendant once detained. Indeed, this argument has been floated by state prosecutors and police as an appropriate response to COVID-19, and by the Department of Justice as a necessary component of the current state of emergency. Other pretrial detention actors have opted to lock inmates in place. On April 1, the Federal Bureau of Prisons locked inmates in their cells for two weeks in hopes of halting or slowing the spread of COVID-19 in an already compromised system. Some local actors have followed suit, declining to release pretrial detainees citing public safety concerns.

On some level there is an internal logic to declining to release. If you fear that the virus will spread rapidly in jails and may be undetectable in some of those infected, detaining all persons indefinitely will effectively insulate the remaining population from any risk of infection as a result of any period of detention. This logic is a cold one, however. It is one that ignores the Court’s own doctrine on pretrial release—a doctrine that presumes freedom as a default and detention as a last resort. It is a logic that runs contrary to fundamental constitutional principles that the accused do not forfeit all rights in the face of arrest, detention or even a pandemic and the fear it generates.

Taken to its extent, it is a logic that would dictate that a defendant should continue to be held even after completing a sentence. If that feels unsustainable as a matter of policy or humanity or constitutionality under the Eighth Amendment (and, spoiler alert, it should), then it should feel equally if not more unsustainable in the context of pretrial detention, in which a defendant has not even been convicted. It is a logic that defies humanity and makes none of us safe. Even those


already exposed to the virus are less likely to infect others if they self-isolate rather remain incarcerated in crowded and unsanitary conditions.

It is a logic that transforms any possible period of detention into a death sentence, both for the detainee and for those who work in our jails and prisons. Work in jails and prisons, like pretrial detention, is transformed into the most punitive of punishments as staff and detainees literally risk their lives going to work or suffering periods of detention.

It is a logic that will tax already strained medical facilities. As Governor Andrew Cuomo laments the lack of hospital beds and ventilators in the state\(^99\) and inmates at Rikers Island are offered $6 an hour to dig graves,\(^100\) the impact of mass infection in jails and prisons is starkly apparent. Given the opportunity to spread, COVID-19 will. In a closed environment like jails and prisons with no opportunity for effective social distancing, once introduced infection and mortality rates will rise. For medical facilities this translates to the introduction of hundreds of new patients into a system already overburdened. In urban centers with high infection rates, this influx of new patients is problematic despite the presence of medical facilities. In rural areas, many already suffering from hospital closures and lack of medical care, the influx of patients will have catastrophic results. Plainly put, leaving people in place to ride out the infection not only will unnecessarily deprive others of access to needed medical care, but it is a recipe to produce mass mortality.

To be sure, questions about pretrial release in the face of COVID-19 raises broader logistical questions. Not all pretrial detainees are the same – some pose different levels of risk in terms of safety or flight, and some have few resources that might ensure their own safety upon release. These differences, however, can be addressed in terms of both the release decisions themselves and conditions of release. Jurisdictions can and have limited release to those accused of non-violent offenses and have placed conditions on releases including home monitoring, curfew requirements or maintaining residence in a particular jurisdiction.

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

A system that relies on detention, whether indefinite and lawless detention in this time of crisis or finite detention beyond, is destined to fail. A continued system that imagines an all-or-nothing proposition in which the most vulnerable among us must either be detained pretrial or be released without support and in which the interest of our community is diametrically opposed to


\(^{100}\) See Ryan Grim, Rikers Island Inmates Offered $6 an Hour to Dig Mass Graves, THE INTERCEPT, March 31, 2020, at: https://theintercept.com/2020/03/31/rikers-island-coronavirus-mass-graves/
the accused’s is likewise unsustainable and cruel. In the face of this crisis and beyond we should recognize what is surely and fundamentally true: a defendant is part of the very community pretrial decisionmakers seek to preserve and protect. The borders of that community may shift and change, but what does not change is the reality that a defendant’s detention will create a void in that community that may well value his presence and his very life. This is true even as we face the risk that some who are released may be infected. And it is true even as we face the risk that released defendants may engage in illegal behavior.

CONCLUSION

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

The current COVID-19 crisis did not break the pretrial detention system. The system has long suffered all the cracks and deterioration of a system built on inequity and injustice. The crisis, however, highlights the failings of the system in new ways. The overcrowding in jails that makes the spread of COVID-19 so likely highlights how many individuals – studies estimate 40% or higher – are held in jails not because they present a true risk but because they are poor, are unable to make bail or pay for a condition of release, or simply have nowhere else to go. These are people who don’t have the resources to meet the conditions set on their freedom.

The crisis also sends a sharp reminder that pretrial detainees are members of the very community the pretrial detention system claims to protect. They are men and women whose everyday lives and interests are entwined with a myriad of community actors who suffer a loss and are rendered less safe as a result of pretrial detention. In the time of this crisis, the pretrial detention population also represents a further and unnecessary drain on community resources – particularly already scarce medical resources. In each of these instances, the crisis counsels toward a reconsideration of the current system.

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

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