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JUSTICE DISEASED IS JUSTICE DENIED:
CORONAVIRUS, COURT CLOSURES, AND CRIMINAL TRIALS

Ryan Shymansky*

INTRODUCTION

On December 31, 2019, health authorities in Wuhan, China, confirmed that an unidentified pathogen was the likely cause of twenty-seven recent cases of pneumonia identified across the region.¹ Just a week later, internal and external pressures forced Chinese authorities to announce the discovery of a novel coronavirus in Wuhan.² Despite efforts at containment, the virus jumped from Wuhan to countries across the globe in the following months.³ By January 21, 2020, the United States had confirmed its first case of the novel coronavirus in Washington state.⁴ The virus spread rapidly across the continent, resulting in thousands of infections and hundreds of fatalities before the end of March.⁵ Federal, state, and local governments responded with varying degrees of efficiency and efficacy, generally stressing the value of “social distancing” in slowing the spread of the disease to afford hospitals precious time to respond to new cases.⁶ Private and public institutions largely shuttered,

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¹ *Chinese Officials Investigate Cause of Pneumonia Outbreak in Wuhan*, REUTERS (Dec. 31, 2019, 2:55 AM), <https://www.reuters.com/article/us-china-health-pneumonia/chinese-officials-investigate-cause-of-pneumonia-outbreak-in-wuhan-idUSKBN1YZ0GP>.

² Sui-Lee Wee & Donald G. McNeil Jr., *China Identifies New Virus Causing Pneumonia-like Illness*, N.Y. TIMES (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/health/china-pneumonia-outbreak-virus.html>.

³ *China Coronavirus Spread is Accelerating, Xi Jinping Warns*, BBC (Jan. 26, 2020), <https://www.bbc.com/news/world-asia-china-51249208>.

⁴ Lena H. Sun & Larry Bergstein, *First U.S. Case of Potentially Deadly Chinese Coronavirus Confirmed in Washington State*, WASH. POST (Jan. 21, 2020), <https://www.washingtonpost.com/health/2020/01/21/coronavirus-us-case/>.

⁵ *Cases of Coronavirus Disease (COVID-19) in the U.S.*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Mar. 20, 2020).

⁶ Julia Belluz, *What Happens Next in the Coronavirus Outbreak? We Mapped 8 Scenarios.*, VOX (Feb. 6, 2020, 6:17 AM),

with universities sending students home to their parents and restaurants switching to takeout-only models.⁷ Medium-to-large gatherings of any sort were discouraged or banned,⁸ and some grocery store shelves were left empty.⁹

The federal courts were not immune to these institutional pressures; indeed, their internal composition of judges, clerks, deputies, and other courthouse personnel largely resembles that of other large public institutions. Yet the judiciary, by its very nature, is not a normal public institution. Unlike the average administrative agency or cabinet department, the federal courts exist to guarantee the statutory and constitutional rights that form the bedrock of the American system of government. And while the disruption of any public agency's operations in light of a pandemic will likely inconvenience or harm some subset of the population, few disruptions are as significant as restricting access to the judicial system. This is acutely true in the case of criminal defendants, as delays in proceedings will seriously impact their right to a speedy trial.¹⁰ And although all criminal defendants are vulnerable to a suspension of various key constitutional rights, pretrial detainees in particular may wallow in prison for indeterminate periods of time pending trials that may never arrive. Writing from a Birmingham Jail and speaking to different facts, Martin Luther King, Jr., captured the essence of the dilemma well: "justice too long delayed," he wrote, "is justice denied."¹¹

<https://www.vox.com/2020/2/5/21122758/coronavirus-outcomes-pandemic-travel-china-map>.

⁷ Nick Anderson & Susan Svuga, *Georgetown and U-Va. Join Cascade of Schools That Will Halt In-person Teaching Because of Coronavirus*, WASH. POST (Mar. 11, 2020), <https://www.washingtonpost.com/education/2020/03/11/georgetown-u-suspends-in-person-teaching-until-further-notice-because-coronavirus/>; Rich Van Wyk, *With Dining In Now Out, Restaurants Turn to Grab and Go*, WTHR (Mar. 16, 2020, 10:36 PM), <https://www.wthr.com/article/dining-now-out-restaurants-turn-grab-and-go>.

⁸ Knvul Sheikh, *No More Than 10 People in One Place, Trump Said. But Why?*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/health/coronavirus-social-distancing-crowd-size.html>.

⁹ Luke Winkie, *A Grocery Store Clerk Explains What It's Like on the Front Lines of Coronavirus Panic*, VOX (Mar. 17, 2020, 7:00 AM), <https://www.vox.com/the-goods/2020/3/17/21182155/grocery-store-coronavirus-clerk-q-a-immunocompromise>.

¹⁰ As in any article addressing the right to trial by jury, it is worth noting that criminal jury trials are an increasingly endangered species across the federal court system. See John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RESEARCH CENTER: FACTTANK (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>. Given the prominent role of the jury trial right in our constitutional system, outsized academic focus on the question is to be expected. Yet scholars and practitioners should always acknowledge that, for the majority of federal defendants, abstract discussions of jury trials are somewhat trivial.

¹¹ See Martin Luther King, Jr., *"Letter from a Birmingham Jail [King, Jr.]"* (Apr. 16, 1963), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

This Article aims to consider the immediate impacts of the novel coronavirus on criminal defendants' access to speedy trials by jury.¹² In particular, it aims to examine whether court closures and delays could affect the substantive rights of criminal defendants—and particularly pretrial detainees—to a speedy and public trial by jury. To date, very little scholarship has considered this question.¹³ Yet the ideal of a speedy trial by jury is deeply embedded in our Constitution and our judicial system, and the potential for a pandemic to limit or negate that right should ring scholastic and judicial alarm bells.

This analysis proceeds in three parts. Part I surveys the rapidly changing responses by a sample of federal district courts across the country to the coronavirus outbreak.¹⁴ Part II examines the constitutional and statutory authority that may conflict with the judiciary's attempt to avoid exposure to the virus altogether. Finally, Part III concludes by suggesting that courts ought to maintain the right to delay proceedings and manage their dockets in confronting the imminent threat of the novel coronavirus, but that this control is subject to an upper (and fact-specific) constitutional bound beyond which courts cannot delay criminal jury trials.

I. CORONAVIRUS AND THE COURTS

The response to the coronavirus pandemic throughout the federal judiciary has been as swift as it has been broad. Much like other public institutions and private workplaces, courts have quickly adopted new policies to slow the spread of disease and protect judicial and administrative employees. Given the decentralized nature of federal

¹² While this article focuses on the federal court system, state courts have adopted stringent restrictions in response to the coronavirus pandemic that mirror their federal counterparts. *See, e.g.*, Courtney Hessler, *High Court Declares Judicial Emergency, Further Shuts Down Court System*, HERALD-DISPATCH (Mar. 23, 2020), https://www.herald-dispatch.com/coronavirus/high-court-declares-judicial-emergency-further-shuts-down-court-system/article_4c3fee11-49da-5d31-9b38-160d5f9a1b62.html.

¹³ There is limited scholarship that has considered the right to a speedy trial in the context of natural disasters. *See, e.g.*, Patrick Ellard, *Learning from Katrina: Emphasizing the Right to a Speedy Trial to Protect Constitutional Guarantees in Disasters*, 44 AM. CRIM. L. REV. 1207 (2007). Yet while natural disasters and pandemics may share the ability to fundamentally disrupt the functioning of a region's economy and governmental institutions, even severe natural disasters are not as wide-reaching or open-ended as the current coronavirus outbreak.

¹⁴ *See* Robert Loeb et al., *The Federal Courts Begin to Adapt to COVID-19*, LAWFARE (Mar. 18, 2020, 1:29 PM), <https://www.lawfareblog.com/federal-courts-begin-adapt-covid-19>. Although both federal district and appellate courts have reacted to the coronavirus pandemic, district courts directly implicate defendants' access to a speedy and public jury trial. As such, this article is focused primarily on district courts rather than their appellate counterparts.

district courts, and the circuit courts of appeal that are situated above them, responses to the outbreak have understandably differed somewhat across all ninety-four federal judicial districts.¹⁵ Nevertheless, a review of various courts' preventative measures still reveal a great deal of underlying similarity. Relevant to this article—and as is explained in detail below—many federal district courts have already determined that a continuance in all jury trials is warranted.

There are good reasons to support this decision, particularly in the short run. First, jury trials—by definition—involve calling together dozens of randomly-selected individuals who would otherwise have no reason to come in contact with each other.¹⁶ At the very least, each of these individuals will spend time in close contact during a voir dire process of indeterminate length.¹⁷ Assuming an individual is seated as a juror, she will spend hours sitting in a tightly-packed jury box or a small deliberation room with her fellow jurors. She will leave the courthouse only to purchase lunch at a grab-and-go business,¹⁸ and then likely return to the courthouse to eat. In this environment, the health of each juror and every other occupant of the courtroom in which they are seated weighs heavily against conducting criminal jury trials.

Of course, there is also the health of the defendant to consider, who— if detained—will likely be more vulnerable to infection in prison.¹⁹

¹⁵ Yet even beyond the structure of the federal judiciary, much of this is the result of the uneven impact of coronavirus across the country; on March 17, 2020, for example, Washington had already reported 1,012 confirmed cases of the virus before West Virginia had reported its first. See *Coronavirus Daily News Updates, March 17: What to Know Today About COVID-19 in the Seattle Area, Washington State, and the Nation*, SEATTLE TIMES (Mar. 18, 2020, 7:12 AM), <https://www.seattletimes.com/seattle-news/health/coronavirus-daily-news-updates-march-17-what-to-know-today-about-covid-19-in-the-seattle-area-washington-state-and-the-nation/>; Phil Kabler, *Justice Confirms WV's First Case of Coronavirus*, HERALD-DISPATCH (Mar. 17, 2020), https://www.herald-dispatch.com/coronavirus/justice-confirms-wv-s-first-case-of-coronavirus/article_7e034a25-949e-5085-8494-87ae9b570016.html.

¹⁶ See FED. R. CRIM. P. 23(b)(1) (“A jury consists of 12 persons unless this rule provides otherwise.”); see also FED. R. CRIM. P. 24(b). Indeed, many courts that have cancelled or postponed criminal jury trials have explicitly noted concerns about juror health in reaching their conclusion. See, e.g., General Order 02-20, at 2, *In re Court Operations Under the Exigent Circumstances Created by COVID-19 and Related Coronavirus* (W.D. Wash. Mar. 17, 2020), <https://www.wawd.uscourts.gov/sites/wawd/files/03-17-20GeneralOrder02-20.pdf> [hereinafter W.D. Wash. General Order].

¹⁷ See FED. R. CRIM. P. 24(b). If this risk were not evident enough as a hypothetical, Ohio's first post-coronavirus jury trial was continued after the defendant experienced shortness of breath and nearly fainted. Max Mitchell, *Ohio's First Post-COVID Jury Trial Was Set to Begin. Then the Defendant Nearly Collapsed*, LAW.COM (Apr. 29, 2020, 6:48 PM), <https://www.law.com/2020/04/29/ohios-first-post-covid-jury-trial-was-set-to-begin-then-the-defendant-nearly-collapsed/>.

¹⁸ See Van Wyk, *supra* note 7.

¹⁹ See Salvador Hernandez, *The Coronavirus Is Hitting US Prisons, and Advocates Fear Sick Inmates Will Be Afraid To Get Treatment*, BUZZFEED NEWS (Mar. 23, 2020, 8:33

Whether one's primary concern is a defendant infecting courtroom participants or courtroom participants infecting a defendant, both outcomes are possible and avoidable. Finally, practical considerations of life during a pandemic will likely complicate the task of calling witnesses (who may have difficulty traveling),²⁰ presenting evidence (which may rely on laboratory reports that will be delayed),²¹ and even finishing a trial (in the case that several jurors become sick).²² Put simply: courts acting to delay jury trials are not doing so out of any irrational or intentional desire to avoid adjudicating cases but rather to avoid unnecessary transmission of a virus that has already proven lethal to thousands.

Regardless of the motivations behind these delays, they are occurring across the federal court system. The standing orders issued to carry them into effect are broadly similar and typically determine that any delay is time excludable under the Speedy Trial Act.²³ In particular, courts have tended to find that "the ends of justice served by" a continuance "outweigh the interests of the parties and the public in a speedy trial."²⁴ Beyond these broad similarities, however, the precise provisions of each order continuing trials has varied from federal judicial district to federal judicial district. In the District of the District of Columbia, for example, Chief Judge Beryl A. Howell ordered that all jury trials scheduled to begin between March 17, 2020 and May 11, 2020 be continued pending further

PM), <https://www.buzzfeednews.com/article/salvadorhernandez/coronavirus-us-prisons-outbreak>.

²⁰ See *Coronavirus and Travel in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (last visited Mar. 23, 2020).

²¹ See Megan Crepeau & Jeremy Gerner, *State Crime Lab Scales Back Operations Amid Coronavirus Spread, Leading to Shelving of Drug Cases*, CHI. TRIB. (Mar. 20, 2020, 2:53 PM), <https://www.chicagotribune.com/news/criminal-justice/ct-coronavirus-state-crime-lab-impact-20200320-pwepakrajrbujhuzygoy2yy5ki-story.html>.

²² See Ben Feuerherd, *Sick Juror Allowed to Deliberate via FaceTime Amid Coronavirus*, N.Y. POST (Mar. 16, 2020, 2:48 PM), <https://nypost.com/2020/03/16/sick-juror-allowed-to-deliberate-via-facetime-amid-coronavirus/>.

²³ See, e.g., Standing Order at 2, In re: Coronavirus/COVID-19 Pandemic, No. M10-468 (S.D.N.Y. Mar. 13, 2020), <https://nysd.uscourts.gov/sites/default/files/2020-03/20%20MISC%20154a%20%28002%29%20-%20In%20Re%20Coronavirus-COVID-19%20Pandemic.pdf> [hereinafter S.D.N.Y. Standing Order]; Standing Order at 2, In re: Court Operations in Exigent Circumstances Created by the COVID-19 Pandemic, No. 20-09 (D.D.C. Mar. 16, 2020), <https://www.dcd.uscourts.gov/sites/dcd/files/Court%20Operations%20Standing%20Order%2020-9.pdf> [hereinafter D.D.C. Standing Order]; W.D. Wash. General Order, *supra* note 16, at 2; General Order at 2, In re: Court Operations under the Exigent Circumstances created by COVID-19 and Related Coronavirus Health Conditions, No. 86 (D. Vt. Mar. 23, 2020), https://www.vtd.uscourts.gov/sites/vtd/files/General%20Order%2386.FINAL_.pdf [hereinafter D. Vt. General Order]. The Speedy Trial Act is discussed in more detail *infra*.

²⁴ *Id.*

order of the court.²⁵ The same order postponed all civil, criminal, and bankruptcy proceedings through April 17, 2020.²⁶ In the Southern District of New York, Chief Judge Colleen McMahon entered a similar—though more temporally-limited—order continuing jury trials scheduled to begin before April 27, 2020.²⁷ Ongoing trials, as well as grand jury proceedings, were unaffected by the order.²⁸ In the Western District of Washington, Chief Judge Ricardo Martinez entered a standing order closing the Seattle and Tacoma courthouses and staying all criminal and civil proceedings until June 1, 2020.²⁹ And while all three of these examples represent particular coronavirus “hotspots,”³⁰ federal courts across the country have limited operations. In the District of Vermont, for example, Chief Judge Geoffrey Crawford entered an order staying all criminal and civil proceedings to some date in the future.³¹ In the Southern District of West Virginia, Chief Judge Thomas E. Johnston entered a similar order continuing “all civil and criminal petit jury selections and trials scheduled to commence [from March 23, 2020] through April 24, 2020.”³² These delays are not insubstantial, particularly given the number of pretrial detainees in the federal system³³ and the potential for continued social distancing mandates.³⁴ It is with this background in mind that an examination of relevant constitutional and statutory law is warranted.

II. CONSTITUTIONAL AND STATUTORY CONSIDERATIONS

At the highest level of generality, the coronavirus pandemic and accompanying courtroom delays implicate two areas of law: the Sixth Amendment to the United States Constitution and the Speedy Trial Act that seeks to carry its guarantees into effect. While both are relevant in a discussion of jury trial delays, the Speedy Trial Act’s broad exemptions

²⁵ D.D.C. Standing Order, *supra* note 23.

²⁶ *Id.* at 3.

²⁷ S.D.N.Y. Standing Order, *supra* note 23, at 1.

²⁸ *Id.* at 2.

²⁹ W.D. Wash. General Order, *supra* note 16, at 2.

³⁰ See *Cases in U.S.*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Mar. 20, 2020).

³¹ D. Vt. General Order, *supra* note 23, at 1.

³² General Order #3, *In re: Court Operations in Light of the Exigent Circumstances Presented by the COVID-19 Pandemic*, No. 2:20-mc-00052 (S.D.W.V. Mar. 23, 2020), <https://www.wvsc.uscourts.gov/pdfs/generalorders/covid19/Gen%20Order%203%20with%20header.pdf>.

³³ See Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 FED. PROB. 2 (Sept. 2018), https://www.uscourts.gov/sites/default/files/fedprobation-sept2018_0.pdf.

³⁴ See W.D. Wash. General Order, *supra* note 16, at 4 (noting that the “Court will vacate or amend this General Order no later than April 15, 2020”).

render it somewhat of a dead letter in the context of the coronavirus pandemic. Instead, the somewhat “slippery” provisions of the Sixth Amendment’s Speedy Trial Clause are the likeliest source of relief for criminal defendants awaiting trial.

A. Sixth Amendment

The Framers were no strangers to pandemic disease. Devastating outbreaks of smallpox had swept across the continent in the decades before the Founding,³⁵ and George Washington himself nearly died after contracting the disease during a trip to Barbados in 1751.³⁶ Yet in a world where widespread illness was a norm and viral infection was often a death sentence, the role of infection played no discernable role in the actual drafting of the Constitution.³⁷ The opposite is true of the notion of trial by jury, which was afforded outsized importance in the drafting of the Constitution and of the Bill of Rights.³⁸ Largely viewed as a bulwark against abusive government,³⁹ juries were enshrined in Article III’s guarantee that the “Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”⁴⁰ The Sixth Amendment added more substance to the jury trial guarantee, providing in part that in “all criminal prosecutions, the

³⁵ Elise A. Mitchell, *The Shortages May Be Worse Than the Disease*, ATLANTIC (Mar. 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/humanitys-long-history-of-making-epidemics-worse/607780/>.

³⁶ Fred Barbash, *Here’s to George Washington, Afflicted With So Many Killer Diseases It’s Miraculous He Survived to Become Father of Our Nation*, WASH. POST (Feb. 22, 2017, 9:16 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2017/02/22/heres-to-george-washington-afflicted-with-so-many-killer-diseases-its-miraculous-he-became-father-of-our-nation/>. Washington’s relationship with smallpox continued through the American Revolution, when he became one of the first military commanders in history to order the mass inoculation of his troops against the disease; Amy Lynn Filsinger & Raymond Dwek, *George Washington and the First Mass Military Inoculation*, LIBR. CONGRESS SCI. REFERENCE SERVICES, <https://www.loc.gov/rr/scitech/GW&smallpoxinoculation.html>. Writing to Dr. William Shippen, Jr. in 1777, Washington explained that “Necessity not only authorizes but seems to require the measure, for should the disorder infect the Army . . . we should have more to dread from it, than from the Sword of the Enemy.” *Id.*

³⁷ See generally DAVID O. STEWART, *THE SUMMER OF 1787* (2007). In fact, perhaps the only part played by disease at the Convention was as an excuse to avoid attending in the first place. See *id.* at 41 (noting that two particularly hypochondriacal delegates—“one from Connecticut and one from Maryland”—chose not to attend the convention because of Philadelphia’s “lurid reputation for disease”).

³⁸ See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871 (1994) (characterizing the importance of juries as “the most consistent point of agreement between the Federalists and Anti-Federalists” during debates over ratification).

³⁹ *Id.* (noting that the “framers’ enthusiastic support for the jury stemmed in large measure from the role that juries had played in resisting English authority before the revolution”).

⁴⁰ U.S. CONST. art. III, § 2, cl. 3.

accused shall enjoy the right to a *speedy and public* trial, by an impartial jury.”⁴¹

Much academic ink has been spilled on both constitutional provisions, and it would be inadvisable and impossible to reproduce that work here.⁴² In any case, it is only the narrow guarantee of a “speedy” trial that is directly relevant to the current pandemic and its attendant effects on the federal court system. Concerns over judicial efficiency in administering trials have deep roots in the common law; indeed, the first hint of a guarantee to a “speedy” trial can be traced back as far as 1166 C.E. and King Henry II’s promulgation of rules for civil and criminal procedure in the Assize of Clarendon.⁴³ Despite this extensive background, the United States Supreme Court has devoted relatively little attention to the speedy trial guarantee throughout most of its history. The Court did not examine the right at all until 1905⁴⁴ and did not deem it fundamental until 1967.⁴⁵

A watershed arrived in 1972 with *Barker v. Wingo*,⁴⁶ which laid out a four-part test that continues to govern courts’ consideration of speedy trial claims.⁴⁷ Writing for a unanimous court, Justice Powell characterized the right to a speedy trial as “amorphous” and “slippery.”⁴⁸ In view of these interpretive challenges, the Court adopted a balancing test to address speedy trial claims on “an *ad hoc* basis.”⁴⁹ The Court identified four factors in determining whether a defendant’s right to a speedy trial has been violated: “length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”⁵⁰ Applying this reasoning to the case before the Court, Justice Powell reasoned that “the length of delay between arrest and trial—well over five years” did not warrant dismissal of the indictment against the petitioner.⁵¹ Nevertheless, the Court considered the case “to be close” and based its conclusion

⁴¹ U.S. CONST. amend. VI (emphasis added).

⁴² See generally Alschuler & Deiss, *supra* note 38; Jack Pope, *The Jury*, 39 TEX. L. REV. 426 (1961).

⁴³ Greg Ostfeld, *Speedy Justice and Timeless Delays: The Validity of Open-Ended “Ends-of-Justice” Continuances Under the Speedy Trial Act*, 64 U. CHI. L. REV. 1037, 1057 n.79 (1997). *Inter alia*, the rules provided that “when a robber or murderer or thief or the receivers of them be arrested,” a nearby judicial officer should be contacted to provide swift justice to the accused. ASSIZE OF CLARENDON, 1166 ¶ 6, <https://avalon.law.yale.edu/medieval/assizecl.asp>.

⁴⁴ See *Beavers v. Haubert*, 198 U.S. 77, 87 (1905) (essentially creating a fact-specific inquiry into speedy trial violations).

⁴⁵ See *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (deeming the right to a speedy trial “fundamental”).

⁴⁶ 407 U.S. 514 (1972).

⁴⁷ *Id.* at 530.

⁴⁸ *Id.* at 522.

⁴⁹ *Id.* at 530.

⁵⁰ *Id.*

⁵¹ *Id.* at 534–36.

primarily on the fact that the petitioner “did not want a speedy trial.”⁵² The Court also noted that a defendant’s pretrial detention could weigh in favor of dismissing an indictment, writing that “the disadvantages for the accused who cannot obtain his relief” from jail are even more serious than those released on bond.⁵³

The *Barker* test remains the touchstone for courts’ analyses of speedy trial claims.⁵⁴ And while it is impossible to fix any precise point after which a defendant’s right to a speedy trial has been violated, the essential point remains: there is an upper bound to the delays trial courts may impose on criminal defendants.⁵⁵

B. *Speedy Trial Act*

The *Barker* test’s looseness prompted relatively swift action from Congress, which passed the Speedy Trial Act⁵⁶ just two years after *Barker* was announced. At its core, the Speedy Trial Act establishes several key deadlines throughout the course of a federal criminal prosecution. An information or indictment must be filed within 30 days of one’s arrest or service of summons,⁵⁷ and a trial must begin within 70 days of the date that an information or indictment is filed.⁵⁸ Absent any exception, dismissal of an indictment is warranted where the Act’s time limits are violated.⁵⁹

Broad and stringent though the these provisions may appear, nine exclusions serve to give courts a degree of discretion over the actual trial date of a given defendant.⁶⁰ Eight of these exclusions are relatively narrow, applying—*inter alia*—where resolution of pretrial motions

⁵² *Id.* at 534.

⁵³ *Id.* at 532.

⁵⁴ *See, e.g., Doggett v. United States*, 505 U.S. 647, 651 (1992) (applying *Barker* to an “extraordinary 8 ½ year lag between [Defendant’s] indictment and arrest” and concluding dismissal of indictment was warranted). Just last year, a Washington appellate court held that a thirty-eight year delay between the first and second time a defendant was charged for the same crime violated the Constitution’s speedy trial guarantee. *See State v. Ross*, 441 P.3d 1254, 1269 (Wash. Ct. App. 2019). Quoting *Barker*, the court noted that “[a] defendant has no duty to bring himself to trial” and that the delay in the petitioner’s trial was “unprecedented in speedy trial cases.” *Id.* at 941–43.

⁵⁵ *See Barker*, 407 U.S. at 532 (reasoning that preventing “oppressive pretrial incarceration” is a key interest protected by the speedy trial guarantee).

⁵⁶ Pub. L. No. 93-619, 88 Stat. 2076 (1975), codified at 18 U.S.C.A. §§ 3161–74 (West 2020).

⁵⁷ 18 U.S.C.A § 3161(b).

⁵⁸ *Id.* § 3161(c)(1).

⁵⁹ *Id.* § 3162(a)(1). Dismissal may be with or without prejudice, depending on “the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.” *Id.*

⁶⁰ *Id.* § 3161(h).

requires extra time⁶¹ or where interlocutory appeals are pending.⁶² The ninth exception is far broader and allows courts to exclude time “on the basis of [a judge’s] findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.”⁶³ This latter provision has served as the basis for continuances during the coronavirus pandemic and has tended to negate any benefit of efficiency criminal defendants would otherwise receive from the Speedy Trial Act.⁶⁴ Limits on such “ends-of-justice” continuances vary from circuit to circuit,⁶⁵ but courts have approved of delays lasting as long as 425 days.⁶⁶

III. CORONAVIRUS AND THE CONSTITUTION

Despite the lack of public discussion surrounding the issue, courts were not blind to the potential tension between delay and the rights of criminal defendants before continuing upcoming trials. The Southern District of New York noted as much in its standing order, confirming that it was “cognizant of the right of criminal defendants to a speedy and public trial under the Sixth Amendment, and the particular application of that right in cases involving defendants who are detained pending trial.”⁶⁷ Yet, merely nodding at the problem does not obviate it, and courts are obligated to take stock of the constitutional implications of delays stemming from the coronavirus pandemic.

This is particularly true with respect to pretrial detainees and, specifically, with reference to the Constitution’s Speedy Trial Clause. Indeed, the Speedy Trial Act offers little to actually analyze in the context of the coronavirus pandemic. The ends-of-justice exclusion is broad, and so long as a court explains the reasons behind a continuance on the record, then it is well within its rights to count any delay as time excludable from the typical seventy-day trial clock.⁶⁸ A much closer question stems from the Speedy Trial Clause itself, however. Indeed, a review of the *Barker* balancing factors suggests that dismissal may well be warranted in certain cases as this pandemic progresses.

⁶¹ *Id.* § 3161(h)(1)(F).

⁶² *Id.* § 3161(h)(1)(E).

⁶³ *Id.* § 3161(h)(7)(A).

⁶⁴ *See supra* note 23.

⁶⁵ *See Ostfeld, supra* note 43, at 1042–52.

⁶⁶ *United States v. Lattany*, 982 F.2d 866, 868 (3d Cir. 1992).

⁶⁷ S.D.N.Y. Standing Order, *supra* note 23, at 2. The Court went on to note that “[a]ny motion by a criminal defendant seeking an exception to this order in order to exercise that right [to a speedy jury trial] should be directed to the District Judge assigned to the matter in the first instance.” *Id.*

⁶⁸ *See* 18 U.S.C.A. § 3161(h)(8) (West 2020).

First, the unprecedented nature of the coronavirus outbreak suggests that the length of any delay facing defendants could be quite substantial. To date, federal courts have addressed the crisis by continuing trials for a definite period of weeks or months; the Western District of Washington, for example, continued all trials until June 1, 2020,⁶⁹ while the Southern District of New York continued all trials until April 27, 2020.⁷⁰ While a delay until either date is not insubstantial, it seems unlikely that a limited delay of a matter of weeks or several months would amount to a constitutional violation apart from any other compelling facts.⁷¹ Yet some models are significantly more pessimistic about the possibility of expeditiously ending the coronavirus outbreak, projecting that continued social distancing measures may be necessary for another year and a half.⁷² As trial dates drag out further into the future, speedy trial claims will only gain in merit. This is particularly true for those accused of less serious offenses, as “the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.”⁷³

As to the second *Barker* factor—the reason for the delay—criminal defendants are not as fortunate. As noted earlier, courts that have delayed trials have done so for entirely valid and appropriate reasons and with an eye toward advice from medical experts and government officials.⁷⁴ Yet the validity of this reasoning is not open-ended. As social distancing measures and pharmaceutical interventions begin to slow the spread of the coronavirus, the persuasiveness of courts’ reliance on disease as a justification for delay will similarly decline.

The third factor—a defendant’s responsibility to assert his right to a speedy trial—will obviously vary case by case. A defendant who is released on a pretrial bond and who makes no effort to actually pursue a

⁶⁹ W.D. Wash. General Order, *supra* note 16.

⁷⁰ S.D.N.Y. Standing Order, *supra* note 23, at 1.

⁷¹ See *Barker v. Wingo*, 407 U.S. 514, 534–36 (1972) (holding that five-year delay in trial was not a constitutional violation).

⁷² Neil M. Ferguson et al., *Impact of Non-Pharmaceutical Interventions (NPIs) to Reduce COVID-19 Mortality and Healthcare Demand* (Mar. 16, 2020), <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf>.

⁷³ *Barker*, 407 U.S. at 531. This is not an insubstantial point with respect to the federal criminal justice system, which handles large-scale conspiracies and street-level drug distribution alike. See UNITED STATES SENTENCING COMM’N, FISCAL YEAR 2018 OVERVIEW OF FEDERAL CRIMINAL CASES 4 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf (reporting that drug crimes made up 28.1% of federal criminal cases while fraud, theft, and embezzlement made up 9.5% of cases).

⁷⁴ See, e.g., S.D.N.Y. Standing Order, *supra* note 23, at 1 (“[T]he Centers for Disease Control and Prevention and other public health authorities have advised the taking of precautions to reduce the possibility of exposure to the virus and slow the spread of disease.”).

trial will necessarily stand on much weaker footing than an incarcerated pretrial defendant who has expressed a desire to proceed immediately to trial. This makes good sense given the central role of “personal prejudice” in determining whether a defendant has adequately asserted his right to a speedy trial.⁷⁵

The fourth factor—its own prejudice inquiry—will similarly vary case by case. As the speedy trial right was designed “(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired,”⁷⁶ a defendant can demonstrate prejudice by pointing to one of these interests. Obviously enough, a defendant who is incarcerated and runs the risk of having a defense impaired by continued delay will have a much stronger speedy trial claim than another defendant who is released on bond and has no similar risk of an impaired defense.⁷⁷

The foregoing analysis should make one point very clear: while it is impossible to fashion any sort of general rule applicable to all defendants awaiting trial in the federal system during the coronavirus pandemic, very compelling claims based upon the Speedy Trial Clause are likely to result from this crisis. At the time of this writing, it is impossible to say with any certainty how long the coronavirus pandemic will shutter much of the federal court system. Yet, it is not impossible to imagine a world where criminal defendants who were prepared to proceed to trial in March 2020 are still unable to do so in May or June of 2021. And while even longer delays have not been viewed as constitutional violations, the unique circumstances of the present coronavirus outbreak should alter this calculus. Put simply, scholars and judges must engage with the difficult reality before them: when the rights of a criminal defendant are stacked against the health of jurors and judges and attorneys, who wins?

The easy answer, perhaps, is to suggest that everyone can do so. Twenty-first century technology has allowed for a substantial segment of the population to continue their work largely unabated—albeit from

⁷⁵ *Barker*, 407 U.S. at 531.

⁷⁶ *Id.* at 532.

⁷⁷ A related yet independent constitutional question arises with respect to pretrial detainees, who are protected by the Fourteenth Amendment to the United States Constitution. *See City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). In particular, the Due Process Clause affords at least the same rights to pretrial detainees as does the Eighth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Confinement in a prison or jail for an indefinite period of time pending trial is arguably a violation of the Sixth Amendment’s Speedy Trial Clause, but pretrial confinement in prisons swarming with a lethal virus is *also* arguably impermissible “punishment” within the meaning of the Fourteenth Amendment. *See Ingraham v. Wright*, 430 U.S. 651, 671–72 n.40 (1977). This is a complicated constitutional question that this Article does not attempt to answer, but it is nonetheless deserving of future scrutiny.

home—during the pandemic.⁷⁸ Videoconferencing and teleconferencing may actually provide opportunities for judges to conduct every proceeding short of an actual jury trial without exposing herself or her employees to the risk of any infection.⁷⁹ Of course, this gets at the nub of the problem: that jury trials are unique, both in a practical and constitutional sense.⁸⁰ Attorneys can no more effectively conduct a voir dire examination via conference call than witnesses can identify evidence via videoconference. Similarly, jurors cannot be expected to apprehend evidence published to them in a courtroom as they would evidence emailed to them during some form of virtual trial. This presents a difficult obstacle for courts, which are charged by *Barker* with balancing the interests of a criminal defendant in a speedy trial with other, countervailing considerations.⁸¹

There is no single answer that can resolve this tension, but any conclusion should favor the rights of a criminal defendant (and particularly of a pretrial detainee) over the rights of the Government or a court to delay trial indefinitely. The current pandemic could largely abate in a matter of weeks—or it could not.⁸² In the latter case of years-long

⁷⁸ Tracy Hadden Loh & Lara Fishbane, *COVID-19 Makes the Benefits of Telework Obvious*, BROOKINGS INST. (Mar. 17, 2020), <https://www.brookings.edu/blog/the-avenue/2020/03/17/covid-19-makes-the-benefits-of-telework-obvious/>.

⁷⁹ See Loeb et al., *supra* note 14 (noting that “some courts are offering oral arguments via video or telephone” in lieu of in-person argument to avoid risk of the disease). Congress recognized as much in the recently-enacted Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, providing that “the chief judge of a district court . . . may authorize the use of video teleconferencing, or telephone conferencing if video teleconferencing is not reasonably available” for ten enumerated proceedings. Pub. L. No. 116-136, § 15002, 134 Stat. 281, 528 (2020). These proceedings include, *inter alia*, detention hearings, initial appearances, probation and supervised release revocation hearings, and misdemeanor pleas and sentencing. *Id.* Felony pleas and sentencing are held to a higher standard and may only be conducted via teleconference if they “cannot be conducted in person without seriously jeopardizing public health and safety, and the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice.” *Id.* In either case, remote proceedings “may only take place with the consent of the defendant, or the juvenile, after consultation with counsel.” *Id.* No provision is made for shifting criminal trials to teleconference. See *id.*

⁸⁰ See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]”); see also *Maryland v. Craig*, 497 U.S. 836, 850 (1990) (“[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”).

⁸¹ This obstacle may be less daunting in civil bench trials, where the Confrontation Clause is not at issue and jurors are not involved. See Patricia Mazzei, *A Major Trial for Voting Rights in Florida Is Happening on Video Chat*, N.Y. TIMES (Apr. 27, 2020), <https://www.nytimes.com/2020/04/27/us/florida-felons-voting-trial.html>.

⁸² See Ferguson et al., *supra* note 72.

delay, it is likely that a significant portion of criminal defendants will have been denied a speedy trial under *Barker*.

It of course bears repeating that the Supreme Court placed special emphasis on the *ad hoc* nature of Speedy Trial Clause claims and that each case will likely differ from the next. A defendant who is not detained will likely be unable to show the same degree of prejudice as a detained defendant, just as a defendant who has not actively asserted his right to a speedy trial will be less likely to receive relief.⁸³ Yet, serious though the threat posed by the novel coronavirus is, courts must be equally mindful of the fundamental guarantees the Constitution affords to criminal defendants. When this pandemic ends, courts will be confronted with new and difficult claims to analyze under *Barker*. They should do so with an eye toward defendants and detainees who have asserted a right guaranteed to them by the Sixth Amendment, but denied to them by disease.

CONCLUSION

The Constitution guarantees all defendants the right to a speedy trial by jury. This right is of particular importance to those detained pending trial, facing the potential spread of the novel coronavirus from inside crowded prisons already primed for the rapid transmission of infectious disease. Courts closing their doors to the public and delaying jury trials are doing so for admirable reasons—to protect judges, jurors, employees, lawyers, and litigants from the spread of a disease that has already killed thousands and hospitalized countless more. Yet these reasons alone do not render the Sixth Amendment meaningless. Where the length and prejudice of a delay outweigh its justification, courts should enforce the guarantee to a speedy trial by dismissing indictments with or without prejudice; the Constitution requires nothing less.

⁸³ See *Barker v. Wingo*, 407 U.S. 514, 502 (1972).