

# Criminal Law During (and After) COVID-19

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T E R R Y   S K O L N I K \*

## ABSTRACT

In response to the COVID-19 pandemic, governments across the globe are implementing drastic physical distancing measures with wide-ranging implications. Courts are increasingly confronted with novel pandemic-related issues that are significantly altering the criminal justice system. This article explores the current and potential impacts of COVID-19 on three specific areas of the criminal law: the scope of certain crimes, bail, and punishment. It advances three core arguments.

First, the pandemic creates a risk that courts will expand the breadth of crimes such as assault and aggravated assault for conduct such as coughing. It provides compelling reasons why courts must limit the scope of these criminal offences and why judges should not extend the legal framework that applies to HIV non-disclosure to COVID-19 transmissions. Second, the pandemic is changing the bail process. Due to COVID-19 outbreaks in detention centres, courts are rethinking whether pre-trial custody is necessary to maintain public confidence in the criminal justice system. More than ever, judges consider the interests of defendants and detainees when interpreting the concept of “public confidence” – a positive change that limits recourse to pre-trial custody. Third, the pandemic is impacting sentencing as judges move away from custodial punishments. COVID-19 highlights why incarceration and financial penalties disparately impact defendants, which raises concerns regarding proportionality and retributive justifications for punishment both during and beyond the pandemic. Ultimately, this article shows why judges, policy makers, and justice system actors should seize on this unique opportunity to generate lasting positive changes to the criminal justice system that are taking place during the pandemic.

## I. INTRODUCTION

The pandemic is changing everything, including criminal law. In order to prevent the transmission of COVID-19, governments are employing various coercive measures that aim to limit the virus' spread.<sup>1</sup> Police officers are enforcing *Criminal Code* provisions, provincial health laws, and by-laws for conduct such as coughing on others and disobeying physical distancing guidelines.<sup>2</sup> These measures generate profound civil rights concerns and raise crucial questions about the criminal law's breadth, its expansion during emergencies, and the future of Canada's criminal justice system.

This article explores the impact of COVID-19 on three areas of Canadian criminal law: the scope of certain crimes, bail, and sentencing. It argues that legal responses to the pandemic expose the severity of problems such as overcriminalization, pre-trial detention, and disproportionate punishments that have plagued the criminal justice system for decades. However, COVID-19 has also resulted in certain positive changes to the criminal law that can catalyze a shift away from overly punitive criminal justice policy and practice. Justice system actors are developing innovative ways to address the above-mentioned problems and decrease overreliance on the criminal law. This article explores these changes and shows why they should persist beyond the pandemic. It advances three main arguments.

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<sup>1</sup> Alexander McClelland & Alex Luscombe, "Policing the Pandemic: Tracking the Policing of Covid-19 across Canada" (2020), online (pdf): <static1.squarespace.com/static/5e8396f40824381145ff603a/t/5e8f788edecf77629b70587a/1586460816391/Policing\_the\_Pandemic\_White\_Paper\_April\_9\_2020.pdf> [perma.cc/D4LP-56QF]; Eric S Brock et al, "COVID-19: Can They do That? Part VII: Québec's Public Health Act and Civil Protection Act" (21 March 2020), online: McCarthy Tetrault <www.mccarthy.ca/en/insights/articles/covid-19-can-they-do-part-vii-quebecs-public-health-act-and-civil-protection-act> [perma.cc/GC8N-4JKQ].

<sup>2</sup> Alex Luscombe & Alexander McClelland, "Policing the Pandemic: Enforcement Report: April 14 2020-May 1 2020" (2020) at 1-6, online (pdf): <static1.squarespace.com> [perma.cc/2ZQU-Q9RD] [Luscombe & McClelland, "Enforcement Report"]. Note that this article employs the term "physical distancing" rather than "social distancing".

First, the pandemic creates a serious risk of overcriminalization because courts may expand the breadth of crimes such as assault, aggravated assault, and inchoate offences. In line with other scholars' suggestions, this article demonstrates why it is objectionable for judges to transpose the legal framework applicable to the criminalization of communicable disease transmission into the context of COVID-19.<sup>3</sup> Second, the emergence of COVID-19 is forcing courts to rethink bail and recourse to pre-trial detention. The pandemic has altered how judges conceptualize the tertiary ground that justifies remand in custody, which assesses whether the defendant's detention is necessary to maintain public confidence in the criminal justice system.<sup>4</sup> Courts must now accord greater importance to the defendant's interests in interpreting the concept of "public confidence" and must truly examine all of the alternatives to pre-trial detention.<sup>5</sup> Third, COVID-19 requires justice system actors to reconsider the harms associated with various punishments. The pandemic illustrates the shortfalls of retributivism and sheds new light on why disproportionate financial penalties are objectionable.

This article is structured as follows. Section II provides an overview of COVID-19 and Canada's response to the pandemic. Section III explores the dangers of expanding the breadth of various crimes. Against the historical backdrop of over-criminalizing HIV non-disclosure, it sets out the problems associated with extending that framework to COVID-19.<sup>6</sup> Section IV shows how COVID-19 has forced courts to recommit to the presumption of innocence and increasingly mandate pre-trial release. After providing an overview of recent case law developments, it explains how COVID-19 has led courts to reinterpret the tertiary ground in bail decisions

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<sup>3</sup> See e.g. Lee Seshagiri, "Criminalizing COVID-19 Transmission via Sexual Assault Law? No. And that Means No" (28 April 2020), online: *The Lawyer's Daily* <[www.thelawyersdaily.ca/articles/18817](http://www.thelawyersdaily.ca/articles/18817)> [perma.cc/39GL-TAF4]; Scott Skinner-Thompson, "Don't Criminalize COVID-19" (27 March 2020), online: *Slate* <[slate.com/news-and-politics/2020/03/criminalize-coronavirus-hiv-stigma.html](http://slate.com/news-and-politics/2020/03/criminalize-coronavirus-hiv-stigma.html)> [perma.cc/DLF9-BTSY].

<sup>4</sup> *Criminal Code*, RSC 1985, c C-46, s 515(10)(c).

<sup>5</sup> Jenny Carroll, "Pre-Trial Detention in the Time of COVID-19" (2020) 115 *Nw UL Rev* 57 at 78–80.

<sup>6</sup> Skinner-Thompson, *supra* note 3; "Flatten Inequality: Human Rights in the Age of COVID-19" (3 April 2020) at 1, online: *Canadian HIV/AIDS Legal Network* <[www.aidslaw.ca/site/flatten-inequality-human-rights-in-the-age-of-covid-19/?lang=en](http://www.aidslaw.ca/site/flatten-inequality-human-rights-in-the-age-of-covid-19/?lang=en)> [perma.cc/XH8G-J2GM]; Alexander McClelland, "We Can't Police our Way out of a Pandemic" (30 March 2020), online: *NOW* <[nowtoronto.com/news/coronavirus-we-cant-police-our-way-out-of-pandemic/](http://nowtoronto.com/news/coronavirus-we-cant-police-our-way-out-of-pandemic/)> [perma.cc/5U3K-C7JT].

and revisit the notion of “public confidence”.<sup>7</sup> Section V concludes the article by examining how COVID-19 is shifting the criminal justice system away from imprisonment and why the State should not impose disproportionate financial penalties on defendants, both during and after the pandemic. In line with emerging case law, it proposes a range of schemes that accommodate the realities of COVID-19 into custodial sentencing and shows why day fines (or graduated economic sanctions) are preferable to traditional fines.<sup>8</sup>

Although COVID-19 risks imperiling civil liberties and expanding police officers’ powers, it has also forced courts to embrace a greater commitment to the presumption of innocence, pre-trial liberty, and non-custodial punishments – developments that can persist once the pandemic subsides. This article demonstrates why justice system actors are in the midst of a unique historical opportunity to implement lasting positive changes to the Canadian criminal justice system and ultimately, take meaningful steps towards alleviating many of its worst problems.

## II. AN OVERVIEW OF COVID-19 AND LEGAL RESPONSES TO THE PANDEMIC

In December 2019, China reported the emergence of a novel coronavirus (SARS CoV-2) that originated in the city of Wuhan.<sup>9</sup> The virus causes the COVID-19 disease that produces a range of symptoms that vary significantly across a spectrum.<sup>10</sup> While some individuals infected with COVID-19 are asymptomatic, others experience mild, upper respiratory illness, high fever, pneumonia, other symptoms, and respiratory failure that leads to death.<sup>11</sup> The virus quickly spread across the globe and the World Health Organization (WHO) declared a pandemic on March 11, 2020.<sup>12</sup>

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<sup>7</sup> Carroll, *supra* note 5 at 78–80.

<sup>8</sup> See e.g. Sally T Hillsman, “Fines and Day Fines” (1990) 12 Crime & Justice 49.

<sup>9</sup> Michael Holshue et al, “First Case of 2019 Novel Coronavirus in the United States” (2020) 382:10 New Eng J Med 929 at 929, DOI: <10.1056/NEJMoa2001191>.

<sup>10</sup> Fei Zhou et al, “Clinical Course and Risk Factors for Mortality of Adult Inpatients with COVID-19 in Wuhan, China: A Retrospective Cohort Study” (2020) 395:10229 Lancet 1054 at 1054, DOI: <10.1016/S0140-6736(20)30566-3>.

<sup>11</sup> *Ibid.*

<sup>12</sup> Juliet Bedford et al, “COVID-19: Towards Controlling of a Pandemic” (2020) 395:10229 Lancet 1015 at 1015, DOI: <10.1016/S0140-6736(20)30673-5>.

Before exploring certain facets of COVID-19, two caveats are necessary. For one, insight into COVID-19 is in a state of constant flux and new information about SARS CoV-2 emerges daily. Although this article was completed in June 2020, some of the following information may not be current in a matter of days, weeks, or months. The other caveat is that much about the virus remains unknown. As discussed more below, seemingly basic knowledge – such as exactly how the virus transmits, its mortality rate, and its basic reproductive rate – is unclear and contested. With this being said, the virus has several general characteristics that make it particularly dangerous, leading countries to adopt drastic measures to curve the disease’s spread.

First, compared to seasonal influenza, COVID-19 appears to have a significantly higher mortality rate.<sup>13</sup> Elderly persons, immunocompromised individuals, and those with pre-existing medical conditions (such as diabetes, cardiovascular disease, or pulmonary disease) are at an especially heightened risk of complications and death.<sup>14</sup> Moreover, COVID-19 results in a significant number of hospitalizations and admissions to the ICU that have overwhelmed some countries’ health care systems.<sup>15</sup> Due to the possibility of asymptomatic spread and limited testing capabilities, it is difficult to ascertain the actual number of infected persons within the population.

Second, COVID-19 is easily transmissible.<sup>16</sup> At the time of drafting this article, the Centers for Disease Control and Prevention observe that it is not entirely certain how COVID-19 spreads.<sup>17</sup> They note that it is believed

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<sup>13</sup> Roy M Anderson et al, “How Will Country-Based Mitigation Measures Influence the Course of the COVID-19 Epidemic?” (2020) 395:10228 *Lancet* 931 at 931, DOI: <10.1016/S0140-6736(20)30567-5>.

<sup>14</sup> Zonyou Wu & Jennifer M. McGoogan, “Characteristics of and Important Lessons from the Coronavirus Disease 2019 (COVID-19) Outbreak in China: Summary of a Report of 72314 Cases from the Chinese Center for Disease Control and Prevention” (7 April 2020), online: *JAMA* <jamanetwork.com/journals/jama/fullarticle/2762130> [perma.cc/S339-J7B8].

<sup>15</sup> “Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19): United States, February 12–March 16, 2020” (27 March 2020) at 343–45, online: *Centers for Disease Control and Prevention* <www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm> [perma.cc/7CF3-MYAT].

<sup>16</sup> “Coronavirus Disease 2019 (COVID-19): How COVID-19 Spreads” (last modified 2 June 2020), online: *Centers for Disease Control and Prevention* <www.cdc.gov/coronavirus/2019-ncov/faq.html#How-COVID-19-Spreads> [perma.cc/363X-6R3M].

<sup>17</sup> *Ibid.*

to transmit through person-to-person spread via respiratory droplets, for example, by sneezing or coughing.<sup>18</sup> There may be other forms of transmission, although it is unclear.<sup>19</sup> For instance, a study published in the *New England Journal of Medicine* notes that the virus can be found on certain types of surfaces for a period of hours to days, depending on the surface.<sup>20</sup> Although estimates vary, COVID-19's basic reproduction rate (or R-0 factor, pronounced "R naught") is considered to be somewhere between two to three, and even higher according to some.<sup>21</sup> This means that without effective physical distancing measures, each person with COVID-19 would transmit the virus to an average of two to three other persons, resulting in an exponential growth rate of infections.<sup>22</sup> Furthermore, evidence suggests that asymptomatic individuals can spread the virus, although it is unclear to what extent asymptomatic spread occurs.<sup>23</sup> Some countries, such as South Korea, have developed intensive testing, case follow-up, contact tracing, and

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<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* See also Jianyun Lu et al, "COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020" (2020), online: *Centers for Disease Control and Prevention* <[wwwnc.cdc.gov/eid/article/26/7/20-0764\\_article#suggestedcitation](http://wwwnc.cdc.gov/eid/article/26/7/20-0764_article#suggestedcitation)> [perma.cc/5L2Q-HQX6]; Yuan Liu et al, "Aerodynamic Analysis of SARS-CoV-2 in Two Wuhan Hospitals" (27 April 2020), online: *Nature* <[www.nature.com/articles/s41586-020-2271-3](http://www.nature.com/articles/s41586-020-2271-3)> [perma.cc/6ECU-YLWJ].

<sup>20</sup> Neeltje van Doremalen et al, "Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1" (2020) 382:16 *New Eng J Med* 1564, DOI: <10.1056/NEJMc2004973>.

<sup>21</sup> Alessia Lai et al, "Early Phylogenetic Estimate of the Effective Reproduction Number of SARS-CoV-2" (25 February 2020) at 4, online: *Pub Med: National Library of Medicine* <[pubmed.ncbi.nlm.nih.gov/32096566/](http://pubmed.ncbi.nlm.nih.gov/32096566/)> [perma.cc/M3M7-BS44]; Shi Zhao et al, "Preliminary Estimation of the Basic Reproduction Number of Novel Coronavirus (2019-nCoV) in China, from 2019 to 2020: A Data-Driven Analysis in the Early Phase of the Outbreak" (2020) 92 *Intl J Infectious Disease* 214 at 216; Anthony Fauci, Clifford Lane & Robert R. Redfield, "Covid-19: Navigating the Uncharted" (2020) 382 *New Eng J Med* 1268 at 1268–69, DOI: <10.1056/NEJMe2002387> (estimating the R-0 to be roughly 2.2).

<sup>22</sup> On the R-0 rate, see Roger Webber, *Communicable Disease Epidemiology and Control: A Global Perspective*, 2nd ed (Oxford, UK: Oxford University Press, 2005) at 26–28.

<sup>23</sup> Melissa Auns et al, "Presymptomatic SARS-CoV-2 Infections and Transmission in a Skilled Nursing Facility" (2020) 382:22 *New Eng J Med* 2081 at 2081, 2087–88, DOI: <10.1056/NEJMoa2008457>; Monica Gandhi, Deborah S. Yokoe & Diane V. Havlir, "Asymptomatic Transmission, the Achilles' Heel of Current Strategies to Control Covid-19" (2020) 328:22 *New Eng J Med* 2158 at 2159, DOI: <10.1056/NEJMe2009758>.

isolation protocols that have limited the incidence of outbreaks.<sup>24</sup> In other countries that lack such widespread measures, physical distancing remains the primary way to limit transmission.<sup>25</sup> Studies and epidemiological models show that early and effective physical distancing reduces the incidence of infections, decreases mortality rates, and eases the burden on healthcare systems.<sup>26</sup> It is also unclear when the pandemic will end, with scientists and governments bracing for the possibility of multiple waves – raising uncertainty about the duration of physical distancing measures.<sup>27</sup>

Third, there is currently no cure for COVID-19.<sup>28</sup> No vaccine exists at this point. Vaccine development typically takes many years and involves multiple phases of clinical trials, although these phases may overlap for vaccines that are developed in response to urgent pandemic contexts.<sup>29</sup> Many experts are skeptical about the development and mass-production of a COVID-19 vaccine within an 18-month period that some have suggested is possible.<sup>30</sup> Clinical trials that study the effectiveness of anti-viral medication are ongoing,<sup>31</sup> although the FDA and Health Canada have approved the use of some medications (such as remdesivir) to treat COVID-19 in certain circumstances.<sup>32</sup>

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<sup>24</sup> Dale Fisher & Annelies Wilder-Smith, “The Global Community Needs to Swiftly Ramp Up the Response to Contain COVID-19” (2020) 395:10230 *Lancet* 1109 at 1109–10.

<sup>25</sup> Jon Cohen & Kai Kupferschmidt, “Countries Test Tactics in ‘War’ against COVID-19” (20 March 2020) at 1288, online: *Pub Med: National Library of Medicine* <pubmed.ncbi.nlm.nih.gov/32193299/> [perma.cc/U4X6-XMNC].

<sup>26</sup> Sharon Kirkley, “What Is the End Game? Ontario’s Stark Modelling Forecast Could Help Canadians Cope with COVID-19”, *National Post* (4 April 2020), online: <nationalpost.com/news/what-is-the-end-game-ontarios-stark-modelling-forecast-could-help-canadians-cope-with-covid-19> [perma.cc/B57E-9AXU].

<sup>27</sup> Peter Baker & Eileen Sullivan, “U.S. Virus Plan Anticipates 18-Month Pandemic and Widespread Shortages”, *New York Times* (17 March 2020), online: <www.nytimes.com/2020/03/17/us/politics/trump-coronavirus-plan.html> [perma.cc/4NX3-ZC2J].

<sup>28</sup> Fauci Lane & Redfield, *supra* note 21 at 1268–69.

<sup>29</sup> Nicole Lurie et al, “Developing Covid-19 Vaccines at Pandemic Speed” (2020) 381:21 *New Eng J Med* 1969, DOI: <10.1056/NEJMp2005630>.

<sup>30</sup> Laura Spinney, “When Will a Cononavirus Vaccine Be Ready?”, *The Guardian* (3 April 2020), online: <www.theguardian.com/world/2020/apr/06/when-will-coronavirus-vaccine-be-ready> [perma.cc/HD3B-3GR9].

<sup>31</sup> Fauci, Lane & Redfield, *supra* note 21 at 1268–69.

<sup>32</sup> Tom Blackwell, “Canadian Experts don’t See Remdesivir as a COVID-19 Killer: ‘This Is Not a Silver Bullet’”, *National Post* (30 April 2020), online: <nationalpost.com/health/more-data-supply-needed-before-making-promising-covid-19-drug-remdesivir-a-routine-part-of-treatment-in-canada-say-experts> [perma.cc/VG4B-H54R].

These three characteristics discussed above — high mortality and complication rates, high transmissibility, and lack of a widely available and effective vaccine or treatment — point to the need to reduce COVID-19’s impact within Canada. Given the country’s current inability to implement adequate testing and tracing mechanisms, COVID-19’s spread is, for the moment, primarily limited by effective physical distancing, the use of personal protective equipment, and proper hygiene habits.

Scholars have addressed Canada’s legal response to the pandemic. Yves Le Bouthillier and Delphine Nackache observe that the Canadian federal and provincial governments have imposed a range of limitations on individual liberty, association, and movement in order to combat COVID-19.<sup>33</sup> Eric S. Brock and colleagues have analyzed the extent to which police officers and public health officials can lawfully enforce various federal and provincial penal laws in an effort to contain the pandemic.<sup>34</sup> Alex Luscombe and Alexander McClelland highlight that there are essentially three categories of coercive penal laws that are currently being employed to enforce physical distancing measures: the *Criminal Code*, provincial public health laws, and municipal by-laws.<sup>35</sup>

Scholars, advocates, and civil society groups, however, are preoccupied that the State’s response to the pandemic will limit civil liberties.<sup>36</sup> From the scope of State power to the breadth of individual liberties during emergencies, pandemics raise a crucial set of new questions and concerns that touch the foundations of substantive criminal law, criminal procedure,

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<sup>33</sup> Yves Le Bouthillier & Delphine Nakache, “Is it Constitutional to Screen Canadians Trying to Board Flights Home?: The Federal Government has an Obligation Under the Canadian Charter to Ensure Even Citizens with Symptoms Suggestive of COVID-19 can Return Home”, *Policy Options* (7 April 2020), online: <[policyoptions.irpp.org/magazines/april-2020/is-it-constitutional-to-screen-canadians-trying-to-board-flightshome/](http://policyoptions.irpp.org/magazines/april-2020/is-it-constitutional-to-screen-canadians-trying-to-board-flightshome/)> [perma.cc/6MQC-QDLG]. The following measures are all mentioned by Le Bouthillier & Nakache.

<sup>34</sup> Eric S. Brock et al, “COVID-19: Can They Do That? Part IX: Enforcement of Emergency Measures” (7 April 2020), online: [McCarty Tetraault <www.mccarthy.ca/en/insights/articles/covid-19-can-they-do-part-ix-enforcement-emergency-measures>](http://www.mccarthy.ca/en/insights/articles/covid-19-can-they-do-part-ix-enforcement-emergency-measures) [perma.cc/TA4H-A5SW].

<sup>35</sup> McClelland & Luscombe, “Enforcement Report”, *supra* note 2.

<sup>36</sup> See e.g. Joseph Arvay & David Wu, “As Civil Liberties Erode, Canada Must Not Allow COVID-19 Outbreak to Infect the Rule of Law”, *CBC News* (26 March 2020), online: <[www.cbc.ca/news/opinion/opinion-charter-rights-freedoms-covid](http://www.cbc.ca/news/opinion/opinion-charter-rights-freedoms-covid)> [perma.cc/AUX6-QHT6].

and criminal justice policy.<sup>37</sup> The following sections examine three principal issues related to COVID-19 and the criminal law: the substantive criminal law, bail, and sentencing.

### III. COVID-19, ASSAULTS, AND RESULT CRIMES

#### A. COVID-19 and Assaults

First, COVID-19 raises new issues about the scope of certain crimes. The “Policing the Pandemic Database” developed by McClelland and Luscombe indicates that many individuals have been accused of assault for either spitting or coughing on complainants (namely, police officers).<sup>38</sup> As explained more below, though intentionally coughing on others may constitute an assault in certain rare circumstances, courts must limit the criminal law’s scope during the pandemic and restrict assault convictions to clear cases that exemplify particularly reprehensible conduct.

The *Criminal Code* defines an assault as an intentional application of direct or indirect force against a complainant without their consent.<sup>39</sup> Even prior to the pandemic, courts have ruled that spitting on others constitutes a particularly reprehensible form of assault.<sup>40</sup> Courts characterize spitting on a complainant as “demeaning and degrading”,<sup>41</sup> a “distasteful and harmful form of assault”,<sup>42</sup> and note that it “carries a social message that other forms of assault do not carry.”<sup>43</sup> Some judges posit that such conduct may carry a veiled threat of transmitting a communicable disease to the complainant (even though some communicable diseases cannot be

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<sup>37</sup> Colleen Flood et al, “Overview of COVID-19: Old and New Vulnerabilities” in Flood et al, eds, *Vulnerable: The Law, Policy, and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 1 at 13–14; Terry Skolnik, “The Punitive Impact of Physical Distancing Laws on Homeless People” in Flood et al, eds, *Vulnerable: The Law, Policy, and Ethics of COVID-19* (Ottawa: University of Ottawa, 2020) at 290.

<sup>38</sup> Alexander McClelland & Alex Luscombe, “Policing the Pandemic: Searchable Database” (2020), online (pdf): <policingthepandemic.github.io/table> [perma.cc/VG K6-NK97] [Luscombe & McClelland, “Searchable Database”].

<sup>39</sup> *Criminal Code*, *supra* note 4, ss 265(1)(a), 270.

<sup>40</sup> *R v Charlette*, 2010 SKCA 78 at para 9 [*Charlette*]; *R v Maier*, 2015 ABCA 59 at para 28 [*Maier*]; *R v Koppang*, 2002 ABCA 295 at para 18; *R v Hominuk*, 2019 MBCA 64 at para 11; *R v Solomon*, [2001] OJ No 5733 at para 2; *R v Joseph*, [2001] OJ No 5726 at para 3; *R v Francis (Sentence)*, 2019 CanLII 75329 at para 24.

<sup>41</sup> *Maier*, *supra* note 40 at para 28.

<sup>42</sup> *Charlette*, *supra* note 40 at para 9.

<sup>43</sup> *R v Kakakaway*, 2017 BCPC 342 at para 12 [*Kakakaway*].

transmitted through saliva alone).<sup>44</sup> Since the complainant may not know whether the defendant has a communicable disease – and if so, whether the complainant can become infected – being spit on may cause significant anxiety.<sup>45</sup> Spitting on others may induce fear in victims in ways that other assaults may not.<sup>46</sup> In many cases, complainants cannot anticipate or prevent being spit on.<sup>47</sup> For these reasons, courts have concluded that intentionally spitting on others is a serious assault and an aggravating factor in sentencing, notably where the defendant has a communicable disease and intentionally spits in a police officer’s face.<sup>48</sup> Some judges reached the same conclusion where the defendant falsely claims to have a communicable disease and intentionally spits on the complainant.<sup>49</sup>

One might argue that many of these same considerations apply to cases where a defendant intentionally coughs in another person’s face during the pandemic.<sup>50</sup> Like spitting, coughing expels droplets that can spread COVID-19 from person to person.<sup>51</sup> In many cases, defendants are alleged to have intentionally coughed on police officers while expressing that they have COVID-19, which suggests that defendants intend to exploit the victim’s fear and uncertainty of transmission.<sup>52</sup> Complainants may be required to self-isolate as a result of the defendant’s conduct, which can generate downstream impacts on their physical and mental health, family life, and ability to work (including as an essential frontline worker). The wide range of adverse health outcomes from infection – and lack of knowledge about

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<sup>44</sup> *Charlette*, *supra* note 40 at para 9. See Crispian Scully, Jacobo Limeres Posse & Pedro Diz Dios, *Saliva Protection and Transmissible Diseases* (London, UK: Elsevier, 2017) at 69.

<sup>45</sup> *Kakakaway*, *supra* note 43 at para 12; *R v McLeod*, 2009 SKPC 85 at para 4 [McLeod].

<sup>46</sup> *Charlette*, *supra* note 40 at paras 1–4, 9; *R v Custer*, 2013 SKPC 66 at paras 4, 6 [Custer].

<sup>47</sup> *Charlette*, *supra* note 40 at para 9.

<sup>48</sup> *Ibid* at paras 1–4, 9. See also *Maier*, *supra* note 40; *R v Pelletier*, 2011 SKQB 7 at paras 204–05.

<sup>49</sup> *Custer*, *supra* note 46 at para 6; *R v McLeod*, *supra* note 45 at para 19.

<sup>50</sup> See David G. Chow, “Prosecuting Coronavirus” (19 March 2020), online (blog): *David G Chow: Criminal Defence Lawyer* <calgary-law.ca/blog/prosecuting-coronavirus-the-application-of-r-v-cuerrier/> [perma.cc/6PD2-72W6].

<sup>51</sup> Hussin A Rothan & Siddappa N. Byrareddy, “The Epidemiology and Pathogenesis of Coronavirus Disease (COVID-19) Outbreak” (2020) 109 *J Autoimmunity* 1 at 3, DOI: <10.1016/j.jaut.2020.102433>.

<sup>52</sup> For an overview of the number of cases where defendants are alleged to have coughed or spit on police officers, see McClelland & Luscombe, “Searchable Database”, *supra* note 38.

what makes some infected persons more vulnerable to complications than others – adds to these concerns.

There are, however, serious dangers associated with over-criminalizing conduct such as coughing during the pandemic. Emergency contexts raise unique concerns about the enforcement (and expansion) of the criminal law, including over-policing, racial and social profiling, and using the justice system as a tool to confront complex social problems.<sup>53</sup> In response to an emergency, history shows that the State often limits civil liberties, over-criminalizes individuals, and alters criminal justice policy based on fear.<sup>54</sup> As explained more in the next subsection, there is also a potential for an expanded criminal law doctrine of assault to become anchored within the criminal justice system and lead to greater disparities in coercion, criminalization, and punishment practices.<sup>55</sup>

The unique context of the pandemic gives rise to additional concerns about COVID-19-related assault convictions. Trials will be delayed far longer than normal.<sup>56</sup> Courts may conclude that the pandemic constitutes an unforeseeable discrete event that justifies further delays in the justice system.<sup>57</sup> Accusations may hang over defendants' heads for many months, if not years until they are adjudicated.<sup>58</sup> Furthermore, the stigmatization associated with having a criminal record will likely produce unprecedented consequences on individuals. Canada and the world are entering into a

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<sup>53</sup> Gil Gott, "The Devil We Know: Racial Subordination and National Security Law" (2005) 50 *Vill L Rev* 1073 at 1075–77; David Cole, "The Priority of Morality: The Emergency Constitution's Blind Spot" (2004) 113:8 *Yale LJ* 1753 at 1756–57.

<sup>54</sup> See an overview of these arguments in Eric Posner & Adrian Vermeule, "Accommodating Emergencies" (2003) 56 *Stan L Rev* 605 at 609–10.

<sup>55</sup> Owen Gross & Fionnuala Ni Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006) at 103.

<sup>56</sup> *R v Dagher*, 2020 ONSC 2592 at para 20.

<sup>57</sup> "COVID-19 And Criminal Practice (Part One): Delay in the Time of Coronavirus" (23 March 2020), online: *Luke J. Merrimen: Barristers & Solicitors* <merrimenlaw.ca/blog/2020/3/23/covid-19-and-criminal-practice-part-one-delay> [perma.cc/V2LB-W4B9]. See also *R v Jordan*, 2016 SCC 27 at para 73; Bill Graveland, "COVID-19 Pandemic Means Court Delays and Stalled Justice System", *National Observer* (18 March 2020), online: <www.nationalobserver.com/2020/03/18/news/covid-19-pandemic-means-court-delay-s-and-stalled-justice-system> [perma.cc/NQN7-36LW].

<sup>58</sup> Aidan Macnab, "How Does the COVID-19 Criminal Trials Shutdown Affect Charter Rights of Those Awaiting Trial?" (27 March 2020), online *Canadian Lawyer* <www.canadianlawyermag.com/news/general/how-does-the-covid-19-criminal-trials-shutdown-affect-charter-rights-of-those-awaiting-trial/328048> [perma.cc/TA8F-AX6H].

period of profound economic uncertainty and social dislocation.<sup>59</sup> Unemployment rates are climbing and many industries — notably the service industry, travel, hospitality, and retail — are disproportionately affected.<sup>60</sup> Since criminal records characteristically decrease employment prospects and there may be ongoing limits on interprovincial travel (and out-of-province job opportunities), it may be even harder for ex-offenders to find jobs.<sup>61</sup> As discussed more below, if defendants are denied bail, they also face the risk of being exposed to a COVID-19 outbreak in a detention center.<sup>62</sup>

This explains why accusations and convictions for assault should be limited to exceptional cases where defendants demonstrate a clear intent to spit or cough on others, which excludes reflexive or accidental coughs, sneezes, and so on. In addition to being based on clear intent, convictions will generally be more legitimate when a defendant expresses that they have COVID-19 when coughing on the complainant, attempts to induce fear in the complainant, or ambushes a defenceless victim. Such conduct not only exemplifies a particularly reprehensible act and a culpable state of mind; it also undermines the complainant’s fundamental interests in physical integrity and mental wellbeing — interests that crimes against the person typically impact and that the criminal law can legitimately protect.<sup>63</sup>

## **B. Case Law Approaches: Distinguishing Result Crimes from Attempts**

Second, COVID-19 raises important questions about the applicability and scope of certain result crimes, such as aggravated assault. A result crime implies a criminal offence “that is in part defined by certain consequences”

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<sup>59</sup> Jason Kirby, “Coronavirus Plunges Canada’s Economy into the Abyss”, *Maclean’s* (6 April 2020), online: <[www.macleans.ca/economy/economicanalysis/coronavirus-plunges-canadas-economy-into-the-abyss/](http://www.macleans.ca/economy/economicanalysis/coronavirus-plunges-canadas-economy-into-the-abyss/)> [perma.cc/FFF4-KLBG].

<sup>60</sup> Vanessa Subramaniam, “Think Canada’s Job Market Is Bad Now? You ain’t Seen Nothing Yet”, *Financial Post* (24 April 2020), online: <[business.financialpost.com/news/economythink-canadas-job-market-is-bad-you-aint-seen-nothing-yet](http://business.financialpost.com/news/economythink-canadas-job-market-is-bad-you-aint-seen-nothing-yet)> [perma.cc/HA3M-MEXZ].

<sup>61</sup> Devah Pager, “The Mark of a Criminal Record” (2003) 108:5 *American J Sociology* 937 at 954–60.

<sup>62</sup> Paul Cherry, “More than A Dozen Inmates at Bordeaux Jail Diagnosed with COVID-19”, *Montreal Gazette* (30 April 2020), online: <[montrealgazette.com/news/more-than-a-dozen-inmates-at-bordeaux-jail-diagnosed-with-covid-19](http://montrealgazette.com/news/more-than-a-dozen-inmates-at-bordeaux-jail-diagnosed-with-covid-19)> [perma.cc/JW48-K37E].

<sup>63</sup> *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 74.

that follow, such as bodily harm, gross bodily harm, or death.<sup>64</sup> Homicide, criminal negligence causing death, and dangerous driving causing bodily harm are all examples of result crimes. All other things being equal, the criminal law construes result crimes that cause bodily harm or death as more culpable than offences that cause no such consequences.<sup>65</sup>

Prior to the emergence of COVID-19, courts have analyzed whether a defendant who has a communicable disease can be convicted of aggravated assault when they intentionally spit on the complainant.<sup>66</sup> In particular, they examine whether defendants satisfy the *actus reus* of aggravated assault by endangering the complainant's life.<sup>67</sup> In making that assessment, courts apply the legal framework that governs the criminalization of HIV transmission described in the Supreme Court of Canada decisions *R v Cuerrier*, *R v Williams*, and *R v Mabior*.<sup>68</sup>

The Manitoba Court of Appeal, for instance, applied the framework from these decisions in *R v Bear*.<sup>69</sup> In that case, the Court examined whether an accused who was HIV positive could be convicted of aggravated assault for intentionally spitting in a police officer's eye.<sup>70</sup> Evidence suggested that the accused had a small open wound on his lip, yet it was unclear whether the accused's spit contained blood.<sup>71</sup> The trial judge examined expert evidence that HIV cannot be transmitted through saliva alone and concluded that the Crown failed to prove that there was blood in the accused's saliva that could transmit the virus.<sup>72</sup> The trial judge thus acquitted the accused of aggravated assault but convicted him of simple assault.<sup>73</sup>

The Manitoba Court of Appeal, however, overturned the trial judge's decision and concluded that the accused was guilty of attempted aggravated

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<sup>64</sup> Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Carswell, 2014) at 142.

<sup>65</sup> A.P. Simester & Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart, 2011) at 43–46, 51.

<sup>66</sup> *R v Bear* (CW), 2013 MBCA 96 [*Bear* (CW)].

<sup>67</sup> *Ibid*.

<sup>68</sup> *R v Cuerrier*, [1998] 2 SCR 371, 162 DLR (4th) 513 [*Cuerrier*]; *R v Williams*, 2003 SCC 4 [*Williams*]; *R v Mabior*, 2012 SCC 47 [*Mabior*].

<sup>69</sup> *Bear* (CW), *supra* note 66 at para 6. See also Lisa Silver, "Criminal Law in the Time of COVID-19: Part One" (12 April 2020), online (blog): *IdeaBlawg* <[www.ideablawg.cabl.org/2020/4/12/](http://www.ideablawg.cabl.org/2020/4/12/)> [perma.cc/932H-DLVW].

<sup>70</sup> *Bear* (CW), *supra* note 66 at paras 3–6.

<sup>71</sup> *Ibid* at paras 55–59.

<sup>72</sup> *Ibid* at paras 51, 57–59.

<sup>73</sup> *Ibid* at para 6.

assault.<sup>74</sup> After interpreting the provision's scope, the unanimous Court concluded that aggravated assault is comprised of conduct that endangered the victim's life even if it did not, in fact, cause bodily harm.<sup>75</sup> Citing the Supreme Court of Canada decision *R v Mabior*, the Manitoba Court of Appeal held that a defendant endangers the victim's life within the meaning of section 268 when the defendant engages in conduct that creates a significant risk of serious bodily harm to the victim.<sup>76</sup> The Court observed that there is a "significant risk of serious bodily harm" when there is a realistic possibility of transmitting the virus.<sup>77</sup>

In acquitting the accused of aggravated assault, the Court of Appeal deferred to the trial judge's findings of fact that there was no realistic possibility of HIV transmission in the circumstances.<sup>78</sup> The Court found the accused guilty of attempted aggravated assault. They observed that the Crown had proven the accused's *mens rea* beyond a reasonable doubt and that the accused had taken more than preparatory steps to completing the *actus reus* of the offence by spitting on the victim.<sup>79</sup>

### C. Aggravated Assault and the Perils of the *R v Mabior* Framework

The pandemic creates a risk that courts will expand the scope of result crimes such as aggravated assault. As scholars such as Alex McClelland and Scott Skinner-Thompson explain, judges risk extending the legal framework that applies to the criminalization of HIV to COVID-19 transmissions, despite the significant shortfalls and injustices inherent to that approach.<sup>80</sup> By applying this framework, the criminal justice system may unduly

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<sup>74</sup> *Ibid* at para 96.

<sup>75</sup> *Ibid* at para 33. See also *Dubourg c R*, 2018 QCCA 1999 at para 46.

<sup>76</sup> *Bear* (CW), *supra* note 66 at para 44, citing *Mabior*, *supra* note 68 at para 92 (per McLachlin CJ).

<sup>77</sup> *Bear* (CW), *supra* note 66 at para 49 [emphasis added]. See also *R v Thompson*, 2018 NSCA 13 at para 19; Matthew Cornett, "Criminalization of the Intended Transmission or Knowing Non-Disclosure of HIV in Canada" (2011) 5:1 McGill J L & Health 61 at 94-96.

<sup>78</sup> *Bear* (CW), *supra* note 66 at paras 59-63.

<sup>79</sup> *Ibid* at paras 69-72, citing *United States of America v Dynar*, [1997] 2 SCR 462 at paras 72-74.

<sup>80</sup> Canadian HIV/AIDS Legal Network, *supra* note 6 at 1; McClelland, *supra* note 6; Skinner-Thompson, *supra* note 3.

stigmatize, coerce, and punish individuals based on similar errors that resulted in the over-criminalization of persons with HIV.<sup>81</sup>

As explained above, the Supreme Court of Canada decided in *Mabior* that a defendant endangers the complainant's life by creating a significant risk of causing serious bodily harm, such that there is a realistic possibility that the defendant transmits HIV to the complainant.<sup>82</sup> The Court reasoned that there is a realistic possibility of transmission when defendants who knowingly have HIV do not satisfy two cumulative conditions: they must wear a condom and they must have a low viral load.<sup>83</sup> Furthermore, as noted in *Cuerrier* and *Williams*, defendants must know that they have HIV in order to risk conviction for aggravated assault.<sup>84</sup>

Many scholars have criticized the *Mabior* decision on the grounds that it applied an overbroad understanding of "life endangerment" in light of the actual scientific risks of HIV transmission.<sup>85</sup> Isabel Grant, Martha Shaffer, and Allison Symington observe that individuals who had a sufficiently low viral load could not transmit the virus.<sup>86</sup> Yet, defendants still risked convictions for failing to wear a condom even if the sexual activity could not endanger the victim's life.<sup>87</sup> Davinder Singh & Karen Busby note that the Court's legal test did not properly analyze medical science pertaining to HIV transmission.<sup>88</sup> The decision disproportionately impacted marginalized communities.<sup>89</sup> It also increased the stigma

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<sup>81</sup> *Ibid.* On the over-criminalization of HIV in Canada, see Isabel Grant, "The Over-Criminalization of Persons with HIV" (2013) 63:3 UTLJ 475; Richard Elliot, Ryan Peck & Léa Pelletier-Marcotte, "Prosecuting COVID-19 Non-Disclosure Misguided" (29 April 2020), online: *The Lawyer's Daily* <[www.thelawyersdaily.ca/articles/18816](http://www.thelawyersdaily.ca/articles/18816)> [perm a.cc/T4844TEV].

<sup>82</sup> *Mabior*, *supra* note 68 at paras 91-92.

<sup>83</sup> *Ibid* at paras 94-95.

<sup>84</sup> *Cuerrier*, *supra* note 68 at paras 125-28; *Williams*, *supra* note 68 at paras 27-28.

<sup>85</sup> For a summary of these criticisms, see Kyle Kirkup, "Releasing Stigma: Police, Journalists, and Crimes of HIV Non-Disclosure" (2015) 46:1 Ottawa L Rev 127 at 138-39, citing Grant, *supra* note 81 at 480; Martha Shaffer, "Sex, Lies, and HIV: *Mabior* and the Concept of Sexual Fraud" (2013) 63:3 UTLJ 466 at 471-74. See also Davinder Singh & Karen Busby, "Criminalizing HIV Non-Disclosure: Using Public Health to Inform Criminal Law" (2019) 42:3 Man LJ 89 at 100-04.

<sup>86</sup> Grant, *supra* note 81 at 480; Shaffer, *supra* note 85 at 473; Alison Symington, "Injustice Amplified by HIV Non-Disclosure Ruling" (2013) 63:3 UTLJ 485 at 488-90.

<sup>87</sup> *Ibid.*

<sup>88</sup> Singh & Busby, *supra* note 85 at 99-103.

<sup>89</sup> Elaine Craig, "Personal Stare Decisis, HIV Non-Disclosure, and the Decision in *Mabior*" (2015) 53:1 Alta L Rev 207 at 223.

associated with HIV and disincentivized some individuals from seeking testing.<sup>90</sup>

## D. The Dangers of Applying the *R v Mabior* Framework to COVID-19

The post-*Mabior* context is a sobering reminder about the dangers of adopting broad interpretations of concepts such as causation and life endangerment in the context of COVID-19. Due to the lack of scientific knowledge about the precise modes of transmission and the risks of transmission in different contexts, courts should interpret these legal concepts particularly restrictively. There are also many pragmatic considerations that militate against wide interpretations of notions such as “realistic probability of transmission” and “significant risk of serious bodily harm.”

First, due to Canada’s initial lack of testing capabilities, the country’s current low testing rates, and the unavailability of widespread antibodies testing, it may be unclear whether a complainant unknowingly contracted COVID-19 in the past.<sup>91</sup> This is further complicated by the lack of scientific consensus about whether a complainant who has already been infected with the virus can become re-infected.<sup>92</sup> For these reasons, when a defendant intentionally coughs on a victim, there may be no realistic possibility of transmitting the virus in certain circumstances and, therefore, no significant risk of serious bodily harm.

Second, in cases where defendants have not tested positive for the disease, there may be a reasonable doubt as to the defendant’s infected status and, therefore, their ability to transmit the disease and endanger the victim’s life. The inability to force defendants to undergo COVID-19 testing

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<sup>90</sup> Maya A Kesler et al, “Prosecution of Non-Disclosure of HIV Status: Potential Impact on HIV Testing and Transmission Among HIV-Negative Men Who Have Sex with Men” (2018) 13:3 PLoS One 1 at 14, DOI: <10.1371/journal.pone.0193269>.

<sup>91</sup> Katelyn Thomas, “Half of Canadians who think they had COVID-19 didn’t consider testing: survey”, *CTV News* (8 June 2020), online: <montreal.ctvnews.ca/half-of-canadians-who-think-they-had-covid-19-didn-t-consider-testing-survey> [perma.cc/2QW W-XFNU].

<sup>92</sup> See “‘Immunity Passports’ in the Context of COVID-19” (24 April 2020), online: *World Health Organization* <www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19> [perma.cc/8PKQ-RN4B]; Robert D Kirkcaldy, Brian A King & John T Brooks, “COVID-19 and Postinfection Immunity: Limited Evidence, Many Remaining Questions” (2020) 323:22 *JAMA* 2245 at 2245–46.

in certain provinces further complicates the ability to prove that the accused placed the defendant's life at risk. Some provincial laws require defendants to provide a blood sample to health authorities in cases where the defendant exposed a victim to a bodily substance and the victim requests such an analysis.<sup>93</sup> Though these provincial acts can order defendants to submit blood samples to test for viruses such as HIV and different strands of hepatitis, they do not currently authorize compelled testing for COVID-19.<sup>94</sup>

Third, and interrelatedly, the current context surrounding COVID-19 makes proof of causation elusive.<sup>95</sup> Even when complainants or defendants test positive for the virus, it may be difficult to ascertain from whom the complainant acquired the virus.<sup>96</sup> Since the median incubation period for COVID-19 is about five days, it may be unclear if the victim acquired the disease before coming into contact with the defendant's bodily substances.<sup>97</sup> The uncertainties regarding transmissibility, infectious status, and immunity may even lead to bizarre results in some situations. Suppose a defendant who does not have COVID-19 but believes they have the disease intentionally coughs on a police officer who has COVID-19 but is asymptomatic. During an ensuing physical altercation, the officer subdues the defendant and unintentionally transmits the virus to them. The defendant refuses testing and the officer is tested several days later, at which point the officer discovers that they have COVID-19. This type of situation highlights the difficulties in establishing that the defendant transmitted the virus to the complainant at a specific point in time.

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<sup>93</sup> *Mandatory Blood Testing Act*, SO 2006, c 26, s 2, 5(2); *Mandatory Testing and Disclosure Act*, RSA 2006, c M-3.5, s 2, 4; *Mandatory Testing and Disclosure Regulation*, Alta Reg 190/2007.

<sup>94</sup> *Ibid.*

<sup>95</sup> Seshagiri, *supra* note 3.

<sup>96</sup> For similar concerns in the context of HIV transmission, see Isabel Grant, "The Boundaries of the Criminal Law: The Criminalization of the Non-Disclosure of HIV" (2008) 31 Dal LJ 123 at 132; Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (London: Routledge, 2007) at 97.

<sup>97</sup> Stephen A Lauer et al, "The Incubation Period of Coronavirus Disease 2019 (COVID-19) From Publicly Reported Confirmed Cases: Estimation and Application" (2020) 172:9 *Annals Intl Medicine* (Online) 1 at 4-5. The term incubation period implies the period of time between the initial infection and the appearance of symptoms. See Miquel Porta, ed, *A Dictionary of Epidemiology*, 6th ed (Oxford: Oxford University Press, 2014) at 145.

One might argue that if courts apply the Manitoba Court of Appeal's reasoning in *Bear* to contexts where a defendant who is knowingly infected with COVID-19 intentionally coughs or spits on the complainant, it should lead to a conviction for attempted aggravated assault. According to that view, the defendant still risks conviction to the extent that they have the full *mens rea* (knowledge that they have COVID-19 and the intention to apply direct or indirect force without consent) but only part of the defendant's *actus reus* (an attempt to endanger the victim's life).<sup>98</sup>

Though there may be some plausible basis for conviction in such circumstances, the history of over-criminalizing HIV non-disclosure is instructive about the risks of heavy criminal sanctions and criminalizing public health issues. For one, expanding the scope of criminalization for attempted aggravated assault has the potential to seep back into HIV non-disclosure law and expand the likelihood of criminalization in that context. Furthermore, like in cases surrounding the criminalization of HIV non-disclosure there are also concerns that attempted aggravated assault convictions will lead to disparate policing practices that overwhelmingly impact marginalized groups.<sup>99</sup> Finally, since COVID-19 has caused widespread economic dislocation, individuals who are already in a precarious financial situation may be unable to afford legal counsel and may plead guilty to these offences. Like in the areas of remand in custody and sentencing, the pandemic emphasizes the need to limit the criminal law's coercive force more than ever.

## IV. COVID-19 AND BAIL

### A. The Current State of Bail in Canada

The COVID-19 pandemic has impacted two principal areas of the bail process: initial decisions to grant bail under s. 515 of the *Criminal Code* and bail review decisions under s. 520 of the *Criminal Code*.<sup>100</sup> In principle, when a defendant is accused of a crime, they should be released without conditions while awaiting their trial.<sup>101</sup> The Crown must demonstrate (or,

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<sup>98</sup> *United States of America v Dynar*, [1997] 2 SCR 462 at paras 72–74, 147 DLR (4th) 399.

<sup>99</sup> Skinner-Thompson, *supra* note 3.

<sup>100</sup> Jordan Gold, "Bail, COVID-19, and the Release of Inmates Detained on the "Tertiary Ground"" (2 April 2020), online: *Robichaud's Criminal Defence Litigation* <robichaudlaw.ca/bail-coronavirus-covid/> [perma.cc/9ESN-WHCA].

<sup>101</sup> *R v Antic*, 2017 SCC 27 at para 21 [Antic]; *Criminal Code*, *supra* note 4, s 515(1).

show cause) why the defendant's detention is justified.<sup>102</sup> The three grounds that justify the accused's detention are to ensure attendance at trial (the primary ground), protect public safety, (the secondary ground), or maintain public confidence in the administration of justice (the tertiary ground).<sup>103</sup> Rather than constituting a residual justification for remand in custody, the tertiary ground is a "separate and distinct" ground for pre-trial detention.<sup>104</sup>

As discussed next, the impact of COVID-19 has primarily been analyzed under the tertiary ground: maintaining public confidence in the justice system.<sup>105</sup> Courts also consider its application to the secondary ground of public safety.<sup>106</sup> Many courts consider how the pandemic constitutes a change in material circumstances that justifies bail review, which also requires courts to explore such changes in light of the tertiary ground.<sup>107</sup>

Leading Supreme Court of Canada decisions such as *R v Antic* and *R v Myers* explain that bail is intimately connected to the presumption of innocence and that pretrial detention should be used sparingly.<sup>108</sup> However, empirical studies demonstrate that courts frequently remand defendants into custody.<sup>109</sup> Nicole Marie Myers observes that recourse to remand in custody has tripled within the past 30 years.<sup>110</sup> Many of these restrictions

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<sup>102</sup> *Criminal Code*, *supra* note 4, s 515(10).

<sup>103</sup> *Ibid.* See also Carolyn Yule & Rachel Schumann, "Negotiating Release? Analysing Decision Making in Bail Court" (2019) 61:3 Can J Corr 45 at 46-48.

<sup>104</sup> *R v St-Cloud*, 2015 SCC 27 at para 34 [*St-Cloud*].

<sup>105</sup> See e.g. *R v JR*, 2020 ONSC 1938 at paras 20-52 [*JR*]; *R v Rajan*, 2020 ONSC 2118 at para 2 [*Rajan*]; *R v Budlakoti*, [2020] OJ No 1352 (ONSC) at para 13 [*Budlakoti*]; *R v JA*, 2020 ONSC 2312 at para 16 [*JA*]; *R v TK*, 2020 ONSC 1935 at para 60 [*TK*]; *R v Arsenaault-Lewis*, 2020 ONCJ 181 at para 58, citing *R v TL*, 2020 ONSC 1885 at paras 34-36. See also Paul L Moreau, "COVID-19 and the Tertiary Ground: The Global Pandemic and the Public Interest" (6 April 2020), online: *CanLII (Commentary)* <[www.canlii.org/en/commentary/](http://www.canlii.org/en/commentary/)> [perma.cc/D9E5-APW2].

<sup>106</sup> See e.g. *R v Yaman*, 2020 BCPC 56 at paras 16-22; *R v Jeyakanthan*, 2020 ONSC 1984 at para 8; *R v A*, 2020 ONSC 2077. These decisions are all cited in: *R v CKT*, 2020 ABQB 261.

<sup>107</sup> *R v Phuntsok*, 2020 ONSC 2158 at para 41 [*Phuntsok*]; *Budlakoti*, *supra* note 105.

<sup>108</sup> *Antic*, *supra* note 101 at para 1; *R v Myers*, 2019 SCC 18 at para 22 [*Myers*].

<sup>109</sup> See an overview of these studies in Marie-Ève Sylvestre, Celine Bellot & Nicholas Blomley, "Une peine avant jugement? La mise en liberté provisoire et la réforme du droit pénal canadien" in Marie-Ève Sylvestre, Margarida Garcia & Julie Desrosiers, eds, *Criminal Law Reform in Canada: Challenges and Possibilities* (Cowansville: Yvon Blais, 2017) 189 at 203-05.

<sup>110</sup> Nicole Marie Myers, "Eroding the Presumption of Innocence: Pre-trial Detention and the Use of Conditional Release on Bail" (2017) 57:3 *Brit J Crim* 664 at 666-67.

disproportionately impact marginalized individuals and groups.<sup>111</sup> Holly Pelvin notes that roughly 38% of individuals who were remanded into custody in Ontario courts in 2015 were found not guilty of an offence.<sup>112</sup> For many decades, scholars and civil society groups issued dire warnings about the imperilled state of Canada's bail system.<sup>113</sup> Despite those warnings, many of these problems have since worsened.<sup>114</sup>

The increased resort to remand in custody has devastating consequences. Crystal Yang points out that pre-trial detention incentivizes individuals to plead guilty in order to avoid harsh conditions in detention centres – a concern that may be magnified during the pandemic.<sup>115</sup> Compared to defendants who are granted bail, individuals who are remanded into custody are more likely to be convicted at trial.<sup>116</sup> They are also subjected to overcrowding and lack access to rehabilitative and educational programs.<sup>117</sup> They risk losing their jobs, access to housing, and abilities to support their families.<sup>118</sup> They can also experience significant anxiety while their case winds its way through the justice system.<sup>119</sup> Due to the profound consequences of remand in custody, scholars suggest that it

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<sup>111</sup> Keara Lundrigan, “R v Jordan: A Ticking Time Bomb” (2018) 41:4 Man LJ 113 at 142; Jillian Rogin, “Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada” (2017) 95:2 Can Bar Rev 325 at 341.

<sup>112</sup> Holly Pelvin, “Remand as a Cross-Institutional System: Examining the Process of Punishment before Conviction” (2018) 61:2 Can J Corr 66 at 67.

<sup>113</sup> Martin L. Friedland, *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965); Roger Ouimet, *Toward Unity: Criminal Justice and Corrections: Report of the Canadian Committee on Corrections* (Ottawa: Queen's Printer, 1969). These books are cited in *Antic*, *supra* note 101.

<sup>114</sup> Benjamin L Berger & James Stribopoulos, “Risk and The Role of The Judge: Lessons from Bail” in Benjamin L. Berger, Emma Cunliffe & James Stribopoulos, eds, *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto: Thomson Reuters Canada, 2017) 305 at 309–14.

<sup>115</sup> Crystal S. Yang, “Towards an Optimal Bail System” (2017) 92:5 NYUL Rev 1399 at 1406.

<sup>116</sup> Shima Baradaran Baughman, *The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System* (Cambridge: Cambridge University Press, 2017) at 83.

<sup>117</sup> Pelvin, *supra* note 112 at 69; *R v Hall*, 2002 SCC 64 at para 118.

<sup>118</sup> Alfred Allan et al, “An Observational Study of Bail Decision-Making” (2005) 12:2 Psychiatry, Psychology & L 319 at 320.

<sup>119</sup> Michael Weinrath, “Inmate Perspectives on the Remand Crisis in Canada” (2009) 51:3 Can J Corr 355 at 361.

constitutes a form of pre-trial punishment that flouts the presumption of innocence.<sup>120</sup>

## B. The Risks Associated with COVID-19 in Detention Centres

COVID-19 compounds many of these problems. Currently, detention centres are adopting even more stringent physical distancing measures to isolate inmates and combat the virus' spread.<sup>121</sup> Detainees report a greater number of lockdowns that bar access to showers, outdoor areas, and other shared spaces.<sup>122</sup> Detainees complain that they are receiving less food than usual and that its quality has declined.<sup>123</sup> New detainees are quarantined for a period of two weeks.<sup>124</sup> Furthermore, many inmates lack personal protective equipment, cannot implement effective hygiene practices (such as handwashing), and cannot practice physical distancing while incarcerated.<sup>125</sup> These measures, combined with inmates' knowledge that they are confined to a location that is particularly susceptible to outbreaks, generate additional adverse impacts on detainees' mental and physical wellbeing.<sup>126</sup>

Due to the heightened threat of contracting COVID-19 in detention centers and inmates' particular health vulnerabilities, many scholars are preoccupied that subjecting defendants to such risks corrodes public

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<sup>120</sup> Marie-Eve Sylvestre, Nicholas Blomley & Céline Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People* (Cambridge: Cambridge University Press, 2020) at 125–27 [Sylvestre, Blomley & Bellot, *Red Zones*].

<sup>121</sup> Richard Warnica, “The Hidden Pandemic: Social Distancing is Nearly Impossible in Care Homes, Prisons and Shelters”, *National Post* (25 April 2020), online: <nationalpost.com/news/canada/the-hidden-pandemic-social-distancing-is-nearly-impossible-in-care-homes-prisons-and-shelters> [perma.cc/PHY5-755Z].

<sup>122</sup> John Ivison, “John Ivison: Prisoners are Sitting Ducks as Ottawa Lets COVID-19 Sweep through Canadian Jails”, *National Post* (21 April 2020), online: <nationalpost.com/opinion/john-ivison-prisoners-are-sitting-ducks-as-ottawa-lets-covid-sweep-through-canadian-jails> [perma.cc/D3AV-QXRE].

<sup>123</sup> *Ibid.*

<sup>124</sup> *JA*, *supra* note 105 at para 89.

<sup>125</sup> Terri Theodore, “Doctors Urge Governments to Release as Many Inmates as Possible amid COVID”, *The Globe and Mail* (7 April 2020), online: <www.theglobeandmail.com/canada/> [perma.cc/3DDH-FT7W].

<sup>126</sup> Warnica, *supra* note 121.

confidence in the justice system.<sup>127</sup> These risks should not be understated. An epidemiological model developed by the American Civil Liberties Union (ACLU) in conjunction with various researchers concluded that increased resort to incarceration – including pre-trial detention – will likely result in a significantly higher number of inmate deaths and health complications.<sup>128</sup> In a similar vein, the *New York Times* has reported that jails continue to be some of the predominant sources of COVID-19 outbreaks in the United States.<sup>129</sup> Empirical evidence shows that in U.S. prisons, a major proportion of inmates that are tested for COVID-19 have the virus and many are asymptomatic.<sup>130</sup> These risks are exemplified by the inherent difficulty of ensuring physical distancing guidelines within prisons.<sup>131</sup>

In terms of health status and outcomes, inmates constitute a particularly vulnerable population. Their overall health tends to be worse than the general population.<sup>132</sup> There is a higher prevalence of tuberculosis infections in federal prisons compared to in the general population.<sup>133</sup> Inmates are also more likely to have certain communicable diseases, such as Hepatitis C and HIV.<sup>134</sup> Furthermore, inmates also lack access to adequate healthcare, which is a frequent complaint of detainees.<sup>135</sup> Inmates also have a considerably higher incidence of mental illness and are more likely to commit suicide

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<sup>127</sup> See e.g. *JR*, *supra* note 105 at paras 20–21; *R v Nelson*, 2020 ONSC 1728 at paras 40–42 [*Nelson*]; *TK*, *supra* note 105 at para 73; *R v JS*, 2020 ONSC 1710 at paras 10, 17, 20 [*JS*].

<sup>128</sup> “COVID-19 Model Finds Nearly 100,000 More Deaths Than Current Estimates, Due to Failures to Reduce Jails” (2020) at 1–3, online (pdf): <[www.aclu.org/sites/default/files/field\\_document/aclu\\_covid19-jail-report\\_2020-8\\_1.pdf](http://www.aclu.org/sites/default/files/field_document/aclu_covid19-jail-report_2020-8_1.pdf)> [perma.cc/JN6P-94QG].

<sup>129</sup> Timothy Williams & Danielle Ivory, “Chicago’s Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars”, *The New York Times* (8 April 2020), online: <[www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html](http://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html)> [perma.cc/698X-DUUJ].

<sup>130</sup> Linda So & Grant Smith, “In Four U.S. State Prisons, Nearly 3,300 Inmates Test Positive for Coronavirus: 96% Without Symptoms” (25 April 2020), online: *Reuters* <[www.reuters.com](http://www.reuters.com)> [perma.cc/9ZMU-Q5WF].

<sup>131</sup> “Coronavirus in the U.S.: Latest Map and Case Count” (last modified 17 June 2020), online: *The New York Times* <[www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html](http://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html)> [perma.cc/E6N3-WRMD].

<sup>132</sup> Fiona Kouyoumdjian et al, “Health Status of Prisoners in Canada: Narrative Review” (2016) 62:3 *Can Family Physician* 215 at 219.

<sup>133</sup> *Ibid* at 217.

<sup>134</sup> *Ibid*, citing Liviana Calzavara et al, “Prevalence of HIV and Hepatitis C Virus Infections among Inmates of Ontario Remand Facilities” (2007) 177:3 *CMAJ* 257 at 260–61.

<sup>135</sup> Adam Miller, “Prison Health Care Inequality” (2013) 185:6 *CMAJ* 249 at 249–50.

compared to the general population.<sup>136</sup> All of these factors elucidate the mental and physical toll that pre-trial detention can have on detainees during the pandemic.

### C. The Impact of COVID-19 on Bail Decisions

These considerations shape how judges and justices assess the impact of COVID-19 in deciding whether to grant bail.<sup>137</sup> S. 515(10)(c) of the *Criminal Code* provides that a defendant can be remanded into custody on the ground that it is necessary to maintain public confidence in the justice system.<sup>138</sup> In *R v St-Cloud*, the Supreme Court of Canada affirmed that the “public” implies “reasonable members of the community who are properly informed about ‘the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case’”.<sup>139</sup> In assessing the public confidence ground, courts examine a list of non-exhaustive factors mentioned in s. 515(10)(c) of the *Criminal Code*, such as “the apparent strength of the prosecution’s case”, “the gravity of the offence”, “the circumstances surrounding the commission of the offence, including whether a firearm was used”, and, the potential length of imprisonment.<sup>140</sup> Since this list of factors in s. 515(10)(c) of the *Criminal Code* is non-exhaustive, COVID-19 constitutes a novel factor that judges examine in deciding whether the public confidence ground is met.

Courts have recognized that there are three principal reasons why granting defendants bail during COVID-19 maintains public confidence in the Canadian criminal justice system. First, it is objectionable to remand defendants into custody and expose them to COVID-19 given the high rate of infections in detention centers.<sup>141</sup> Second, newly incarcerated defendants may import the disease into jails and endanger others, such as detainees,

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<sup>136</sup> Kouyoumdjian et al, *supra* note 132 at 217.

<sup>137</sup> Betsy Powell, “COVID-19 is Revealing a ‘Momentous Divide’ among Ontario Judges on whether to Release more Accused People on Bail”, *The Star* (9 April 2020), online: <[www.thestar.com/news/gta/2020/04/09/covid-19-is-revealing-a-momentous-divide-among-ontario-judges-on-whether-to-release-more-accused-people-on-bail.html](http://www.thestar.com/news/gta/2020/04/09/covid-19-is-revealing-a-momentous-divide-among-ontario-judges-on-whether-to-release-more-accused-people-on-bail.html)> [perma.cc/F7VT-RR2B].

<sup>138</sup> *Criminal Code*, *supra* note 4, s 515(10)(c).

<sup>139</sup> *St-Cloud*, *supra* note 104 at para 74, quoting *R v Nguyen* (1997), 119 CCC (3d) 269 at para 18, 1997 CanLII 10835 (BCCA).

<sup>140</sup> *St-Cloud*, *supra* note 104 at paras 12, 31, 35, 56.

<sup>141</sup> “Protecting the Forgotten During Canada’s Response to Coronavirus: The Jailed” (19 March 2020), online: *Canadian Civil Liberties Association* <[ccla.org/coronavirus-update-the-jailed/](http://ccla.org/coronavirus-update-the-jailed/)> [perma.cc/8HJC-B9SR]; TK, *supra* note 105 at para 60.

corrections officers, and prison staff.<sup>142</sup> Third, the revolving door between remand in custody and re-entry into the community creates a risk that infection within detention centers will seep into the community, placing the broader population's health in peril.<sup>143</sup>

Courts have struggled with how best to maintain public confidence in the justice system in the face of COVID-19's impact on the bail process. Many courts take judicial notice of the pandemic and recognize that defendants are exposed to greater risks of contracting the virus in detention centers.<sup>144</sup> They factor that consideration into the public confidence analysis and recognize that the pandemic's incidence militates towards bail. Other courts disagree with that approach and contend that some judges have unduly broadened judicial notice by presuming a generalized risk within detention centers without proper evidence that would make such assessments reliable.<sup>145</sup> Such evidence includes correctional service policies, conditions within detention centers, statistics regarding the prevalence of COVID-19 in a prison, and the defendant's medical condition.<sup>146</sup> According to this view, a court's ability to maintain public confidence in the justice system can only be weighed accurately if courts have access to such information.

## D. Concerns Regarding Current Approaches to Bail During COVID-19

In response to these concerns, the Superior Court of Ontario decision *R v Baidwan* provides guidance on how judges can assess COVID-19 risks – a framework that can apply to initial bail decisions as well as to bail review.<sup>147</sup>

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<sup>142</sup> Carroll, *supra* note 5 at 78–80; Rajan, *supra* note 105 at paras 69–70; *R v Fraser*, 2020 ONSC 2045 at para 16.

<sup>143</sup> Anna Flagg & Joseph Neff, “Why Jails Are So Important in the Fight Against Coronavirus”, *The New York Times* (2 April 2020), online: <[www.nytimes.com/2020/03/31/upshot/coronavirus-jails-prisons.html](http://www.nytimes.com/2020/03/31/upshot/coronavirus-jails-prisons.html)> [perma.cc/VX5E-ASK4]. See also *R v Kazman*, 2020 ONCA 251 at para 18.

<sup>144</sup> See e.g. *JS*, *supra* note 127 at paras 18–19; *R v Leppington*, 2020 BCSC 546 at para 29; *JR*, *supra* note 105 at para 44; *R v Cain*, 2020 ONSC 2018 at paras 6–8; Rajan, *supra* note 105 at para 56; *Nelson*, *supra* note 127 at para 34; *R v Dawson*, 2020 ONSC 2481 at para 53.

<sup>145</sup> *R v GTB*, 2020 ABQB 228 at para 46 [GTB]; *R c Kadoura*, 2020 QCCQ 1455 at para 84 [Kadoura].

<sup>146</sup> *GTD*, *supra* note 145; *Kadoura*, *supra* note 145. See also *R v Myles*, 2020 BCCA 105 at para 40.

<sup>147</sup> *R v Baidwan*, 2020 ONSC 2349.

The Court explained that judges who assess COVID-19 related risks should “rely on the most recent reliable data regarding infection rates and deaths... [that] come from reliable sources from government and private institutions which have a legal/moral duty to collect and report this data.”<sup>148</sup>

To paraphrase the Court’s framework in *Baidwan*, judges should also consider (1) the general risk of infection in the population (federally, provincially, and locally), (2) specific risks to the defendant in light of their age or medical history, (3) the prevalence of COVID-19 in a given detention centre, (4) medical evidence proffered by the defendant, (5) the defendant’s past compliance with court orders in contexts where public safety is at issue, and (6) “any other circumstances deemed relevant.”<sup>149</sup> Although this framework provides valuable guidance on the types of factors that courts can assess in evaluating the “public confidence” ground for detention, there are also important drawbacks to it.

First, some courts expressly require a defendant to adduce medical evidence that they are at greater risk of contracting the virus and experiencing complications.<sup>150</sup> This creates significant obstacles for indigent and self-representing defendants who may lack the resources or know-how to acquire such reports, especially during a time of scarce access to medical personnel.<sup>151</sup> Furthermore, since individuals without known medical conditions may experience severe complications from the virus, a defendant’s prior health may be a poor proxy for assessing adverse health outcomes.<sup>152</sup>

Second, since detention centres are not currently undergoing widespread testing, the true extent of COVID-19 infections in incarceration settings is ambiguous. Some detention centres in Ontario have declared COVID-19 outbreaks.<sup>153</sup> Furthermore, as certain courts observe, it is easier

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<sup>148</sup> *Ibid* at para 60.

<sup>149</sup> *Ibid* at para 61.

<sup>150</sup> *Nelson*, *supra* note 127 at para 41; *Phuntsok*, *supra* note 107 at para 41; *Budlakoti*, *supra* note 105 at para 14; *R v Brown*, [2020] OJ No 1432 at para 59; *R v Bear*, 2020 SKCA 47 at para 16.

<sup>151</sup> *Budlakoti*, *supra* note 105 at para 7.

<sup>152</sup> See e.g. Ariana Eunjung Cha, “Young and Middle-Aged People, Barely Sick with Covid-19, Are Dying of Strokes”, *The Washington Post* (25 April 2020), online: <[www.washingtonpost.com/health/2020/04/24/strokes-coronavirus-young-patients/](http://www.washingtonpost.com/health/2020/04/24/strokes-coronavirus-young-patients/)> [perma.cc/WB9L-QM8N].

<sup>153</sup> *R v Ali*, 2020 ONSC 2374 at paras 92–98; “COVID-19 Outbreak Leads to Ontario Jail Being Closed after 60 Inmates, Eight Staff Test Positive”, *National Post* (20 April 2020), online: <[nationalpost.com/news/ontario-jail-closing-after-60-inmates-8-staff-test-positiv](http://nationalpost.com/news/ontario-jail-closing-after-60-inmates-8-staff-test-positiv)

to prevent outbreaks through proper physical distancing than it is to react to them, which further militates in favor of bail.<sup>154</sup> The U.S. experience with COVID-19 should serve as an important reminder that detention centres serve as major vectors for transmitting the virus.<sup>155</sup>

Third, in assessing the impact of COVID-19 on the secondary ground, there is a risk that judges focus primarily on the existence of past breaches without examining their surrounding context. As a general proposition, pre-trial detention will be more justifiable where the defendant represents a tangible risk to public safety and has a long history of prior breaches, especially those that resulted in concrete harms or endangerment.

Not all prior breaches are equal. As the Canadian Civil Liberties Association notes, many defendants are imposed pre-trial conditions that set them up for failure and result in breaches that neither injure or jeopardize the wellbeing of others.<sup>156</sup> For instance, defendants who struggle with alcohol or drug addictions are imposed bail conditions that require them to abstain from consuming alcohol or drugs.<sup>157</sup> In other cases, defendants who are experiencing homelessness are prohibited from entering a certain perimeter within a city's downtown core, despite the fact that many services available to homeless people are located in such areas.<sup>158</sup> In Manitoba, defendants who violated their bail conditions in relatively minor ways – such as missing an appointment with a bail supervisor – were still charged and convicted for a breach.<sup>159</sup> Others are found guilty of breaches even though the original charge giving rise to the conditions was subsequently withdrawn.<sup>160</sup> Given the vast array of circumstances that result in breached bail conditions, judges must carefully examine the circumstances surrounding prior breaches, especially the incidence of violence in the underlying offence or breached bail conditions.

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e-for-covid-19> [perma.cc/3V27-QX6D].

<sup>154</sup> *R v McArthur*, 2020 ONSC 2276 at paras 61–62.

<sup>155</sup> So & Smith, *supra* note 130.

<sup>156</sup> “Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention” (2014) at 2–5, online (pdf): *Canadian Civil Liberties Association* <ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf> [perma.cc/F69T-8V63] [CCLA, “Set Up to Fail”].

<sup>157</sup> *Ibid* at 55–57.

<sup>158</sup> Sylvestre, Blomley & Bellot, *Red Zones*, *supra* note 120 at 170.

<sup>159</sup> CCLA, “Set up to Fail”, *supra* note 156 at 69–70.

<sup>160</sup> *Ibid* at 2, 81.

## E. Rethinking “Public Confidence” in Bail Decisions

The pandemic is bringing about fundamental changes to the bail system and the interpretation of the tertiary ground in remand decisions. Namely, COVID-19 has forced courts to place greater emphasis on defendants’ and inmates’ fundamental interests when interpreting the notion of “public confidence.” As explained next, this signals a shift towards a more “liberal and enlightened system of pre-trial release” that the *Bail Reform Act* of 1972 was supposed to achieve.<sup>161</sup>

Justice Gary Trotter observes that when the tertiary ground was debated in the legislative assembly in the early 1970s, the House of Commons Standing Committee interpreted the term “public interest” narrowly to imply public safety and preventing pre-trial misconduct.<sup>162</sup> In subsequent years, courts interpreted the provision more expansively.<sup>163</sup> Some judges conceptualized the public interest factor (or public confidence factor) as a normative constraint that aims to prevent courts from too easily caving into public pressure and remanding defendants into custody as a result of the community’s visceral reactions to a crime.<sup>164</sup> As Frederick Schumann and Caroline Davidson observe, this constraint analogizes the “reasonable person” who forms the basis of the public confidence factor to a judge, in that both are required to view the situation dispassionately, impartially, and reasonably.<sup>165</sup> As explained earlier in this article, the Supreme Court of Canada adopted this approach in *R v St-Cloud* and described the public confidence factor in terms of a reasonable person who is informed of *Charter* values, the legislative philosophy surrounding bail, and the facts of the case.<sup>166</sup>

Though the public confidence assessment is supposed to consider the interests of the public at large from a normative standpoint, it largely fails

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<sup>161</sup> Myers, *supra* note 108 at paras 21–22.

<sup>162</sup> Gary T. Trotter, *The Law of Bail in Canada*, 3rd ed (Toronto: Thompson Reuters, 2016), s 3.4(b).

<sup>163</sup> *Ibid.*

<sup>164</sup> Frederick Schumann, “The Appearance of Justice: Public Justification in the Legal Relations” (2008) 66 UT Fac L Rev 189 at 200. See e.g. *R c Lamothe*, [1990] RJQ 973 at 541, 58 CCC (3d) 530, cited in Trotter, *supra* note 162; *R v Collins*, [1987] 1 SCR 265 at para 33, 38 DLR (4th) 508, cited in Schumann.

<sup>165</sup> Schumann, *supra* note 164 at 200–01; Caroline Davidson, “May It Please the Crowd? The Role of Public Confidence, Public Order, and Public Opinion in Bail for International Criminal Defendants” (2012) 43:2 Colum HRLR 349 at 358.

<sup>166</sup> *St-Cloud*, *supra* note 104 at para 74.

to consider the defendant's own interests that are impacted by remand in custody. None of the factors listed in s. 515(10)(c) of the *Criminal Code* – the strength of the prosecution's case, the seriousness of the offence, the use of a firearm, and the potential length of imprisonment – consider the plight of defendants who are detained pre-trial.<sup>167</sup> Many scholars have argued that the public confidence factor has worsened pre-trial detention across Canada. Archibald Kaiser notes that the focus on public confidence allows the judiciary to justify remand decisions based on public fear where the prosecution fails to satisfy the secondary ground.<sup>168</sup> Don Stuart points out that judges have broad subjective discretion to determine which crimes are sufficiently “serious” to merit pretrial detention.<sup>169</sup> David MacAllister suggests that the notion of public confidence is inherently vague and affords judges too much discretion to remand defendants into custody.<sup>170</sup> Micah Rankin, for his part, points out that the low evidentiary threshold required for bail hearings – credible or trustworthy evidence – exacerbates the risk of pre-trial detention.<sup>171</sup>

The failure to incorporate the defendant's interests into the public confidence analysis is surprising given the serious consequences that defendants experience during pre-trial custody. Defendants who are remanded into custody face risks of violence, overcrowding, lack of resources, financial ruin, and homelessness upon release.<sup>172</sup> Jenna Carroll points out that since defendants are also members of the public, their interests should be factored into the tertiary ground.<sup>173</sup> It is particularly important to consider the defendant's interests in evaluating the tertiary ground because it is the only one of the three grounds listed in s. 515(10) *Criminal Code* that can plausibly incorporate their interests into the bail decision calculus. Furthermore, courts would be demonstrating respect for the newly codified principle of restraint in pre-trial detention, as well as the

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<sup>167</sup> *Criminal Code*, *supra* note 4, s 515(10)(c).

<sup>168</sup> H. Archibald Kaiser, “R. v. Hall: Erosion of Basic Principles in Bail and Beyond” (2002) 4 *Crim Reports* (6th) 241 (WL Can).

<sup>169</sup> Don Stuart, “St-Cloud: Widening the Public Confidence Ground to Deny Bail Will Worsen Deplorable Detention Realities” (2015) 19 *Crim Reports* (7th) 337 (WL Can).

<sup>170</sup> Davis MacAlister, “St-Cloud: Expanding Tertiary Grounds for Denying Judicial Interim Release” (2015) 19 *Crim Reports* (7th) 344 (WL Can).

<sup>171</sup> Micah B Rankin, “R. v. St. Cloud: Searching for a Silver Lining” (2015) 19 *Crim Reports* (7<sup>th</sup>) 359 (WL Can).

<sup>172</sup> CCLA, *supra* note 156 at 9–10.

<sup>173</sup> Carroll, *supra* note 5 at 78–81, 83.

requirement that justices who are making bail decision consider whether the defendant is part of a vulnerable population that is over-represented in the justice system.<sup>174</sup>

Pre-trial custody rates could decline if courts accorded more importance to defendants' interests in the public confidence analysis and ensured that pre-trial custody was truly a last resort. As Kent Roach observes, the tertiary ground did not exist between the years 1992-1997, since the Court had struck down the former "public interest" ground as unconstitutional in *R v Morales* and Parliament enacted replacement legislation roughly five years later.<sup>175</sup> However, during that time, remand in custody rates increased.<sup>176</sup> If judges applied the principle of restraint vigorously and considered the consequences of pre-trial detention within the tertiary ground, it may lead to a meaningful reduction in remand in custody.

The COVID-19 pandemic illustrates that it is possible to decrease the incidence of pre-trial detention in Canada. Indeed, the pandemic is forcing judges to increasingly consider how measures such as electronic monitoring, sureties, and house arrest – measures that still must be used sparingly and respect the ladder principle – can fulfil traditional law enforcement objectives while limiting pre-trial detention.<sup>177</sup> Similar to how courts recognize the specific risks associated with COVID-19 and remand in custody, they should more broadly acknowledge how pre-trial detention impacts the interests of defendants, detainees, and the broader community. Like other members of the public, defendants are also presumed innocent until proven guilty. A more inclusive interpretation of the tertiary ground allows judges to demonstrate a greater commitment to that hallowed principle.

## V. COVID-19, PUNISHMENT, AND SENTENCING

Lastly, COVID-19 is impacting sentencing, imprisonment, and other forms of non-custodial punishment. As Justice Applegate observed in the

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<sup>174</sup> *Criminal Code*, *supra* note 4, s 493.1-493.2.

<sup>175</sup> Kent Roach, "A Charter Reality Check: How Relevant Is the Charter to the Justness of Our Criminal Justice System?" (2008) 40 SCLR (2d) 717 at 725.

<sup>176</sup> *Ibid.* See also Myers, *supra* note 110 at 667, fig 1.

<sup>177</sup> Stephanie Francis Ward, "Where and How Are Criminal Defense Lawyers Making Headway on COVID-19 Bail Motions?" (6 April 2020), online: *ABA Journal* <[www.abajournal.com/web/article/where-and-how-are-criminal-defense-lawyers-making-headway-on-covid-19-bail-motions](http://www.abajournal.com/web/article/where-and-how-are-criminal-defense-lawyers-making-headway-on-covid-19-bail-motions)> [perma.cc/NHL5-3MWJ].

Ontario Court of Justice decision *R v Deakin*, courts have devised various ways to shorten or avoid prison sentences due to the risks of COVID-19 in detention centres.<sup>178</sup> Some courts have granted a “COVID credit”, meaning enhanced credit for pre-trial custody due to harsher than normal detention conditions and risks of harm from the virus.<sup>179</sup> For example, in the Ontario Court of Justice decision *R v OK*, Justice Pringle granted an extra 0.5 days of enhanced credit per day that the defendant spent in pre-trial custody during the pandemic.<sup>180</sup> Some judges impose a shorter prison sentence that takes into account time served and combines it with a longer period of probation.<sup>181</sup> Instead of imposing imprisonment, some courts release defendants from custody for time-served.<sup>182</sup> In some cases, judges have deferred intermittent sentences to avoid the heightened dangers of incarceration and observed that imprisonment should only be imposed when absolutely necessary.<sup>183</sup> Like in the bail context, judges take judicial notice of the risks of COVID-19 in prisons and do not require the accused to proffer medical evidence.<sup>184</sup> These decisions illustrate that the emergence of COVID-19 both militates towards non-custodial punishments and mitigates the severity of custodial sentences.

More generally, though, the impact of COVID-19 on prisons shows why courts should rethink how prison conditions fit within retributive theory and affect the proportionality of punishment.<sup>185</sup> Retribution is a backwards-looking theory of punishment that holds that individuals should be punished because they made a morally blameworthy choice to break the

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<sup>178</sup> For a summary of the approaches adopted by courts in reducing prison sentences during the pandemic, see *R v Dakin*, 2020 ONCJ 202 at para 27. Many of the cases in footnotes 210-16, *infra* are cited in *Dakin*.

<sup>179</sup> *R v OK*, 2020 ONCJ 189 [OK], citing *R v Abdella*, ONCJ 245 [*Abdella*].

<sup>180</sup> *OK*, *supra* note 179 at paras 32-44.

<sup>181</sup> *R v Wilson*, 2020 ONCJ 176 at paras 39, 47; *R v McConnell*, 2020 ONCJ 177 at para 40; *R v Hearn*, 2020 ONSC 2365 at para 2 [*Hearn*].

<sup>182</sup> *R v Kandhai*, 2020 ONSC 1611 at paras 7-8 [*Kandhai*].

<sup>183</sup> *R v Savvateikin*, 2020 ONSC 2257 at paras 44-45.

<sup>184</sup> *Abdella*, *supra* note 179; *Kandhai*, *supra* note 182 at para 7; *Hearn*, *supra* note 181 at para 14.

<sup>185</sup> On the disconnection between prison conditions and proportionality in punishment theory, see Lisa Kerr, “How the Prison Is A Black Box in Punishment Theory” (2018) 69:1 UTLJ 85 at 91-92, 95-96, 105.

law.<sup>186</sup> As the Supreme Court of Canada recognized in *R v M (CA)*, retribution is a valid justification for punishment and a bedrock criminal law principle.<sup>187</sup> Proportionality plays a fundamental role in retributive theory by ensuring that defendants are not punished more harshly than they deserve.<sup>188</sup>

As scholars such as Lisa Kerr and John Castiglione point out, punishment theory generally focuses on the length of imprisonment when assessing the proportionality of a defendant's punishment (quantitative proportionality), while ignoring the harshness of prison conditions to which the defendant is subject (qualitative proportionality).<sup>189</sup> Two defendants who commit a similar crime with comparable culpability may receive equally long prison sentences from a quantitative standpoint. Yet, the defendants may be sent to separate prisons with drastically different incarceration conditions, such that they experience disparate levels of hard treatment from a qualitative standpoint.<sup>190</sup> The defendant who is subject to far harsher prison conditions, however, is arguably punished more than they deserve.<sup>191</sup>

The emergence of COVID-19 has forced courts to increasingly consider qualitative proportionality when justifying punishments in terms of retribution.<sup>192</sup> Custodial sentences during the pandemic are harsher than normal because inmates are exposed to extra health risks and psychological harms while in jail. When courts assess a sentence's severity while ignoring the pandemic's impact on inmates' wellbeing, defendants can receive disproportionate punishments that are inconsistent with the basic

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<sup>186</sup> David Dolinko, "Punishment" in David Dolinko & John Deigh, eds, *The Oxford Handbook of Philosophy of the Criminal Law* (Oxford: Oxford University Press, 2011) 403 at 406.

<sup>187</sup> *R v M (CA)*, [1996] 1 SCR 500 at paras 79–80, 46 CR (4th) 269; Clayton C. Ruby, et al, *Sentencing*, 9th ed (Toronto: LexisNexis Canada, 2017), s 2.2.

<sup>188</sup> Palma Paciocco, "Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing" (2014) 81:3 CCLR 241 at 251.

<sup>189</sup> Kerr, *supra* note 185 at 88, 91–93, 95–96, 105; Lisa Kerr, "Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment" (2017) 32:3 CJLS 187 at 200; John D. Castiglione, "Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism" (2010) 71:1 Ohio St LJ 71 at 78–79, 88–89.

<sup>190</sup> Castiglione, *supra* note 189 at 78–79, 88–89.

<sup>191</sup> Richard L. Lippke, "Retribution and Incarceration" (2003) 17:1 Public Affairs Q 29 at 44–45. See also Jesper Ryberg, *The Ethics of Proportionate Punishments: A Critical Investigation* (Dordrecht: Kluwer Academic Publishers, 2004) at 113; Adam J. Kolber, "Unintentional Punishment" (2012) 18 Leg Theory 1 at 2.

<sup>192</sup> See the sources cited in nn 178–83.

principles of retributivism.<sup>193</sup>

The impact of COVID-19 in prisons elucidates why courts should accord greater consideration to prison conditions and the consequences of incarceration when assessing the proportionality of custodial sentences more generally. As discussed above, inmates are frequently subject to violence and overcrowding, and they lack of access to adequate medical care – realities they experience as part of their punishments.<sup>194</sup> Studies show that incarceration produces a host of adverse effects that persist after imprisonment: poverty, decreased employment opportunities, worse physical and mental health, strain on families, a greater likelihood of homelessness upon release, and so on.<sup>195</sup> Like the risks associated with COVID-19 in prisons, these consequences also affect the harshness of prison conditions and the severity of one’s punishment. These considerations militate against recourse to incarceration and emphasize the need for courts to reconsider the role of qualitative proportionality in sentencing.

Law enforcement’s response to the pandemic also magnifies many traditional concerns regarding economic sanctions. In many cities, police officers are enforcing provincial public health laws that carry significant financial penalties.<sup>196</sup> In Quebec, for instance, those who contravene physical distancing measures can receive a fine of approximately \$1,500.<sup>197</sup>

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<sup>193</sup> *Ibid*; Adam J Kolber, “The Subjective Experience of Punishment” (2009) 109:1 Colum L Rev 182 at 186.

<sup>194</sup> For a discussion on violence in prisons, see Canada, Office of the Correctional Investigator, *2018-2019 Annual Report* (Ottawa: Correctional Investigator Canada, 25 June 2019) at 38–39, online: <[www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20182019-eng.pdf](http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20182019-eng.pdf)> [perma.cc/E8QD-PYZ3]; Rose Ricciardelli, *Surviving Incarceration Inside Canadian Prisons* (Waterloo, ON: Wilfred Laurier University Press, 2014) at 79, 86–89. For a discussion on over-crowding and the healthcare challenges in prisons, see Adelina Iftene & Allan Manson, “Recent Crime Legislation and the Challenge for Prison Health Care” (2013) 185:10 CMAJ 886 at 887–88.

<sup>195</sup> See e.g. Craig Haney, “Prison Effects of in the Age of Mass Incarceration” (2012) 20 Prison J 1 at 3–7; Margot B Kushel et al, “Revolving Doors: Imprisonment Among the Homeless and Marginally Housed Population” (2005) 95:10 American J Public Health 1747 at 1750–51.

<sup>196</sup> McClelland & Luscombe, “Enforcement Report”, *supra* note 2 at 1; Sharon Lindores, “COVID-19 and the Rising Costs of Social Distancing: ‘We’ve Seen A Real Escalation’”, *National Post* (22 April 2020), online: <[nationalpost.com/news/canada/covid-19-rising-costs-of-social-distancing](http://nationalpost.com/news/canada/covid-19-rising-costs-of-social-distancing)> [perma.cc/5ADV-NQXY].

<sup>197</sup> *Public Health Act*, CQLR c S-2.2, r 1, s 139. Individuals can receive a fine of between \$1,000–\$6,000 for violating the Act’s provisions.

Lawyers and civil society groups raise concerns about the arbitrary enforcement of public health legislation and municipal by-laws during the pandemic.<sup>198</sup> As some point out, this risk is exacerbated because some law enforcement agencies encourage individuals to denounce others who violate these rules.<sup>199</sup> Advocates also highlight the risks that marginalized groups will be disproportionately coerced and fined during the pandemic.<sup>200</sup> In many cases, expensive fines have been issued to homeless people.<sup>201</sup> Marie-Eve Sylvestre's research demonstrates that even prior to the pandemic, homeless people were disproportionately issued fines for laws that regulate public property.<sup>202</sup>

These fines can entrench individuals in the criminal justice system and result in significant long-term consequences.<sup>203</sup> Criminal justice debt can worsen a person's credit rating, which decreases their ability to secure access to housing, receive a loan, and obtain utilities.<sup>204</sup> The quantum of these debts can increase dramatically as defendants accumulate additional

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<sup>198</sup> "Policing Pandemic Remedies: Too Many COVID Charges, Too Many Tickets, Too Many Fines" (21 April 2020), online: *Canadian Civil Liberties Association* <[ccla.org/coronavirus-update-too-many-fines/](http://ccla.org/coronavirus-update-too-many-fines/)> [perma.cc/7W3Q-XBDU]; Giuseppe Valiante, "Harsh Fines and Policing Don't Protect People from COVID-19, Criminologists Say", *Global News* (last modified 16 April 2020), online: <[globalnews.ca/news/6825280/coronavirus-sharsh-policing-fines/](http://globalnews.ca/news/6825280/coronavirus-sharsh-policing-fines/)> [perma.cc/97UR-LBEV].

<sup>199</sup> Jen Gerson, "Don't Let Coronavirus Turn Us into a Nation of Snitches", *Maclean's* (20 April 2020), online: <[www.macleans.ca/opinion/dont-let-coronavirus-turn-us-into-a-nation-of-snitches/](http://www.macleans.ca/opinion/dont-let-coronavirus-turn-us-into-a-nation-of-snitches/)> [perma.cc/M6VJ-SRCH].

<sup>200</sup> See e.g. Marie-Eve Sylvestre et al, "Ontario's Safe Streets Act Will Cost Lives Amid the Coronavirus Pandemic", *The Conversation* (23 April 2020), online: <[theconversation.com/ontarios-safe-streets-act-will-cost-lives-amid-the-coronavirus-pandemic-135665](http://theconversation.com/ontarios-safe-streets-act-will-cost-lives-amid-the-coronavirus-pandemic-135665)> [perma.cc/DHL6-S4WE]; Skolnik, *supra* note 37 at 291, 295–96.

<sup>201</sup> Angela MacKenzie & Adam Kovac, "Multiple Homeless Montrealers Given Tickets for Physical Distancing Infractions", *CTV News* (12 April 2020), online: <[montreal.ctvnews.ca/multiple-homeless-montrealers-given-tickets-for-physical-distancing-infractions-1.4893128](http://montreal.ctvnews.ca/multiple-homeless-montrealers-given-tickets-for-physical-distancing-infractions-1.4893128)> [perma.cc/J9TC-DNFL].

<sup>202</sup> Marie-Eve Sylvestre & Céline Bellot, "Challenging Discriminatory and Punitive Responses to Homelessness in Canada" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 155 at 172.

<sup>203</sup> Catherine T Chesnay, Céline Bellot & Marie-Eve Sylvestre, "Taming Disorderly People One Ticket at a Time: The Penalization of Homelessness in Ontario and British Columbia" (2013) 55:2 *Can J Corr* 161 at 178–79.

<sup>204</sup> *Ibid*; Terry Skolnik, "Rethinking Homeless People's Punishments" (2019) 22:1 *New Crim L Rev* 73 at 80.

administrative fees.<sup>205</sup> As the Supreme Court of Canada observed in *R v Boudreault*, such financial penalties can amount to the equivalent of an indeterminate sentence for impecunious defendants who cannot afford to pay them.<sup>206</sup> Despite the Supreme Court of Canada’s clear admonition in *R v Wu* that “[g]enuine inability to pay a fine is not a proper basis for imprisonment”, homeless people in Quebec are incarcerated for unpaid fines.<sup>207</sup> Staunch enforcement of public health laws undermines the very access to housing that makes physical distancing possible and worsens homeless people’s plight.

The disproportionate toll of economic sanctions on marginalized groups highlights the need for more proportionate financial penalties. Many scholars argue that U.S. and Canadian cities should adopt the Scandinavian model of day fines (or graduated economic sanctions), where individuals are sanctioned proportionally to their daily adjusted income.<sup>208</sup> The amount of a day fine is generally calculated by multiplying the number of days (which represents the severity of the offence and varies between offences) by a percentage of the defendant’s daily income (50% in some jurisdictions), after taxes and deductions.<sup>209</sup> To ensure that more affluent individuals do not pay astronomical fines for relatively minor infractions, the state can set a ceiling on the maximum amount of a fine.<sup>210</sup> Scholars have shown that there are numerous advantages to day fines compared to traditional economic sanctions that extend beyond a more just sanction for impoverished defendants, such as the possibility of “improved revenue generation... [and a] decrease of expenditures related to collections, supervision, and incarceration.”<sup>211</sup> Day fines are more fair for defendants

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<sup>205</sup> Beth A Colgan, “The Excessive Fines Clause: Challenging the Modern Debtors’ Prison” (2018) 65:2 UCLA L Rev 2 at 32–41.

<sup>206</sup> *R v Boudreault*, 2018 SCC 58 at para 3.

<sup>207</sup> *R v Wu*, 2003 SCC 73 at para 3; Marc Allard, “Encore la Prison pour des Amendes Impayées” (last modified 16 January 2020), online: *Le Soleil* <[www.lesoleil.com/actualite/encore-la-prison-pour-des-amendes-impayees](http://www.lesoleil.com/actualite/encore-la-prison-pour-des-amendes-impayees)> [perma.cc/2Z9B-QA3F].

<sup>208</sup> See e.g. Beth A. Colgan, “Graduating Economic Sanctions According to Ability to Pay” (2017) 103:53 Iowa L Rev 53 at 61 [Colgan, “Graduating Economic Sanctions”]; Terry Skolnik, “Beyond Boudreault: Challenging Choice, Culpability, and Punishment” (2019) 50 Crim Reports (7th) 283 at 292–93 (WL Can).

<sup>209</sup> Elena Kantorowicz-Reznichenko, “Day-Fines: Should the Rich Pay More?” (2015) 11:3 Rev L & Economics 481 at 484.

<sup>210</sup> Colgan, “Graduating Economic Sanctions”, *supra* note 208 at 96–101.

<sup>211</sup> Beth A. Colgan, “Fines, Fees, and Forfeitures” (2017) 18:3 Criminology, Crim Justice, L & Society 22 at 31 [footnotes omitted].

and can be more efficient and effective for the state.<sup>212</sup> As the prospect of economic decline looms large, all levels of government should avoid disproportionate economic sanctions that entrench individuals into poverty and increase their contact with the criminal justice system.

## VI. CONCLUSION

This article argued that COVID-19 is impacting three major areas of the criminal law: the scope of certain criminal offences, bail, and sentencing. It demonstrated why the unique context of the pandemic has highlighted some of the most problematic aspects of the Canadian criminal justice system. The emergence of COVID-19 provides novel insight into why courts must restrict the breadth of certain crimes, grant reasonable bail, and limit recourse to custodial sentences. In some respects, the pandemic has forced various justice system actors to demonstrate a renewed commitment to bedrock criminal law principles, such as the presumption of innocence, pre-trial liberty, and proportionality in sentencing – hallmarks of a more liberal and enlightened criminal justice system. Ultimately, COVID-19 provides compelling new justifications for why the state and criminal justice system actors must rely less heavily on the criminal law.

Much remains to be seen about how the pandemic will evolve and how the criminal justice system will respond. Although courts must carefully safeguard our most precious civil and political liberties during this crisis, it should not miss this unapparelled chance to permanently implement positive changes to the criminal justice system and address some of its most egregious aspects. Judicial responses to the pandemic not only illustrate the possibility of embracing a less punitive criminal justice system both during and after COVID-19, but also show how we can take meaningful steps in that direction.

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<sup>212</sup> *Ibid.*