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RETHINKING CONSTITUTIONALLY IMPERMISSIBLE PUNISHMENT

Nadia Banteka & Erika Nyborg-Burch***

INTRODUCTION

Prisons and jails endanger the health and wellbeing of incarcerated individuals and their communities. These facilities are often overcrowded and unsanitary,¹ with limited access to medical care,² and no basic sanitation and personal hygiene products unless a person can pay the spiked prices of the jail's commissary.³ Public health emergencies compound these dangers. Most recently, the spread of the COVID-19 pandemic created a crisis for people in detention, their families, and the communities surrounding jails and prisons. For over a year, there were no vaccines against COVID-19, new strains of the virus continue to evade vaccine-induced immunity, and there is still no known cure for the disease caused by the virus. For over a year, the only known measures to mitigate the spread of this pandemic were social distancing, vigilance with hygiene and disinfectants, and proper ventilation. Yet individuals in jails and prisons had no ability to implement these measures in spaces that, even in the absence of a pandemic, pose

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¹ CATHERINE HEARD, TOWARDS A HEALTH-INFORMED APPROACH TO PENAL REFORM? EVIDENCE FROM TEN COUNTRIES 1 (2019).

² Jordan Andrews, *The Current State of Public and Private Prison Healthcare*, WHARTON PUB. POL'Y INITIATIVE (Feb. 24, 2017), <https://web.archive.org/web/20200623211158/https://publicpolicy.wharton.upenn.edu/live/news/1736-the-current-state-of-public-and-private-prison> [<https://perma.cc/392L-C4TR>].

³ Stephen Raheer, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL'Y INITIATIVE (May 2018), <https://www.prisonpolicy.org/reports/commissary.html> [<https://perma.cc/3QQ8-P96L>].

public health risks.⁴ Every decision to send a person into the jails or prisons, or to deny requests for release, had the potential to cause severe illness and turn into a death sentence for members of communities across the country. Now, with new variants appearing across the globe, we face an uncertain next chapter for public health.

In this Essay, we discuss how the COVID-19 pandemic has affected our understanding of constitutionally permissible punishment. We argue, first, that the protracted failure to act by those who have had authority to do so during this public health emergency created a high risk that incarcerated people would suffer severe illness—and even death—in violation of due process protections and the Eighth Amendment prohibition against cruel and unusual punishment.⁵ Second, we suggest that a changed understanding of public safety in the context of detention and release during public health emergencies has the potential to shift the framework even after the emergency subsides. Conceptions of what qualifies as a danger to the community and what enhances public safety have radically shifted during this time in a way that supports release of individuals back to their communities. This shift can spur a further interrogation of how we define constitutionally permissible punishment in a system that has fueled mass incarceration.

I. INCARCERATION AND DETENTION AS CONSTITUTIONALLY IMPERMISSIBLE PUNISHMENT

People in confinement have limited control over their own movement and must live in close proximity to many others, including when they eat, sleep, and use the bathroom. They also have limited access to soap, running water, and cleaning supplies.⁶ When the virus enters a jail, these conditions provide a tinderbox for rapid transmission.⁷ The virus has myriad opportunities to get into jails: new detainees may be brought in each day; staff come and go with their daily shifts.⁸ Because individuals in jails are also more likely to have health conditions that make severe infection more likely, exposure to the virus has the

4 Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html> [<https://perma.cc/6YS5-VRDZ>].

5 U.S. CONST. amends. V, VIII, XIV.

6 Jennifer Gonnerman, *How Prisons and Jails Can Respond to the Coronavirus*, NEW YORKER (Mar. 14, 2020), <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus> [<https://perma.cc/JP53-KW2Q>].

7 Nicole Wetsman, *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, THE VERGE (Mar. 7, 2020, 8:30 AM), <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap> [<https://perma.cc/M6VA-E35N>].

8 *Id.*

potential to cause them serious injury and even death.⁹ This same transmission pattern may work in reverse, spreading infection to the broader community, putting exponentially more people at risk.¹⁰

Forcing individuals who have a high risk of serious illness or death from COVID-19 to live in this tinderbox, while depriving them of access to risk-mitigation strategies, implicates their constitutional rights. Once the State deprives someone of their liberty through incarceration, the Eighth Amendment sets a substantive limit to ensure that the State does not fail to provide for basic human needs such as food, clothing, medical care, and reasonable safety.¹¹ Depriving someone of basic human needs, including the need for reasonable safety during the pandemic and access to viable medical care, crosses that limit.¹² The Eighth Amendment also protects against subjection to likely future harm where it crosses this same line.¹³ In *Helling*, the Court rejected the State's attempt to put a temporal limit on the scope of the Eighth Amendment: just as the State may not be deliberately indifferent to current health problems, it also cannot "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year."¹⁴ The Court recognized that exposure to "a serious, communicable disease" could pose an unreasonable risk to health, and deliberate indifference to this harm would rise to the level of an Eighth Amendment violation.¹⁵

9 Gonnerman, *supra* note 6.

10 See Josiah Rich, Scott Allen & Mavis Nimoh, Opinion, *We Must Release Prisoners to Lessen the Spread of Coronavirus*, WASH. POST (Mar. 17, 2020, 4:01 PM), <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/> [<https://perma.cc/VSG9-7ECU>].

11 *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989).

12 *Id.* at 199–200 (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”).

13 See *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“In *Hutto v. Finney*, 437 U.S. 678, 682 (1978), we noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed. . . . Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.”).

14 *Id.*

15 *Id.* at 33–34.

The Fifth and Fourteenth Amendments' Due Process Clauses also protect against punitive pretrial and immigration-related detention.¹⁶ When courts assess the constitutionality of pretrial detention, they determine whether a certain condition is imposed on a detainee for the purpose of punishment or in furtherance of another legitimate governmental purpose.¹⁷ Where an "expressed intent to punish" is not evident, courts must still examine whether the restriction is excessive in relation to the purpose assigned to it.¹⁸ A pretrial detainee can prevail under this standard by providing objective evidence that the governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.¹⁹ For individuals serving all but the most punitive sentences, the high likelihood of severe illness and death is "grossly disproportionate to the offense."²⁰ State and local officials knew—from the growing medical coverage as well as habeas petitions filed on behalf of incarcerated people—that continued incarceration during the COVID-19 pandemic carried this risk for individuals with certain medical conditions.²¹ Yet in many circumstances, officials kept these people confined in squalid conditions.²² Their failure to protect the incarcerated population from the known risk of COVID-19 and attendant consequences has arguably risen to the level of deliberate indifference, in violation of the Eighth Amendment.

Overall, in the context of pretrial detention during the pandemic, decisions to detain and failures to release those who are eligible for such release have imposed a form of punishment prior to an adjudication of guilt in violation of the Fifth Amendment, for immigration detainees, or the Fourteenth Amendment, in the context of pretrial detainees. In all but the most extreme cases, sending an individual who has a preexisting health condition into a detention setting where they may contract serious illness and even die is excessive in relation to the

16 U.S. CONST. amends. V, XIV; *Bell v. Wolfish*, 441 U.S. 520, 535–38 (1979) (explaining that pretrial detainees have general Fourteenth Amendment rights and analogizing those rights to those of persons in immigration-related detention).

17 *Bell*, 441 U.S. at 538–39.

18 *Id.*

19 See *Hutto v. Finney*, 437 U.S. 678, 685–67 (1978).

20 *Id.* at 682–83, 685.

21 See, e.g., *A State-by-State Look at 15 Months of Coronavirus in Prisons*, MARSHALL PROJECT (July 1, 2021, 1:00 PM), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> [<https://perma.cc/T4RJ-9Y34>].

22 See Allison Wexler Weiss, *Habeas Corpus, Conditions of Confinement, and COVID-19*, 27 WASH. & LEE J. OF C.R. & SOC. JUST. 131, 140 (2020).

government's public safety interests.²³ As we mentioned earlier, COVID-19 had no known vaccines for over a year and existing treatment options appear only to reduce the risk of being hospitalized or dying from the disease.²⁴ These treatment options do not cure the disease or prevent certain complications like long COVID.²⁵ It also spreads far more easily than the flu, including the various Omicron strains that are currently prevalent across the nation, with the BA.5 strain being declared as one of the most contagious viruses known to humankind.²⁶ The virus remains particularly lethal to those over fifty-five and those with comorbidities, even amongst vaccinated populations.²⁷ Given these circumstances, release remains the only effective remedy to protect many people's rights and also prevent grave suffering and death.

II. RETHINKING INCARCERATION AND DETENTION

State and federal trial-level courts have an obligation to consider alternatives to pretrial detention and, where their jurisdiction extends to parole and early release, to conduct hearings for certain post-trial detainees. In making decisions about pretrial detention, the courts should not hold people simply because they cannot afford cash bail.²⁸ To subject someone to a known risk of serious illness verges on

²³ We note that if a vulnerable individual cannot pay cash bail or an immigration bond, continued detention could violate due process protections against punishment as well as the Equal Protection Clause.

²⁴ See *COVID-19 Treatments and Medications*, CDC (Aug. 5, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/treatments-for-severe-illness.html> [https://perma.cc/9AM2-8ZFH].

²⁵ See *Long COVID or Post-COVID Conditions*, CDC (Sept. 1, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html> [https://perma.cc/DAN7-JBQY].

²⁶ Adrian Esterman, *New Covid Subvariants BA.4 and BA.5 Are the Most Contagious Yet—and Driving Australia's Third Omicron Wave*, THE GUARDIAN (July 4, 2022, 7:16 PM), <https://www.theguardian.com/world/2022/jul/05/new-covid-variants-ba4-ba5-most-contagious-australia-third-omicron-wave-coronavirus-subvariants-ba-4-5> [https://perma.cc/DXP3-FVQM]; Erin Prater, *Move over, Measles: Dominant Omicron Subvariants BA.4 and BA.5 Could Be the Most Infectious Diseases Known to Man*, FORTUNE (July 9, 2022, 4:30 PM), <https://fortune.com/2022/07/09/is-covid-omicron-more-transmissible-infectious-than-measles-ba4-ba5/> [https://perma.cc/R5GJ-ZEYD].

²⁷ Adekunle Sanyaolu et al., *Comorbidity and Its Impact on Patients with COVID-19*, 2 SN COMPREHENSIVE CLINICAL MED. 1069, 1069 (2020); WASH. ST. DEP'T. OF HEALTH, *COVID-19 Cases, Hospitalizations, and Deaths by Vaccination Status 10–11* (Oct. 12, 2022), <https://doh.wa.gov/sites/default/files/2022-02/421-010-CasesInNotFullyVaccinated.pdf> [https://perma.cc/C6FK-TEBP].

²⁸ Mitch Arvidson, *Time to Bail on Cash Bail? A Growing Number of States are Scrutinizing Current Systems, and Exploring Alternatives Such as Use of Risk-assessment Tools*, STATELINE MIDWEST, Apr. 2019, at 1, 6.

punishment, and to subject someone to this punishment based on indignity runs afoul of due process and equal protection.²⁹ For those eligible for parole or early release, the likelihood of harm should weigh heavily in the calculus.

Courts should also reconsider the use of existing algorithms that determine whether to release someone or to hold them in pretrial detention based on artificially intelligent risk-assessment tools, as these algorithms were not designed to consider a public health crisis like the one caused by the COVID-19 virus. Judges have increasingly relied upon algorithms that are intended to measure risk of danger to the community and flight in pretrial and sentencing decisions.³⁰ Yet research has exposed how these algorithms often reproduce existing biases that discriminate against people of color and disadvantaged communities in making these assessments.³¹ If the courts suspend the use of these algorithms during this public health crisis and confront questions of how to measure public safety, evolving approaches to these questions may pave the way for challenging bias and protecting liberty interests in bail and sentencing decisions beyond the pandemic.

Parole boards also have the power to release individuals eligible for parole who are still being held in jail.³² In determining whether to grant parole, decisionmakers can and should consider the risk of illness to which the eligible individual will be exposed as well as the public health risks for all in the community when prisons are full. While parole boards have discretion to grant or deny parole, in these exigent circumstances it would likely be an abuse of such discretion to subject eligible individuals, especially those most vulnerable to serious complications from COVID-19, to continued incarceration. Those same considerations about individual health conditions and the relative safety of returning to a home and community should remain salient even after the COVID-19 pandemic makes incarceration less of a public health crisis.

In the context of immigration, both the federal enforcement agency, and the immigration courts have discretionary authority to

29 See *Bearden v. Georgia*, 461 U.S. 660, 661–62 (1983).

30 See, e.g., *State v. Loomis*, 881 N.W.2d. 749, 753 (Wis. 2016).

31 Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/5PNP-63GD>].

32 Jorge Renaud, *Grading the Parole Release Systems of All 50 States*, PRISON POLY INITIATIVE (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html [<https://perma.cc/QW33-WEAN>].

release individuals held in immigration detention.³³ These grants of discretion contemplate some consideration of alternatives to detention. A blanket policy of no-release despite new risks would thus violate these statutory provisions, which ought to be read in the context of the constitutional prohibition against deprivation of liberty without process. Prior to the COVID-19 pandemic, a district court enjoined Immigration and Customs Enforcement (ICE) from implementing a no bond policy by which it was detaining all or nearly all individuals with no individualized determination.³⁴ For those who do receive individualized determinations in immigration court, immigration judges regularly set high bonds or deny bond altogether where the immigrant detainee bears the burden of proving release.³⁵ The Fifth Amendment's Due Process Clause protects these detainees from punitive detention and prohibits ICE from imposing conditions that are excessive.³⁶ As but one example of available policy changes, a March 2020 ICE notification stated that the agency would use "alternatives to detention" in some circumstances and would not target for enforcement individuals in or near healthcare facilities, like doctors' offices and hospitals.³⁷

Federal courts also possess powers necessary to remedy constitutional violations.³⁸ Acting on this authority, courts across the country recognized that continued detention in ICE facilities posed an impermissibly punitive risk to some individuals.³⁹ As these individuals lived

33 See 8 U.S.C. § 1226(a) (2018); 8 C.F.R. § 1236.1(c)(8) (2022); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

34 *Damus v. Nielsen*, 313 F. Supp. 3d 317, 343 (D.D.C. 2018); see also Complaint, *N.Y.C.L. Union v. U.S. Immigr. & Customs Enf't*, No. 18-cv-11557 (S.D.N.Y. Dec. 11, 2018).

35 See 8 C.F.R. § 1003.19 (2022).

36 See U.S. CONST. amend. V; *Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015).

37 Maria Sacchetti & Arelis R. Hernández, *ICE to Stop Most Immigration Enforcement Inside U.S., Will Focus on Criminals During Coronavirus Outbreak*, WASH. POST (Mar. 18, 2020, 7:23 PM), https://www.washingtonpost.com/national/ice-halting-most-immigration-enforcement/2020/03/18/d0516228-696c-11ea-abef-020f086a3fab_story.html [https://perma.cc/TLV6-W8WK]. We note that the Court has agreed to hear a case in its October 2022 Term that may result in additional restrictions on the executive branch's discretionary authority over enforcement decisions where states claim a downstream impact. See *Texas v. United States*, 40 F.4th 205 (5th Cir. 2022), cert. granted, 2022 WL 2841804, at *1 (U.S. July 21, 2022) (No. 22-58).

38 *Stone v. San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992).

39 See, e.g., *Kolawole O.T. v. Ahrendt*, 466 F. Supp. 3d 457, 472 (D.N.J. 2020), appeal dismissed sub nom., *Tomiwa v. Warden Bergen Cnty. Jail*, No. 20-2643, 2020 WL 8461702 (3d Cir. Dec. 23, 2020); *Jose B.R. v. Tsoukaris*, No. 20-3347 (MCA), 2020 WL 2744586, at *13-14 (D.N.J. May 27, 2020), appeal dismissed sub nom., *Rufino v. Dir. Newark N.J.*, No. 20-2426, 2020 WL 8085109 (3d Cir. Sept. 30, 2020); *Asmed B. v. Decker*, 460 F. Supp. 3d 519, 522 (D.N.J. 2020); *Santiago P. v. Decker*, No. 20-5067, 2020 WL 2487648, at *9 (D.N.J. May 14, 2020); *Leandro R.P. v. Decker*, 455 F. Supp. 3d 85, 98 (D.N.J. 2020); see also *Barbecho v. Decker*, No. 20-cv-2821, 2020 WL 2513468, at *8 (S.D.N.Y. May 15, 2020); *Pimentel-Estrada*

for months in their communities, their lives further proved just how excessive continued detention would have been during the pandemic. Courts may also enter orders placing limits on a prison's population when overcrowding violates the Constitution.⁴⁰ For example, in cases involving prisons and jails, federal courts have repeatedly ordered the release of detained persons when necessary to remedy constitutional violations caused by overcrowding.⁴¹ However, these remedies are more likely to be effective in securing emergency release for individuals. Efforts at class-wide relief, or systemic changes, are likely to turn into protracted litigation battles. When this happens, federal courts may be too slow to remedy an acute public health crisis. In extreme circumstances, courts may no longer be available to individual petitioners in many states. During the early months of the COVID-19 pandemic, such sudden closures created backlogs on court dockets, while individuals in jails and prisons continued to contract the virus.⁴²

Finally, governors have an obligation to prevent violations of constitutional rights as they exercise control over prisons and jails. They also are often authorized to take emergency measures.⁴³ Staff of the jails and prisons have been unable to control the pandemic given the infrastructure of the facilities and the nature of this airborne and highly transmissible virus. Thus, the responsibility for these constitutional violations extends beyond the custodians to the governors. Governors have an obligation to keep the public safe and ought to exercise their emergency powers to release or direct other government actors

v. Barr, 464 F. Supp. 3d 1225, 1237 (W.D. Wash. 2020); Singh v. Barr, No. 20-cv-02346-VKD, 2020 WL 1929366, at *10–11 (N.D. Cal. Apr. 20, 2020); Malam v. Adducci, 452 F. Supp. 3d 643, 662 (E.D. Mich. 2020).

40 See *Brown v. Plata*, 563 U.S. 493, 502, 511 (2011) (ordering California to reduce crowding in its prisons where overcrowding was the “primary cause” of “severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care”) (quoting 18 U.S.C. § 3626(a)(3)(E)(i) (2018)).

41 See, e.g., *Duran v. Elrod*, 713 F.2d 292, 297–98 (7th Cir. 1983) (concluding that court did not exceed its authority in directing release of low-bond pretrial detainees as necessary to reach a population cap); *Mobile Cnty. Jail Inmates v. Purvis*, 581 F. Supp. 222, 224–25 (S.D. Ala. 1984) (concluding that the district court properly exercised remedial powers to order a prison's population reduced to alleviate unconstitutional conditions and noting other cases); *Inmates of the Allegheny Cnty. Jail v. Wecht*, 565 F. Supp. 1278, 1297 (W.D. Pa. 1983) (concluding that an order to reduce overcrowding “is within our power to correct the constitutional violations”).

42 Lyle Moran, *Court Backlogs Have Increased by an Average of One-Third During the Pandemic*, *New Report Finds*, ABA J. (Aug. 31, 2021, 12:57 PM), <https://www.abajournal.com/news/article/many-state-and-local-courts-have-seen-case-backlogs-rise-during-the-pandemic-new-report-finds> [<https://perma.cc/FUX3-697C>].

43 See F. David Trickey, Comment, *Constitutional and Statutory Bases of Governors' Emergency Powers*, 64 MICH. L. REV. 290, 290–91 (1965).

to consider release, to the maximum extent of the law. At a minimum, they can and should consider release for those with increased risk such as people over fifty-five years of age, individuals with comorbidities, individuals who are pregnant, those eligible for parole and community supervision or release, and those incarcerated for technical parole or probation violations.

III. RETHINKING THE RELEASE OF INCARCERATED AND DETAINED INDIVIDUALS

On the one hand, the way we conceptualize public safety during unprecedented public health emergencies is critical. Lives depend on our collective recalibration of what qualifies as a danger to the community, and what enhances public safety. As we saw in the early months of the COVID-19 pandemic, continued detention posed a high danger to many individuals held in prisons and jails. The communities they would return to also faced the present uncertainty of their loved-one's well-being, and the future risk that this person would suffer lasting consequences of a COVID-19 infection. Many people who were released were able to shelter at home. There, they could access healthcare. They could also help families bear the toll of sick elders and closed child-care facilities, among other things.

Officials also have material interest in release. Prison officials, for example, have an interest in preventing any potential spread of COVID-19 in their facilities. The release of people most vulnerable to COVID-19 reduces the overall health risk for detainees and facility staff alike. Release is also in the broader public's interest. Potential spread in a prison or jail quickly affects the broader communities, and fewer outbreaks in prisons or jails correlate to fewer outbreaks in the surrounding communities. The release of people most vulnerable to serious illness from COVID-19 thus reduces the health and economic burden on the local community and health infrastructure at large.

On the other hand, this moment allows us to rethink what we are referring to when we talk about "danger" to a community. It casts light on other facts that should be considered in determining whether someone should be released. In many cases, people's return home during this pandemic has the potential to illustrate to courts and agency decisionmakers the benefit to communities when individuals are not in detention. Advocates have been working to shift this narrative before these tribunals for decades. Maybe now it will be harder to ignore their calls.

CONCLUSION

How we redefine what qualifies as a danger to the community and what enhances public safety has radically shifted during the ongoing COVID-19 pandemic. In this Essay, we show how this shift supports release of incarcerated and detained individuals back to their communities during this public health crisis. If it turns out, as we argue, that it makes sense to release many more of the currently incarcerated and detained individuals at this time of crisis, we have an obligation to consider releasing these people generally, not just when a pandemic hits, and to rework the existing metrics and system that have fueled mass incarceration.