The Pains of Imprisonment in a Pandemic

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This article examines how the law of punishment has responded to the impact of the COVID-19 pandemic on jails and prisons. While detention has become more severe and risky for all who live and work in correctional institutions, there has been significant variation in judicial willingness to recognize these systemic impacts. Often courts limit protection to those able to adduce evidence that they will become seriously ill or die from COVID-19.

First, the authors discuss the approach taken by individual judges to bail, observing (1) cases where judges take judicial notice of the heightened risks and severity of imprisonment for all inmates during the pandemic, and (2) cases that require the accused to establish that they are at increased risk before COVID-19 can weigh heavily on the decision to detain.

Second, the authors discuss a similar story of variation in how judges have responded to the effect that pandemic conditions should have on the calculation of credit for pretrial detention. Finally, they discuss the impact that COVID-19 has had on sentencing, where judges are more willing to consider how the pains of imprisonment have been intensified during the pandemic in a way that impacts the question of a fit or proportionate sentence of custody.

The authors conclude that the use of individual vulnerability as a prerequisite is a flawed halfway measure given the impacts of COVID-19 on our institutions of detention and punishment. They conclude further that a proper understanding of those impacts may help to facilitate better understanding of the risks and effects of detention that predate the pandemic and will outlast it.

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Introduction

Overcrowding, communal spaces, and unsanitary conditions mean that it is always difficult to contain the spread of infectious disease in custody. The pandemic has raised the stakes of this challenge and has intensified the risks and severity of confinement in both provincial jails[1] and federal prisons.[2] Measures implemented to mitigate the spread of COVID-19 include cancelled visits, suspended programming, and prolonged isolation in cells—all of which serve to make custodial life harder while delaying and impairing access to parole. This article tracks how judges have responded to the impact of COVID-19 in three aspects of the law of punishment: access to bail, calculation of credit for pretrial custody, and sentencing generally. This is a story of significant variation in terms of judicial willingness to recognize how the pandemic has intensified the pains of imprisonment.

In the context of bail, the COVID-19 factor has been treated inconsistently. Some judges have asked whether accused are particularly vulnerable to COVID-19 by requiring evidence of individual, heightened vulnerability to serious illness. These judges seem keen to draw a neat line between those we must carefully protect from state custody during the pandemic and those we need not. Requiring evidence of an underlying health vulnerability to COVID-19 is a tempting halfway measure, but we argue that it fails to address the full range of concerns that the pandemic raises, including the impact of infection control measures on prison conditions generally.

In the context of calculating credit for pretrial custody, some judges have been willing to recognize COVID-19 as a factor that properly bears upon the

1. For discussion of provincial custody, see Howard Sapers, "The Case for Prison Depopulation: Prison Health, Public Safety and the Pandemic" (2020) 5:2 J Community Safety and Well-Being 79.

2. For discussion of federal custody, see Adelina Iftene, "COVID-19 in Canadian Prisons: Policies, Practices and Concerns" in Colleen M Flood et al, ed, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 376.

analysis. Harsh pretrial confinement, including routine lockdowns and other serious deprivations, has long been a basis for enhanced credit at sentencing.[3] We discuss the case of *R v Abdella*, which adds COVID-19 as an additional ground for credit with reasoning that makes clear that individual, heightened vulnerability to illness is far from the only concern.[4] We compare the case of *R v Baptiste* from Quebec, which recognizes but refuses to respond to the impact of the pandemic on our institutions of detention and punishment. There the judge concedes that courts must "react appropriately to important changing conditions in extraordinary times".[5] But the court suggests, wrongly in our view, that "adherence to the established laws of sentencing" is incompatible with that task.[6]

Many other courts have been willing to recognize the relevance of the effects of COVID-19 to established legal principles of sentencing. We discuss the leading case of *R v Hearns*, in which Pomerance J accepts that the pandemic has deepened the severity of the sanction of confinement.[7] Largely by way of judicial notice, she recognizes that a "government-enforced congregation of people" during COVID-19 interacts with sentencing principles like proportionality and parity.[8] Her concerns are not limited to cases where a defendant has a specific underlying condition that renders them vulnerable to serious illness or death from COVID-19.[9]

There is no question that pretrial detention and a sentence of custody may be warranted notwithstanding the pandemic, but we are critical of those decisions that minimize the risks or dismiss the effects of COVID-19. Many bail judges in particular purport to assign responsibility for the pandemic response entirely to corrections, in decisions that implicitly presume correctional expertise in public health and disavow the legal relevance of penal severity. In these approaches, we see an old trope of judicial deference that sees jails and prisons as "beyond

3. Ontario courts have repeatedly condemned pretrial conditions in the course of awarding enhanced credit for time spent there. See e.g. *R v Tyrell*, 2013 ONSC 6555; *R v Grizzle*, 2013 ONSC 6523; *R v Douale*, 2018 ONSC 3658. See also *R v Inniss*, 2017 ONSC 2779 (where the court awards enhanced credit where a defendant is locked in his cell for extended periods and denied fresh air for over one year). The Court of Appeal for Ontario has developed a methodology for awarding enhanced sentencing credit for the many cases that involve serious institutional failures and negative impacts on a remand inmate. See *R v Duncan*, 2016 ONCA 754.

4. 2020 ONCJ 245.

5. *R v Baptiste*, 2020 QCCQ 1813 at para 223.

6. *Ibid*.

7. 2020 ONSC 2365.

8. *Ibid* at paras 13–16, citing *R v Rajan*, 2020 ONSC 2118.

9. See *ibid* at para 12.

the ken of courts".[10] We conclude by suggesting a different perspective: that the pandemic is an occasion to deepen our recognition of the risks and effects of detention generally, many of which are graver than that posed by COVID-19.

I. The Search for an Underlying Condition

Discussion of individual vulnerabilities to COVID-19 has been prominent since the early days of the pandemic when we learned of the "underlying" or "pre-existing" conditions thought to render some more likely to experience severe symptoms from COVID-19. Disability and policy scholars Thomas Abrams and David Abbott tracked the constant "reassurance" in media that serious illness and death happen largely to elderly people and those with underlying health conditions.[11] When the first death of a child was reported in the UK, there was "a clamour to establish whether they had an underlying health condition. Parts of the nation breathed easier when this was confirmed, much like when natural disaster is announced: 'But wait, it's not here, it's somewhere else, somewhere foreign.'"[12]

In responding to the profound anxieties of this pandemic, we seem to be keen to draw lines between those who will be affected and those who will not. Abrams and Abbott argue that these same lines are a troubling reverberation of a pre-pandemic reality as to whose lives are "expendable and not to be counted".[13] There is an "underlying casual brutality" to this discourse which partly serves to comfort the majority: we can breathe a sigh of relief to know that only those who are *already* sick or vulnerable will really be affected.[14]

In some of the pandemic bail cases, there is a similar attempt to draw lines around the vulnerable, but to a different end. We see judges search for underlying vulnerability as a way to decide when pretrial detention is risky or not. This search enables judges to avoid three difficult facts: (1) that COVID-19 can deliver lasting harm to individuals who have no other health conditions, (2) that imprisonment is far more difficult during the pandemic for reasons that have nothing to do with individual vulnerability to COVID-19, and finally, (3) that inmates face considerable risks in detention apart from the pandemic. Rather than recognizing how the pandemic *adds* to a system of pretrial detention that was already unacceptable, judges who seek—and fail to find—evidence of a

10. See generally Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill LJ 43.

11. See Thomas Abrams & David Abbott, "Disability, Deadly Discourse, and Collectivity amid Coronavirus (COVID-19)" (2020) 22:1 Scandinavian J Disability Research 168 at 168.

12. *Ibid*.

13. *Ibid* at 169.

14. See *ibid*.

serious underlying condition are able to breathe a sigh of relief about their decision to detain.

II. Bail in a Pandemic: Debating Vulnerability

When a person is charged with an offence, a decision must be made whether to release or detain them pending trial. Access to bail is a highly consequential decision for an accused person, for a number of reasons. First, conditions in pretrial custody are often very difficult—and it does not include any of the programming that is available to sentenced inmates. Second, those who are held in custody often struggle to prepare for trial, and they are unable to take the rehabilitative steps in the community that might assist their case at a sentencing hearing. Finally, the accused is presumed innocent, such that a decision to deprive them of liberty is a significant measure that must be justified.

A decision to detain pending trial must rest on at least one ground of detention set out in the *Criminal Code*: the primary ground, which is meant to ensure appearance in court; the secondary ground, which is aimed at protecting public safety; and the tertiary ground, which is concerned with maintaining confidence in the administration of justice.[15] The pandemic bail cases help to underscore the extent to which the application of these grounds is highly discretionary.

The pandemic tested the bounds of bail law by importing a novel issue into an already difficult balancing exercise. We have closely tracked the lower court caselaw that unfolded in the early months of the pandemic in another article.[16] We found two prominent lines of cases. One recognized the heightened risks and severity of confinement for all inmates during the pandemic and permitted consideration of COVID-19 in bail applications largely through the doctrine of judicial notice. A second line of cases required that each individual accused point to evidence of an underlying or pre-existing health condition that made them particularly vulnerable before COVID-19 could weigh strongly in favour of release.

A. Position One: Recognize Systemic Impacts

Early on, many superior courts quickly accepted the pandemic as a "material change in circumstances" sufficient to trigger a bail review.[17] In an influential March 20, 2020 decision, Copeland J treats the pandemic as a

15. See *Criminal Code*, RSC 1985, c C-46, s 515(10).

16. See Lisa Kerr & Kristy-Anne Dubé, "Adjudicating the Risks of Confinement: Bail and Sentencing During COVID-19" (2020) 64 CR (7th) 311.

17. *R v St-Cloud*, 2015 SCC 27 (clarifying that in order for a bail decision to be reviewed,

standalone material change on the tertiary ground.[18] She takes judicial notice of "the greatly elevated risk posed to detained inmates from the coronavirus" and is clear that there is no requirement for an applicant to show any particular failure of the correctional authorities with respect to infection control.[19]

The pandemic had the biggest impact in cases where pretrial confinement hinged on the tertiary ground of "public confidence in the administration of justice" under section 515(10)(c) of the *Criminal Code*. As Harris J put it on April 6, 2020 in *R v Rajan*, the public understands the "momentous nature of this crisis" and threat of COVID-19 "goes a long way to cancelling out the traditional basis for tertiary ground detention".[20]

Similarly, in *R v Williams,* decided on April 15, 2020, Stribopoulos J accepts that "unnecessary admissions to correctional facilities are a health hazard for *everyone* in the context of the COVID-19 pandemic".[21] The pandemic is not, however, a trump card that mandates release. Justice Stribopoulos orders detention in a case with strong evidence of first-degree murder. But Stribopoulos J does so without minimizing the significance of the pandemic, and without laying down a rule that an accused must point to heightened vulnerability to COVID-19.

The Court of Appeal for Ontario weighed in on April 8, 2020, indicating in *R v Kazman* that individual vulnerability to COVID-19 is not necessary for the pandemic to count.[22] Though where such vulnerability does exist, it presses strongly in the direction of release. The applicant in *Kazman* was sixty-four years old with asthma and a heart condition. Justice Harvison-Young concludes that release is justified, owing to the "well documented" health conditions that put the applicant in a "vulnerable group that is more likely to suffer complications and require hospitalization" from COVID-19.[23] In another Court of Appeal for Ontario decision, also from April 2020, Harvison-Young JA refers with approval to the decision of Copeland J in *R v JS*, who, as we note, was one of the first justices to recognize the systemic impacts of the pandemic that press in the direction of interim release even where there is no individual vulnerability.[24]

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the defendant must show that the circumstances have materially changed with respect to the grounds upon which they were detained at paras 122–139).

18. See *R v JS*, 2020 ONSC 1710 (where the court treats the pandemic as a standalone material change on the tertiary ground, though there was also a new proposed release plan).

19. *Ibid* at paras 18–19.

20. *Supra* note 8 at paras 69–70.

21. 2020 ONSC 2237 at para 87 [emphasis in original].

22. 2020 ONCA 251.

23. *Ibid* at para 17. See also *ibid* at para 21.

24. See *R v Omitiran*, 2020 ONCA 261 at para 26, citing *R v JS*, *supra* note 18 at paras 18–19, Copeland J. See also *R v SA*, 2020 ONSC 2946 at paras 62–63**.**

B. Position Two: Look for Individual Vulnerability

Compare this first batch of decisions to *R v Nelson* on March 23, 2020.[25] Justice Edwards is clear that the "prevailing health crisis" requires the court to conduct a bail review, due to the "heightened risk of contracting the virus" that applies to *all* inmates.[26] But *Nelson* also requires an applicant to show they are particularly at risk of "severe health issues or even death".[27]

In the cases that require heightened individual risk, the issue is often presented as one about the sufficiency of evidence.[28] But it is clear that what is really missing is a sufficiently strong claim of "increased risk to the accused".[29] In *R v Stone*, one Court of Appeal for Ontario judge goes further still, suggesting that an applicant must exhibit a sort of *blameless* form of vulnerability.[30] In denying bail pending appeal, the judge accepts that the applicant had the underlying condition of diabetes, but points to evidence that the applicant had a habit of purchasing sugary food from the prison canteen.[31] The suggestion was that poor personal management of an underlying condition lessens the significance of vulnerability to severe effects from COVID-19.

Several of the cases that search for individual risk also opine that public health in the jails is solely the responsibility of correctional services.[32] These judges require inmates to point to active outbreaks in their institutions to bolster a case for pretrial release.[33] In *R v GTB*, the court cautions that a "systemic failure to adequately care for and protect people in custody should not be assumed".[34] In contrast to the reasoning of Copeland J in *JS*, these

25. 2020 ONSC 1728.

26. *Ibid* at paras 39–40.

27. *Ibid* at para 41.

28. See e.g. *R v Budlakoti*, 2020 ONSC 6895 at para 14.

29. *Ibid*. See also *R v Ellis*, [2020] OJ No 1636 (Ont Sup Ct J). Justice of the Peace Levita accepts that the accused has asthma and pneumonia but requires more evidence as to how this enhances vulnerability to COVID-19 (*ibid* at paras 18–19). Justice of the Peace Levita seems to make a presumption that jails are taking all possible measures to respond to the pandemic: "I have heard no evidence that the facility is not doing everything they can to protect themselves and the inmates from the virus" (*ibid* at para 18).

30. 2020 ONCA 448 at para 20.

31. See *ibid* at para 18.

32. See *R v Alexander*, [2020] NJ No 69 at para 7, 163 WCB (2d) 130 (Nfld Ct J); *R v Phuntsok*, 2020 ONSC 2158 at para 48.

33. See *R v Sappleton*, 2020 ONSC 1871 at para 22.

34. 2020 ABQB 228 at paras 42–44.

courts appear to require the accused to show evidence of a current institutional outbreak for COVID-19 to be taken seriously. Other judges have outlined the shortcomings of an approach that requires institutional fault.[35]

C. Court of Appeal for Ontario: Evidence of "Particular Risk" Required

As the pandemic wore on into fall 2020, decisions from the Court of Appeal for Ontario seemed increasingly unwilling to let it function as a robust factor. In *R v Jaser* (September 2020), Doherty JA rejects the notion from *Rajan* that detention on the tertiary ground analysis will "rarely be justified".[36] He holds that the pandemic is a mere factor in tertiary ground balancing—its significance will depend on "the individual case and the evidence provided to the court".[37]

Justice Doherty's reasoning in *Jaser* helps to illustrate the main critical point of this article. He points to evidence filed by the Crown about circumstances in Ontario correctional institutions, concluding with approval that authorities have "acted aggressively" in instituting measures known to limit the spread of COVID-19.[38] The problem with this reasoning is that the very measures which help to prevent outbreaks—cancelling visits, suspending programs, isolating inmates in cells—are precisely what make the experience of custody more severe. This is why the pandemic matters in all cases, not only in cases of individual vulnerability or during active outbreaks.

By October 2020, a majority decision of the Court of Appeal for Ontario settled on a view that individual heightened vulnerability to COVID-19 is required before an applicant can even seek a bail review. In *R v JA*, the accused faced two counts of first-degree murder and was automatically detained as a result.[39] When the pandemic hit, he secured release in a bail review.[40] The Crown sought review of that decision. Its relevance depends on the

35. A major issue with this approach is simply that, at that point, it may be too late. See *R v Cain*, 2020 ONSC 2018, London-Weinstein J ("Given that matters at the jail may become rapidly worse, if present events occurring elsewhere are any indication, the time to determine whether Mr. Cain can be released and the public adequately protected, is now, before matters have worsened" at para 9). See also *R v Duncan*, 2020 BCSC 590, Kent J (pointing to an April 2020 outbreak at a BC institution in which forty-two prisoners and six staff were infected, with seven hospitalizations at para 41). Justice Kent cites this outbreak to show how, notwithstanding mitigating measures, outbreaks are still possible and can spread quickly (*ibid*).

36. 2020 ONCA 606 at para 103.

37. *Ibid*.

38. *Ibid* at para 102.

39. 2020 ONCA 660, leave to appeal to SCC refused, 39364 (1 April 2021).

40. See *Criminal Code*, *supra* note 15, s 515(11).

circumstances of the particular case.[41] She states that the effect of COVID-19 must be "significant" in that it "would reasonably be expected to have affected the result" of the first hearing.[42] The majority accepts that COVID-19 presents a serious health risk to all inmates[43] and, in some cases, it may be relevant to any of the three grounds for detention.[44] However, "absence of particular risk is relevant in assessing whether the evidence relating to the pandemic is 'relevantly material'".[45] The majority provides a list of factors to consider: the accused's age, health, and conditions of their institution.[46] JA was young and healthy, and he would be detained in Stratford Jail, which had never had a confirmed case of COVID-19.

In dissent, Nordheimer JA exhibits an entirely different understanding of both the risks of COVID-19 and the structure of the bail review analysis. He finds that COVID-19 constitutes a material change in circumstances sufficient for bail review for *every* detention order made prior to the pandemic.[47] He reasons that "there can be no reasonable debate that COVID-19 impacts directly on the incarceration of individuals".[48] Indeed, the pandemic has altered "the lives of every person in this country" and "on this planet".[49] Justice Nordheimer holds that COVID-19 must be considered in "every bail hearing".[50]

Justice Nordheimer cautions against imposing an evidentiary burden on the accused to establish any particular susceptibility to COVID-19, pointing to the rushed nature of bail proceedings.[51] It would be impractical to require an accused to provide such evidence, much of which they cannot easily access. Add that the medical community itself cannot yet explain the variation in COVID-19 outcomes among the population.[52]

Justice Nordheimer also emphasizes the impact of the pandemic on conditions of confinement generally. Correctional facilities can take mitigating steps against spread of the virus, though "the risk still exists" given the "very

41. See *R v JA*, *supra* note 39 at paras 55–56.
42. *Ibid* at para 55, reiterating the principles in *R v St-Cloud*, *supra* note 17.
43. See *R v JA*, *supra* note 39 at para 75.
44. See *ibid* at paras 63–65.
45. *Ibid* at para 76.
46. See *ibid* at para 66.
47. See *ibid* at paras 109–10.
48. *Ibid* at para 107.
49. *Ibid* at para 109.
50. *Ibid* at para 110.
51. See *ibid* at paras 117–18.
52. See *ibid.*

nature" of facilities themselves.[53] What's more, the mitigating steps "only increase the negative psychological impact of being incarcerated".[54] Justice Nordheimer acknowledges the reality that these steps come "perilously close to a state of facility-wide solitary confinement".[55]

While both the majority and dissent in *JA* appreciate the risks of COVID-19 for incarcerated populations, the opinions part ways when it comes to the particular burden on defendants to adduce evidence of individual vulnerability or institutional fault manifested in active outbreaks. Exactly this debate has been replicated in dozens of lower court decisions since the pandemic began. Ostensibly, the cases appear as a debate about the proper scope of judicial notice, or as a technical discussion about the three grounds for pretrial detention. Beneath the surface of these formal debates, we find a meaningful divide as to the kind of plea for protection that judges require applicants to make during this extraordinary time.

III. Pretrial Credit: Add the Pandemic to the Mix of Enhanced Credit

When defendants spend time in custody awaiting trial, sentencing judges regularly award a 1.5 credit for that time under section 719(3.1) of the *Criminal Code*. Where pre-sentence incarceration is particularly harsh, those conditions can provide additional mitigation, known in Ontario as the "*Duncan* credit".[56] There is some debate in the caselaw as to whether *R v Duncan* requires evidence of specific, adverse impact on the defendant in every case. In *R v Innis*, for example, hardship was inferred where an inmate was confined to a cell and denied fresh air for extended periods.[57]

In *R v Abdella,* the accused was held pending trial at the Toronto South Detention Centre (TSDC) during the pandemic.[58] Prior to the pandemic, Schreck J in *R v Persad* found that the staff shortages and extensive lockdowns in TSDC created "inhumane conditions" and amounted to "deliberate state misconduct".[59] *Duncan* credit was applied after the accused in *Persad* had spent some forty-seven per cent of their pretrial custody in lockdowns.[60] In *Abdella*, the Court was

53. *Ibid* at para 111.

54. *Ibid* at para 114.

55. *Ibid* at paras 111–14.

56. See *R v Duncan*, *supra* note 3 at para 6.

57. See *R v Innis*, *supra* note 3 at para 36.

58. See *supra* note 4.

59. 2020 ONSC 188 at para 34.

60. See *ibid* at para 7.

faced with an additional layer of penal severity for an accused held in the same centre.

In *Abdella,* Kozloff J combines the usual TSDC lockdowns with the further restrictions flowing from pandemic mitigation measures, and, most notably, "mental and physical hardship" as a result of the risk of contracting COVID-19 in jail.[61] Justice Kozloff points to the decision in *JS* from the bail context, in which Copeland J took judicial notice taken of the "greatly elevated risk" of inmates generally to COVID-19. That elevated risk was sufficient so as to infer mental and physical hardship in a particular case.[62] Justice Kozloff makes clear that no further evidence is required for the accused to demonstrate adverse effect per *Duncan*.[63]

Justice Kozloff's approach in *Abdella* closely follows the first line of bail cases, discussed above, in that it does not require an accused to show particular susceptibility to COVID-19. Rather, it recognizes that *all* inmates generally are being held in "particularly harsh" environments that have adverse effects on their mental and physical health given the confining lockdowns and the risk of contracting COVID-19 in a congregate living setting that is ill-equipped to protect them. Similarly, in *R v Clarke*, Kelly J accepts that the pandemic has led to heightened anxiety for all inmates.[64] Evidence demonstrating limited access to showers, yard time, phones, and family visits, combined with these "most unusual times", is enough to demonstrate a "harsh experience" sufficient for *Duncan* credit.[65]

But there is variety here too. Contrast the decision of Kwolek J in *R v Leclair*, holding that the accused did not present sufficient evidence of specific adverse effects as a result of COVID-19 lockdowns.[66] Other courts have taken a middle ground position by not explicitly requiring evidence of susceptibility, but noting it as a factor in the enhanced credit analysis.[67]

One Quebec decision is striking for its refusal to let settled approaches and expectations be disturbed by the pandemic. In *R v Baptiste,* the judge finds no basis for awarding pretrial credit, again on the basis that the accused did

61. *Supra* note 4 at para 108.

62. See *ibid* at paras 107–08, citing *R v JS*, *supra* note 18; citing *R v Nelson*, *supra* note 25.

63. See *R v Abdella*, *supra* note 4; *R v Duncan*, *supra* note 3 at para 6.

64. 2020 ONSC 3878 at paras 35–36. See also *R v Prince*, 2020 ONSC 6121 at para 75.

65. *R v Clarke*, *supra* note 64 at paras 39–40.

66. 2020 ONCJ 260 at para 92.

67. See *R v Stevens*, 2020 ONCJ 616 (where the Court gave a "special COVID 19 enhanced presentence custody credit" in the case of an accused who suffered from HIV, asthma, and shingles at paras 14, 50). During his pretrial confinement, the accused had been transferred to the infirmary for seven to eight days for suspected COVID-19, which caused significant anxiety and stress exacerbated by the accused's inability of protecting himself given the general lack of PPE provided by the institution (*ibid* at paras 14, 50). The Court gave the enhanced credit on the

not suffer from medical conditions that put him at "particular risk".[68] But the reasoning in *Baptiste* goes further than that. The Court traces the history of the legal rationale for awarding enhanced credit for pretrial time, citing Supreme Court of Canada authority that it is partly done because of how time in pretrial detention is often more onerous and does not involve the delivery of programming. The court then points to cases that decline to grant enhanced credit where an accused had access to programming during pretrial detention. From this, *Baptiste* concludes that where conditions in pretrial custody resemble that of post-sentencing imprisonment, there is no need for enhanced credit.[69] The court fails to note the clear difference between a case where conditions are *as good as* post-sentence imprisonment and a case where conditions are *as risky and onerous* as post-sentence imprisonment. In addition, *Baptiste* declines to consider the impact of COVID-19 on the fitness of sentence prospectively, stating that courts "lack a crystal ball" and that prison conditions affected by the pandemic may improve.[70]

Outside of Ontario, courts are often more reluctant to apply the *Duncan* credit.[71] However, some courts have found other ways of arriving at effectively the same result through the lens of calculating a fit sentence. In *R v Pangon*, the Nunavut Court of Justice considered pretrial credit for COVID-19 restrictions at a time when Nunavut had not recorded a single case of COVID-19 in the territory.[72] Chief Justice Sharkey explains that "prisons are harsher than they were pre-COVID" and acknowledges the reduced inmate activities.[73] Chief Justice Sharkey rejects the *Duncan* decision as being without "legal basis" for exceeding the statutory cap.[74] But the Court is nonetheless sympathetic to the rationale of the credit and considers COVID-19 as part of the fitness of the sentence.[75] This approach finds considerable support in the sentencing cases we turn to now.

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basis of stress and anxiety, informed by his heightened susceptibility to COVID-19, adding that there is currently an outbreak in the institution (*ibid* at para 64).

68. *Supra* note 5 at para 239.

69. See *ibid* at paras 242–44.

70. *Ibid* at paras 228–234.

71. In *R v Thompson*, 2021 SKPC 13, the Court states that challenges to the statutory limit under section 719(3.1) must be made under section 12 of the *Charter*, which was not done in this case (*ibid* at para 139). The Court does entertain the idea of *Duncan* but finds that there is no evidence to support such a credit in this case (*ibid* at paras 140–41). The Court credit does not award enhanced credit for COVID-19 stating that "such an application was not properly before the court" (*ibid* at para 142).

72. 2020 NUCJ 30.

73. *Ibid* at para 3.

74. *Ibid* at paras 70–71.

75. See *ibid* at para 173.

IV. Sentencing: COVID-19 Is Relevant to Proportionality

Post-conviction, a court will need to engage once more in a highly discretionary decision. The *Criminal Code* tells judges that they can pick from a variety of sentencing principles that might be relevant to a particular case: rehabilitation, deterrence, denunciation, and so on. There is only one "fundamental principle" that must always apply: the severity of a sentence must be *proportionate* to both the gravity of the offence and the degree of responsibility of the offender. Canadian sentencing law is clear that sentence severity can include factors like the impact and collateral consequences of custody that are likely to flow to the particular detainee. While there is caselaw that suggests a range of sentence for particular offences, it is not an error for a judge to sentence outside those ranges given the facts of particular cases.

When sentencing during the pandemic, if an offender is particularly vulnerable to COVID-19 due to an underlying condition, this is a "significant consideration" that could justify a sentence at the very low end or below the ordinary range.[76] But leading cases have generally held that it is not necessary for a defendant to provide medical evidence of heightened vulnerability.[77] In *R v DD*, a conditional sentence was imposed in a case that would have attracted jail time absent the pandemic.[78] The defendant was not required to point to outbreaks in provincial jails, nor to the defendant's particular risks from infection.

Similarly, in *R v Hearns*, Pomerance J declines to apply the standard sentence range for the offence of aggravated assault. While the gravity of the crime and the defendant's record called for a "substantial term of incarceration", time served plus probation was deemed appropriate largely due to the "current social and medical context".[79] It is crucial to note that *Hearns* involved a joint submission: both the Crown prosecutor and the defence agreed on the sentence, which the judge was simply acceding to.

In her analysis, Pomerance J takes judicial notice of how the risk of infection is affected by standard and necessary features of carceral living, such as being forced into "cramped quarters, shared sleeping and dining facilities, [and] lack of hygiene products" which "as a matter of logic and common sense" make the risk of contracting COVID-19 higher in jail.[80] She explicitly rejects the notion that defendants must lead evidence of heightened vulnerability. She points to

76. *R v Bell*, 2020 ONSC 2632 at paras 43–49.

77. See *R v Dakin*, 2020 ONCJ 202 at para 32.

78. 2020 ONCJ 218 at paras 56–57.

79. *R v Hearns*, *supra* note 7 at paras 9–10.

80. *Ibid* at para 11.

"otherwise healthy" people suffering severe COVID-19 complications.[81] The pandemic is not only relevant given particular "characteristics of the offender", though in some cases there may be "heightened vulnerability".[82]

Justice Pomerance is clear that finding fault on the part of correctional authorities for the risk to the accused is not required. In other words, the accused need not show that the correctional facility has failed in some way for COVID-19 to be a factor. Justice Pomerance states: "No one is to blame for the pandemic. I accept that those in charge of jails are doing their best to control the spread of infection."[83] The entire world must socially distance, which is "very difficult" in custodial settings.[84]

Justice Pomerance applies established sentencing principles which recognize hardship in the serving of a custodial sentence as relevant to proportionality.[85] She notes that "jails have become harsher environments" either because of the risk of contracting the virus, the psychological effects of that risk, or the isolation from the mitigation measures.[86] "Punishment is increased."[87] She is careful to note that there will be cases where release from custody is not a viable option, and that the pandemic cannot justify a sentence that is "disproportionately lenient, or drastically outside of the sentencing range".[88] But where a period of incarceration has served to address sentencing principles, however imperfectly, release may be justified. Her approach has been followed by many other Ontario

81. *Ibid* at para 12.

82. *Ibid* at para 20.

83. *Ibid*.

84. *Ibid* at para 14.

85. See *R v Hearns*, *supra* note 7. See also *R v Kandhai*, 2020 ONSC 1611. Justice Harris held:

> Hardship in serving a jail sentence has always been a proper consideration in crafting an appropriate sentence. . . . The entire country is being told to avoid congregations of people. A jail is exactly that, a state mandated congregation of people, excluded from the rest of the population by reason of their crimes or alleged crimes. The situation, which has led to drastic measures in society at large, is bound to increase day to day hardship in prison and the general risk to the welfare of prison inmates.

See *ibid* at para 7. See also *R v Kanthasamy*, 2021 ONCA 32. There the Court accepts fresh evidence on a sentence appeal that the risk of COVID-19 "increases the consequences" of the appellant's heart condition and "makes him more susceptible to serious harm" while incarcerated. With the consent of the Crown, the Court agrees to reduce the sentence in part due to the COVID-19 factor (*ibid* at paras 6–9).

86. *R v Hearns*, *supra* note 7 at para 16.

87. *Ibid.*

88. *Ibid* at para 23.

justices,[89] although justices in British Columbia have been more reticent, again citing the need for specific evidence of current outbreaks or individual health vulnerability.[90]

Conclusion

The legal relevance of the pandemic is now relatively clear in the context of sentencing, with many judges attentive to how the risks and effects of imprisonment have deepened during the pandemic. These judges have been willing to connect these changes to longstanding and central sentencing principles like proportionality and parity. In contrast, the law of bail remains unsettled and conflicted in terms of judicial willingness to recognize systemic impacts from the pandemic, with the Court of Appeal for Ontario seeming to settle on a view that an underlying medical condition is the key factor.

We see individual medical vulnerability as a tempting device—perhaps one that feels like an appropriately restrained concession to the extraordinary concerns of this moment. But it is a device that may lend false comfort. The worry about COVID-19 is not simply whether a particular detainee will become extremely sick or die from the virus, or whether a particular institution is in the midst of an outbreak. The management of COVID-19 in prisons and jails affects every aspect of inmate life, which is already so harsh.

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89. See *R v Abdul Ali et al*, 2020 ONSC 7059 at paras 53–54; *R v Bell*, *supra* note 76 at paras 46–48; *R v Dakin*, *supra* note 77 at para 32; *R v DD*, *supra* note 78 at paras 5–57; *R v OK*, 2020 ONCJ 189 at para 41. For an Alberta authority that holds that the pandemic is generally relevant to sentence severity, see *R v EF*, 2021 ABQB 272. Handed down on April 9, 2021, the court imposed a sentence of four years for sexual interference and child luring when the Crown was seeking eleven years. The Court accepts that the pandemic makes a custodial sentence "harsher than it would otherwise be" for both remand and federal inmates (*ibid* at para 79).

90. See e.g. *R v Greer*, 2020 BCSC 1311. There, Crabtree J declines to follow *Hearns*, noting that the defendant filed no evidence to show the current impact of COVID-19 upon federal and provincial institutions, nor evidence that the defendant suffers a suppressed or compromised immune system (*ibid* at paras 51–54). While the defendant did file evidence of the impacts of COVID-19 restrictions in connection with his experience in pretrial custody, Crabtree J finds that it is speculative to assume these restrictions will continue. He draws from *R v Morgan*, 2020 ONCA 279, to suggest that prisoners can seek a remedy from the provincial parole authority going forward. Other BC cases have also declined to follow *Hearns*. See e.g. *R v Zhao*, 2020 BCSC 1552 at paras 134–36; *R v McKibbin*, 2020 BCCA 337 (where a custodial sentence was suspended in light of a serious respiratory disease); *R v Milne*, 2020 BCSC 2101 (where the judge drew from *McKibbin* that "the absence of concrete evidence of significant risk to an offender's physical health" from COVID-19 should not result in the reduction of a sentence that the court would otherwise impose at para 134).

As Abrams and Abbott captured in their article published early in the pandemic, public discourse in response to COVID-19 has disclosed a strong public desire to locate risk "elsewhere".[91] The judicial hunt for individual vulnerability that we have outlined here may resemble that move. And notice how a test of individual vulnerability implies *both* that COVID-19 only matters where it could deliver a detainee to death's door *and* that the risks and effects of pretrial confinement are otherwise acceptable. Just as the pandemic has seen a range of public and political attitudes on the scope of tolerable risk, COVID-19 in the criminal courts has seen a range of judicial sensitivity to the altered pains of imprisonment.

91. Abrams & Abbott, *supra* note 11.