

THE CONSTITUTIONAL CONSEQUENCES OF COVID-19

*Jordan D. Slatten**

I. INTRODUCTION: PANDEMICS AND QUARANTINES AND MASKS, OH MY!

Recall December 2019. Breaking news of a novel coronavirus known as SARS-CoV-2 and its outbreak in Wuhan, China plagued news channels, radio stations, and the internet. With each passing day, healthcare professionals urged people to take sanitary precautions and media broadcasters covered little other than news of the virus. Ultimately, on January 21, 2020, the United States fell victim to this silent killer—on this day, the Centers for Disease Control and Prevention (CDC) confirmed the first case of SARS-CoV-2 in the United States.¹

On January 31, 2020, just one month after the first detection of the virus, the United States Health and Human Services Secretary declared a public health emergency in response to the novel coronavirus now infamously known as COVID-19.² Due to the rapidly increasing infection rate around the world and in the United States, the World Health Organization (WHO) characterized the COVID-19 outbreak as a pandemic on March 11, 2020.³ Three days later, President Trump issued a proclamation declaring the United States in a national emergency, beginning March 1, 2020.⁴

In response to the COVID-19 outbreak, the government has taken proactive measures to prevent, or at least slow, the spread of the virus on federal, state, and local levels.⁵ For example, the federal government has restricted travel in and out of the United States.⁶ In states with high infection rates, governors have issued statewide stay-at-home orders and closed all non-essential businesses.⁷ Meanwhile, other governors have never

* JD, May 2021, University of Arkansas at Little Rock William H. Bowen School of Law

¹ Press Release, Ctr. for Disease Control and Prevention, First Travel-Related Case of 2019 Novel Coronavirus Detected in United States (Jan. 21, 2020), <http://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

² Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

³ *Id.*

⁴ *Id.*

⁵ See generally Craig Konnoth, *Narrowly Tailoring the Covid-19 Response*, 11 CAL. L. REV. ONLINE 193, 194-96 (2020) (explaining federal and state governments' response to the coronavirus).

⁶ See, e.g., Proclamation No. 9996, 85 Fed. Reg. 15,341.

⁷ See, e.g., Executive Department State of California Executive Order N-33-20,

placed their state under lockdown and have only issued statewide mask mandates and encouraged social distancing.⁸ Despite the government's goal to provide for the common good and safety of the public, in enacting these restrictions, the government put fundamental constitutional principles such as liberty, justice, due process, and equal protection at risk.⁹ Unfortunately, these individual liberties are the first sacrifice in the midst of a global pandemic.¹⁰ To ensure individuals' fundamental rights remain intact during the age of COVID-19, courts must tread lightly so not to exchange individuals' constitutional rights in for the collective rights of the public. Although the COVID-19 pandemic has taken a toll on many fundamental and constitutionally protected rights,¹¹ this paper focuses specifically on the Fourth and Sixth Amendments to the Constitution of the United States.

Part II of this paper discusses the last time the Supreme Court of the United States issued an opinion regarding a major public health crisis and that case's role in present day COVID-19 jurisprudence. Additionally, Part II argues that courts are failing to properly apply precedent when reviewing government action during the COVID-19 pandemic. Part III explains how the government, by way of digital surveillance and contact tracing, is encroaching on individuals' privacy rights. Part III also considers the extent of police power regarding enforcement of mandatory stay-at-home orders and compulsory mask mandates. Lastly, Part IV outlines two different approaches that courts are currently using to resume jury trials and how those approaches are eroding criminal defendants' constitutionally guaranteed right to a fair trial.

II. *JACOBSON V. MASSACHUSETTS*: A TALE AS OLD AS TIME

The last time the Supreme Court of the United States considered a public health issue of great magnitude was in 1905 when it decided

<https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf> (as of Jul. 30, 2020) archived at <https://perma.cc/4BQN-4MR7>; N.Y.C.R.R. § 8.202.4 (2020).

⁸ See, e.g., Ark. Exec. Order No. 20-43.

⁹ Diane Messere Magee, Esq., *The Constitution and Federalism in the Age of Pandemic*, 2020 R.I. B.J. 11, 13.

¹⁰ *Id.*; See also Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70-71 (2020) (Gorsuch, J., concurring) ("Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled [constitutional] principles.").

¹¹ Henry F. Fradella, *Pandemics and the Constitution: Why the Special Needs Doctrine is the Most Appropriate Fourth Amendment Theory for Justifying Police Stops to Enforce COVID-19 Stay-at-Home Orders*, 12 CONLAWNOW 1, 1 (2020) ("Some public health measures such as stay-at-home orders, restrict the exercise of personal freedoms ranging from the rights to travel and freely associate to the ability to gather in places of worship for religious services.").

Jacobson v. Massachusetts.¹² *Jacobson* involved the constitutionality of a statute that required all persons 21 years and older to receive a vaccination during a smallpox outbreak.¹³ The Supreme Court upheld the statute as constitutional and deemed it lawful for a state to quarantine an apparently healthy American citizen against his will after he had traveled aboard a ship of individuals infected with “yellow fever or Asiatic cholera.”¹⁴ In so ruling, the Supreme Court essentially placed a greater value on the collective rights of the general public than individual liberties.¹⁵ Specifically, the Court stated:

[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint to be enforced by reasonable regulations, as the safety of the general public may demand.¹⁶

But how much restraint is too much restraint? How long may the government restrain individual liberties amidst a global pandemic?¹⁷ In determining that the government may restrict and regulate individual liberties, “the Supreme Court has not held that restraints against individual constitutional guarantees may be imposed until the pandemic is totally eradicated or a definitive cure or vaccine is found.”¹⁸ Further, the government’s restrictions may not be “arbitrary, capricious, or oppressive,” and such restrictions cannot be “overreaching or indefinite.”¹⁹

In *Jacobson*, the Supreme Court applied a standard dependent on reasonableness, which is different from the tiers of scrutiny that courts presently apply:

[W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some “real or substantial relation” to the public health crisis and are not “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”²⁰

Today, when reviewing government action during a public health crisis,

¹² See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

¹³ *Id.* at 12.

¹⁴ *Id.* at 29.

¹⁵ See Magee, *supra* note 9 at 13.

¹⁶ *Jacobson*, 197 U.S. at 29.

¹⁷ See Magee, *supra* note 9 at 13.

¹⁸ *Id.*

¹⁹ *Id.* at 14.

²⁰ *In re Abbott*, 954 F.3d 772, 777-85 (quoting *Jacobson*, 197 U.S. at 31).

most courts apply a *Jacobson*-rational basis hybrid test that is grounded in “reasonableness” while also giving deference to medical and health experts.²¹ Under a rational basis review, courts must assess whether “there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”²² Given the highly deferential nature of rational basis review, most challenges to government restrictions in the context of COVID-19 will fail despite the general rule that courts are more likely to apply a heightened level of scrutiny where the burden or restriction is great but the overall benefit is small.²³ Even further, these challenge are likely to fail notwithstanding that under a rational basis review, “[a]ny compulsory measures must be implemented in [the] least restrictive manner”²⁴ because there is the legitimate government interest in protecting the health of the public and stopping the spread of COVID-19.²⁵ Therefore, every challenger is destined for failure when courts apply rational basis review to issues involving COVID-19 related government restrictions—essentially barring judicial review.²⁶ In response to the government’s use of digital surveillance for COVID-19 contact tracing, some experts “warn that the public has little recourse to challenge these digital exercises of state power,” while others fret that that United States will reach a point where the government’s response to the virus “fundamentally changes the scope of American civil rights.”²⁷

Today, many courts are relying on *Jacobson*’s precedent to review and uphold government restrictions in the age of the current pandemic.²⁸ But

²¹ See Magee, *supra* note 9 at 13.

²² Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 366-67 (2001).

²³ See Nicholas Stephanopoulos, *Election Litigation in the Time of the Pandemic*, 6/26/2020 U. CHI. L. REV. ONLINE 18, 18 (2020); see also Daniel O’Brien, *Not If but When: Pandemic Influenza, the Law Public Health*, 39 MD. B.J. 12, 16 (2006).

²⁴ Devin Schindler et al., *Pandemic Legal Preparedness A Brief Overview*, 96 MICH. B.J. 28, 29 (2017).

²⁵ See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905).

²⁶ See Stephanopoulos, *supra* note 23 at 18 (“And light burdens result in highly deferential rational basis review under which rules almost always survive.”); See also Avi Weitzman & Mark A. Perry, *Constitutional Implications of Government Regulations and Actions in Response to the COVID-19 Pandemic*, 34 WEST J. 8, 50 (2020) (“Given the nature of rational-basis review, any due process or equal protection challenge to COVID-19 legislation would almost certainly face an uphill climb.”); *Bayley’s Campground Inc. v. Mills*, 463 F. Supp. 3d 22, *31 (D. Me. 2020) (“[*Jacobson*] barely recognizes judicial review at all.”).

²⁷ Choe Sang-Hun & Natasha Singer, *As Coronavirus Surveillance Escalates, Personal Privacy Plummets*, N.Y. TIMES, Apr. 17, 2020, <https://www.nytimes.com/2020/03/23/technology/coronavirus-surveillance-tracking-privacy.html>.

²⁸ See, e.g., *Cassell v. Snyders*, 458 F. Supp. 3d 981, 993-96 (N.D. Ill. 2020); *Cangelosi v. Edwards*, CV 20-1991, 2020 WL 6449111, *5 (E.D. La. 2020); *Bimber’s*

this precedent “predates laws and judicial opinions aimed at maximizing” individual freedoms, and application of current statutory and case law would likely produce a different result in *Jacobson*.²⁹ Moreover, in the 115 years since the *Jacobson* decision, lower courts have greatly criticized the decision.³⁰ For example, the U.S. District Court for the District of Maine chastised *Jacobson* for its lack of judicial review:

[T]he permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review. This may help explain why the Supreme Court established the traditional tiers of scrutiny in the course of the 100 years since *Jacobson* was decided. Although *Jacobson* reflects that, when one weighs competing interests in the balance, the presence of a major public health crises [sic] is a very heavy weight indeed and scientific uncertainties about the best response will afford the state some additional leeway to err on the side of caution³¹

The U.S. District Court for the Northern District of New York bluntly criticized the present day application of this century-old case:

Jacobson was decided just after the turn of the last century, at a time when medical science was in its adolescence if not still in its infancy. Because it endorses an approach to constitutional analysis that has fallen out of fashion, it is admittedly strange—and even a little alarming—to discover that *Jacobson* is still considered the right tool for evaluating state action taken to protect public health. Yet unless and until the Supreme Court revisits *Jacobson* and fashions a test that demands a more particularized showing from public health officials in light of the unbelievable medical achievements of the twenty-first century, it remains a complete roadblock³²

In light of the current global pandemic, now it is more crucial than ever that the Supreme Court reexamines and revisits *Jacobson*. Otherwise, courts will continue to apply this under-reaching, quasi-rational basis test. Even worse, courts may vacillate in applying the *Jacobson* test, which inevitably will lead to arbitrariness and lack of uniformity.

The Supreme Court recently considered the true interpretation of *Jacobson* and its correct application to COVID-19 controversies.³³ Justice

Delwood, Inc. v. James, 20-CV-1043S, 2020 WL 6158612, *7 (W.D.N.Y. 2020); Brach v. Newsom, 220CV06472SVWAFM, 2020 WL 6036764, *2-3 (C.D. Cal. 2020).

²⁹ Fradella, *supra* note 11, at 2.

³⁰ See *Bayley's Campground*, 463 F. Supp. at *31.

³¹ *Id.* at 32.

³² Page v. Cuomo, 478 F. Supp. 3d. 355, 371 (N.D.N.Y. 2020).

³³ Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70-71 (2020) (Gorsuch, J., concurring).

Gorsuch chastised previous judicial opinions for faulty analysis and inappropriate application of *Jacobson* to COVID-19 issues.³⁴ Justice Gorsuch reiterated *Jacobson*'s application of rational basis review, which is the test courts *normally* apply to constitutional questions not involving a suspect classification or a fundamental right.³⁵ This observation is critical because it sheds light on the fact that “*Jacobson* [did not] seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so.”³⁶ Instead, the *Jacobson* court identified the right at issue and applied the correct legal standard for that right, which is precisely what courts do today when determining which level of scrutiny to apply.³⁷ Thus, the traditional tiers of scrutiny should apply *even* during a pandemic.³⁸ Moving forward, when a court approaches a COVID-19 challenge, it must first ascertain the underlying fundamental right at issue and then apply the appropriate level of scrutiny instead of assuming a quasi-rational basis test automatically applies.³⁹ Instead of blanket rational basis review for any issue related to COVID-19, this proper analysis is in accordance with *Jacobson* and provides the challenger the proper avenue to judicial review.⁴⁰

Unfortunately, courts will likely continue to misinterpret and incorrectly apply *Jacobson* because of the standard Chief Justice Roberts established in *South Bay Pentecostal Church v. Newsom* and its reliance on *Jacobson*.⁴¹ In *South Bay*, the Chief Justice “expressed willingness to defer to executive orders in the pandemic’s early stages based on the newness of the emergency and how little was then known about the disease.”⁴² Justice Gorsuch responded to the Chief Justice’s position by stating:

At that time, COVID[-19] had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic’s shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See Id.*

⁴⁰ *See* Stephanopoulos, *supra* note 23 at 18; *See also* Weitzman & Perry, *supra* note 26; *Bayley’s Campground Inc. v. Mills*, 463 F. Supp. 3d 22, *31 (D. Me. 2020).

⁴¹ *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 71 (Gorsuch, J., concurring) (citing *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020)) (Roberts, C.J., concurring) (“[M]any lower courts quite understandably read its invocation as inviting them to slacken their enforcement of constitutional liberties while COVID[-19] lingers.”).

⁴² *Id.* at 70.

this pandemic, it cannot become a sabbatical . . . Nothing in *Jacobson* purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights.⁴³

People's livelihoods, fundamental rights, and liberties are at stake as courts continue to misinterpret and improperly apply *Jacobson*.⁴⁴ As a result, some governors have drastically limited capacity at places of worship and completely shut down small businesses while "essential" businesses such as "acupuncture facilities, camp grounds, garages . . . plants manufacturing chemicals and microelectronic and all transportation facilities" remain open without any capacity regulations.⁴⁵ To ensure individual liberties remain intact during this unprecedented time, it is imperative for courts properly apply *Jacobson*.

III. THE FOURTH AMENDMENT: PRIVACY VS. PROTECTION

The premise of the Fourth Amendment is to prohibit state actors from conducting unreasonable searches and seizures.⁴⁶ Undoubtedly, privacy is the very cornerstone of the Fourth Amendment.⁴⁷ In a recent Supreme Court decision, Chief Justice Roberts supported this proposition by stating:

The Fourth Amendment protects "[t]he rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The "basic purpose of this Amendment," our cases have recognized, "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." . . . In *Katz v. United States*, we established that "the Fourth Amendment protects people, not places," and expanded our conception of the Amendment to protect certain expectations of privacy as well. When an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," we have held that official intrusion into the private sphere generally qualifies as a search and requires a warrant supported by probable cause.⁴⁸

As COVID-19 continues to plague America, it is imperative to strike a

⁴³ *Id.* at 70-71.

⁴⁴ *See Id.* at 72.

⁴⁵ *Id.* at 66.

⁴⁶ U.S. CONST. amend. IV.

⁴⁷ Christopher Slobogin, *A Defense of Privacy As the Central Value Protected by the Fourth Amendment's Prohibition on Unreasonable Searches*, 48 TEX. TECH. L. REV. 143, 143 (2015); *See also* *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) ("[T]he Amendment seeks to secure the privacies of life against arbitrary power.") (internal quotations omitted).

⁴⁸ *Carpenter*, 138 S. Ct. at 2213.

balance between individual privacy and the wellbeing of all citizens.⁴⁹ However, in the age of COVID-19, it seems as though collective rights such as public health and safety have become the linchpin of the Fourth Amendment, while the government steadily encroaches on individuals' right to privacy.⁵⁰ Part A of this section discusses unreasonable searches in the form of digital contact tracing. Part A also recognizes that many of these searches will fall under one of the exceptions to the warrant requirement. Part B analyzes the limitations of police enforcement regarding stay-at-home orders and mask mandates.

A. Tracing Me, Tracing You—Sweet Government Surveillance— DUN-DUN-DUUUUN

As previously stated, the Fourth Amendment prohibits unreasonable searches.⁵¹ There are three ways a search can occur within the meaning of the Fourth Amendment. First, a search occurs within the meaning of the Fourth Amendment when the government physically occupies private property for the purpose of obtaining information.⁵² Second, a search occurs when the government invades a person's subjective reasonable expectation of privacy and society is prepared to recognize that exhibition of privacy as reasonable (hereinafter referred to as a "*Katz* search").⁵³ Third, a search occurs within the meaning of the Fourth Amendment when the government uses sense-enhancing technology that is not in general public use to disclose the details of the interior of a home that could not otherwise be known except by physically entering into the home.⁵⁴ If the government conducts a search without a valid warrant or without identifying an exception to the warrant requirement, that search is unreasonable.⁵⁵

⁴⁹ See Hub staff report, *Johns Hopkins Releases Report on Digital Contact Tracing to Aid COVID-19 Responses*, JOHNS HOPKINS UNIV. HUB (May 26, 2020), <https://hub.jhu.edu/2020/05/26/digital-contact-tracing-technologies-report/>.

⁵⁰ See Thomas K. Clancy, *The Fourth Amendment As A Collective Right*, 43 TEX. TECH L. REV. 255, 263 (2010) ("Despite the historical basics and impressive depth of precedent for the view that the Fourth Amendment protects individual rights, Supreme Court opinions have increasingly utilized language supporting a collective security model.").

⁵¹ U.S. CONST. amend. IV.

⁵² *United States v. Jones*, 565 U.S. 400, 404-05 (2012).

⁵³ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'.").

⁵⁴ *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

⁵⁵ See *Riley v. California*, 573 U.S. 373, 382 (2014).

The third-party doctrine is well-established Fourth Amendment jurisprudence.⁵⁶ The basis of the third-party doctrine is that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”⁵⁷ This is true “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”⁵⁸ However, the Supreme Court circumvented these foundational principles in the 2018 landmark case *Carpenter v. United States*.⁵⁹

In *Carpenter*, the Supreme Court very narrowly expanded the *Katz* search while also claiming to not overrule or extend the third-party doctrine principles of *Smith* and *Miller*.⁶⁰ In *Carpenter*, the government acquired more than 127 days of Timothy Carpenter’s cell-site location records⁶¹ from two cell phone carrier companies without first obtaining a warrant.⁶² Despite well-established third-party doctrine precedent, the Supreme Court concluded that the government conducted a search within the meaning of the Fourth Amendment when it “accesse[d] historical cell phone records that provide[d] a comprehensive chronicle of [Mr. Carpenter’s] past movements”⁶³:

Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection. . . . [W]e hold that an individual maintains a legitimate expectation of privacy in the records of his physical movements as captured through CSLI. The location information obtained from Carpenter’s wireless carriers was the product of a search.⁶⁴

In support of its conclusion, the Court relied on the reasonable expectation

⁵⁶ See, e.g., *United States v. Miller*, 425 U.S. 435, 443 (1976); See also *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979).

⁵⁷ *Smith*, 442 U.S. at 743-44.

⁵⁸ *Miller*, 425 U.S. at 443.

⁵⁹ See Ryan Bender & Ashley Fuchs, *Would COVID-19 Digital Contact Tracing Programs Violate the Fourth Amendment?*, THE RULE OF LAW POST (Apr. 28, 2020), <https://www.law.upenn.edu/live/nes/10007-would-covid-19-digital-contact-tracing-programs>.

⁶⁰ *Carpenter v. United States*, 138 S. Ct. 2206, 2217-20 (2018).

⁶¹ *Id.* at 2208 (explaining that “[e]ach time a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI); [w]ireless carriers collect and store this information for their own business purposes.”).

⁶² Specifically, the Government obtained 127 days of cell-site records from MetroPCS and seven days of cell-site records from Sprint. Overall, this data consisted of “12,898 location points cataloging Carpenter’s movements—an average of 101 data points per day.” *Id.* at 2212.

⁶³ *Id.* at 2211.

⁶⁴ *Id.* at 2217.

of privacy principles established in *Katz* and *Jones*.⁶⁵

Further, the Court explained that the government's "mapping" of Mr. Carpenter's cell phone location for more than 127 days essentially provided the government with a constant all-access pass to Mr. Carpenter's whereabouts.⁶⁶ In reality, this constant surveillance gave the government a front row seat to all the intimate and private aspects of Timothy Carpenter's life.⁶⁷ In fact, the Court reasoned that this search was more intrusive than the search in *Jones* because, in today's culture, a cell phone is practically a "feature of human anatomy."⁶⁸ The Court even went as far as claiming that cell-site location information is akin to placing an ankle monitor on someone because it delivers "near perfect surveillance" of an individual's movements that is "otherwise unknowable."⁶⁹

The *Carpenter* holding seems to support the proposition that, as digital technology progresses and cell phones become an even more integral part of daily life,⁷⁰ the Court will apply its third-party doctrine precedent in light of and giving deference to the reasonable expectation principles established in *Katz*, and decades later reinforced in *Jones*.⁷¹ Therefore, it is reasonable to suggest that a *Carpenter-Katz* hybrid test would apply to government searches for contact tracing and other mechanisms of digital surveillance.⁷²

⁶⁵ *Carpenter*, 138 S. Ct. at 2217.

⁶⁶ *Id.*

⁶⁷ *Id.* ("[T]he time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them, his 'familial, political, professional, religious, and sexual associations.'").

⁶⁸ *Id.* at 2218 (quoting *Riley v. California*, 573 U.S. 373, 385 (2014)).

⁶⁹ *Id.* (Chief Justice Roberts explained the severe invasion of privacy of searching one's cell-site location records, "While individuals regularly leave their vehicles, they compulsively carry phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales.").

⁷⁰ *Id.* at 2223 ("[T]he Court is obligated—as '[s]ubtler and more far-reaching means of invading privacy have become available to the Government'—to ensure that the 'progress of science' does not erode Fourth Amendment protections.") (quoting *Olmstead v. United States*, 277 U.S. 438, 473-74 (1928)).

⁷¹ See Michael A. Foster, *COVID-19, Digital Surveillance and Privacy: Fourth Amendment Considerations*, CONG. RSCH. SERV. LEGAL SIDEBAR, 4 (Apr. 16, 2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10449> ("Though third-party doctrine precedent prior to *Carpenter* would suggest that exposure of information to third-party companies could negate any reasonable expectation of privacy in that information, the Court in *Carpenter* made clear that it intends to view its precedent and the doctrine flexibly in the face of 'seismic shifts in digital technology' that give third parties access to vast swaths of information revealing 'the privacies of life.'").

⁷² See Bender, *supra* note 59 ("*Katz*-based limitations on digital contact tracing programs may be partially circumvented by the 'third-party' doctrine *Carpenter v. United States*, however, shows that this doctrine is in flux It is thus uncertain how new interpretations of the third-party doctrine will impact Fourth Amendment analysis of digital

However, because this virus, as well as the means and methods of contact tracing, is constantly evolving, it is uncertain exactly how courts will approach such challenges to government action.⁷³

So, what is contact tracing? The United States first used contact tracing in the 19th century to report cases of smallpox.⁷⁴ When a physician treated a patient for an infectious disease, he would fill out a card and then manually keep track of the individuals that the patient came into contact with.⁷⁵ Obviously, this required constant communication between the patient and the physician, and this placed tremendous responsibility on the physician to keep the patient's card up to date.⁷⁶ However, the technology of contact tracing rapidly evolved to computer databases and online repositories, which physicians have used to combat diseases like Ebola, SARS, swine flu, and influenza.⁷⁷ Today, contact tracing has progressed even further and encompasses various modes of digital surveillance.⁷⁸

A thorough discussion of *Carpenter* was necessary because during the most powerful global pandemic of the century, the newest, most effective contact-tracing tool rests in the hands of almost every single American—the smartphone.⁷⁹ But something this ingenious comes at a hefty price.⁸⁰ The concept is actually quite simple: digital contact tracing apps use global positioning system (GPS) or Bluetooth technologies to notify users if someone in his or her close proximity has tested positive for COVID-19.⁸¹ However, when one uses a contact-tracing app, he allows the app provider, public health officials, and possibly government officials to know the intricate details and privacies of his life.⁸² Therefore, some digital contact tracing falls into the category of a *Carpenter-Katz* hybrid search, and thus is unreasonable absent a warrant supported by probable cause or the applicability of an exception to the warrant requirement.⁸³

Digital surveillance, in the context of contact tracing, comes in many different modes. For example, in Germany, Corona Digital Donation, a

contact tracing programs.”).

⁷³ See generally J. Cavanaugh Simpson, *An Epidemic's Electronic Eyes*, JOHNS HOPKINS MAG. (Fall 2020), <https://hub.jhu.edu/magazine/2020/fall/digital-contact-tracing-ethics/>.

⁷⁴ See generally *Id.*

⁷⁵ *Id.*

⁷⁶ See *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Simpson, *supra* note 75.

⁸⁰ See, e.g., Magee, *supra* note 9.

⁸¹ *Id.*

⁸² See generally *Carpenter v. United States*, 138 S. Ct. 2206, 2217-18 (2018).

⁸³ See, e.g., *Id.*; *Riley v. California*, 573 U.S. 373, 382-83 (2014).

smartwatch app, is available for download.⁸⁴ In the United States, some companies are using software programs that allow employees to report symptoms or test results.⁸⁵ Some of these software programs will even send an alert reminding the employee of social distancing requirements if he comes within six feet of another employee.⁸⁶ However, the most common and widespread method of contact tracing is the use of smartphone apps.⁸⁷

Virginia was the first state to launch a statewide app that notifies its users if they are in close proximity of anyone who has tested positive for COVID-19.⁸⁸ The Virginia Department of Health created COVIDWISE, which uses Bluetooth Low Energy technology and an “opt-in notification system” to generate “tokens” for each user’s device.⁸⁹ These tokens update approximately every 30 minutes to identify the user’s location.⁹⁰ According to the Virginia Department of Health, COVIDWISE does not collect, use, store, or share personal identifiable information or location data.⁹¹

Taking lead from the Virginia Department of Health, Apple and Google partnered to create a “universal” contact tracing tool known as Exposure Notifications Express.⁹² In states that have enabled Exposure Notifications Express, iPhone and Android users will receive a notification alerting them

⁸⁴ See generally Douglas Busvine, *Germany Launches Smartwatch App to Monitor Coronavirus Spread*, REUTERS (Apr. 7, 2020), <https://www.reuters.com/article/us-health-coronavirus-germany-tech/germany-launches-smartwatch-app-to-monitor-coronavirus-spread-idUSKBN21P1SS>; Astrid Prange, *Will Germans Trade Privacy for Coronavirus Protection?*, MADE FOR MINDS BLOG (Mar. 29, 2020), <https://www.dw.com/en/will-germans-trade-privacy-for-coronavirus-protection/a-52943225>.

⁸⁵ RETURNSAFE, <https://returnsafe.com/how-it-works/> (last visited Sept. 29, 2020); *Salesforce Announces Work.com to Help Businesses and Communities Safely Reopen*, SALESFORCE (May 4, 2020), <https://www.salesforce.com/news/press-releases/2020/05/04/salesforce-announces-work-com-to-help-busiensses-and-communities-safely-repoen-2/>.

⁸⁶ *Id.* (“If employees come within 6 [sic] feet of one another their phone will vibrate, reminding them to practice social distancing.”).

⁸⁷ See generally Theresa Vargas, *A new app offers Virginians the chance to show the country how to contain coronavirus cases. Will they blow it?*, WASH. POST (Aug. 8, 2020), https://www.washingtonpost.com/local/a-new-app-offersvirginians-the-chance-to-show-the-country-how-to-containcoronavirus-cases-will-they-blow-it/2020/08/07/30914ddad914-11ea-9c3b-dfc394c03988_story.html.

⁸⁸ *Id.*

⁸⁹ *Add Your Phone To The COVID Fight*, VA. DEP’T OF HEALTH (2021), <https://www.vdh.virginia.gov/covidwise/>.

⁹⁰ *Id.*

⁹¹ *Virginia Department of Health COVIDWISE – Privacy Policy*, VA. DEP’T OF HEALTH (2021), <https://vdh.virginia.gov/covidwise/privacy-policy/>.

⁹² Sara Morrison, *The New Apple-Google Contract Tracing Tool Finally Seems Useful*, VOX (Sept. 1, 2020), <https://www.vox.com/recode/2020/9/1/21410291/apple-google-exposure-notification-expresscoronavirus-covid-contact-tracing>.

that the tool is available if they wish to enable it.⁹³ Once a user has enabled Exposure Notifications Express, the tool will send and receive anonymous Bluetooth “keys” from nearby phones that also have the tool enabled.⁹⁴ If a user tests positive for COVID-19, he can notify health officials who will then send notifications to any enabled phones that were in close proximity of the user who tested positive.⁹⁵ According to Apple and Google, privacy was a “major consideration” when developing Exposure Notifications Express and very little personal information is shared with public health officials and other users.⁹⁶

Even though use of these contact tracing mechanisms is chilling, there are some circumstances in which Fourth Amendment protections do not extend to individual privacy rights. For example, when private companies or entities engage in contact tracing, there is no state action; therefore, the Fourth Amendment does not apply.⁹⁷ Still, in instances where a search has occurred, an exception to the warrant requirement might excuse the police or other state actor from obtaining a warrant before conducting contact tracing.⁹⁸ Although there are many exceptions to the warrant requirement, one particular exception is likely to be most prevalent in the context of digital surveillance and contact tracing: consent to a search.⁹⁹

In the context of contact tracing, if a search has occurred within the meaning of the Fourth Amendment, it is likely that the user consented to the search because most apps ask for the user’s consent when downloading, after downloading, or before using or sharing the user’s location.¹⁰⁰ If the search occurred pursuant to the user’s consent, the search was lawful because consent is an exception to the warrant requirement.¹⁰¹ However, there is a fine line between consent and coercion, and coercion is not an exception to the warrant requirement:

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ U.S. CONST. amend. IV; *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (“The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous case, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of the sovereign authority[.]”).

⁹⁸ *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2534 (2019) (quoting *Illinois v. McArthur*, 531 U.S. 326, 330 (2001)).

⁹⁹ Fradella, *supra*, note 11, at 6.

¹⁰⁰ See, e.g., Va. Dep’t of Health, *supra*, note 91; Sara Morrison, *The New Apple-Google Contract Tracing Tool Finally Seems Useful*, VOX (Sept. 1, 2020), <https://www.vox.com/recode/2020/9/1/21410291/apple-google-exposure-notification-expresscoronavirus-covid-contact-tracing>.

¹⁰¹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

[T]he question whether consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. . . . For, no matter how subtly the coercion was applied, the resulting ‘consent’ would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.¹⁰²

Black’s Law Dictionary defines “coercion” as “[c]ompulsion by physical force or threat of physical force” and “[c]onduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it.”¹⁰³ This second type of coercion prompted hundreds of thousands of Virginians to download the COVIDWISE contact tracing app.¹⁰⁴ Still, state officials urge more people to download the app as to “make the system increasingly effective.”¹⁰⁵ A statement on the Virginia Department of Health website “strongly encourages” Virginia residents to download the app “as it will help improve the overall effectiveness of efforts to prevent the spread of COVID-19 in the community.”¹⁰⁶ Moreover, a news release from Governor Ralph Northam’s office regarding COVIDWISE stated, “Widespread use is critical to the success of this effort.”¹⁰⁷ Governor Northam even went as far as posting the following on social media:

If enough Virginians use this app, we can identify cases early and slow the spread of this virus. We have to continue to fight #COVID19 from every possible angle—COVIDWISE is another tool we have to protect ourselves, our families, and our communities during this pandemic.¹⁰⁸

These statements insinuate that people who choose not to use the app are unwilling to help the state combat COVID-19, uncaring about the health and safety of others, and therefore, un-American. Such suggestions, especially those coming from the chief executive officer of Virginia would coerce any reasonable person to download and use COVIDWISE. So did

¹⁰² *Id.* at 227-28.

¹⁰³ *Coercion*, BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁰⁴ *Cf.* Jake Burns, *Nearly 600k Virginians downloaded COVIDWISE App in Two Months*, 6 NEWS RICHMOND (Oct. 5, 2020, 9:54 AM), <https://www.wtvr.com/news/local-news/virginians-have-been-slow-to-use-states-coronavirus-app> (last updated Oct. 6, 2020, 2:21 PM).

¹⁰⁵ *Id.*

¹⁰⁶ Vargas, *supra* note 87.

¹⁰⁷ *Id.*

¹⁰⁸ Ralph Northam (@GovernorVA), TWITTER (Aug. 5, 2020, 3:40 PM), <https://twitter.com/GovernorVA/status/1291111891838926848>.

the hundreds of thousands of COVIDWISE users voluntarily consent to the Department of Health's constant surveillance and tracking, or were they coerced by Governor Northam and other state officials? And do all Virginia residents who have not yet downloaded COVIDWISE face the same fateful decision: voluntarily consent or succumb to government coercion? For "[w]here there is coercion there cannot be consent."¹⁰⁹

Although it is likely that most contact tracing mechanisms are constitutional either for lack of state action or evidence of consent to the search, one particular situation seems to fall into the category of a *Carpenter-Katz* hybrid search. At Michigan's Oakland University, the president initiated a program requiring all students and staff to wear a "BioButton"—a wearable temperature and vital monitoring, contact-tracing device.¹¹⁰ In addition to wearing a BioButton, the university would require student and staff to monitor their symptoms daily through a compatible app.¹¹¹ However, before the university could kickstart the program, students circulated a petition in opposition of the program.¹¹² The petition expressed concerns for constant data tracking and other related privacy concerns.¹¹³ In response to the more than 2,500 signatures that the petition received, the university retracted its mandate and allowed use of the BioButton to be voluntary.¹¹⁴ However, if the BioButton initiative moved forward under its original mandate, it would have fallen within the bounds of a *Carpenter-Katz* search and would require a search warrant to pass constitutional muster.¹¹⁵ Like the government's mapping of Mr. Carpenter's cell phones essentially provided the government with a constant all-access pass to his whereabouts, the use of the BioButton and its corresponding app would provide the university with the same front row seat to the intimate and private aspects of student and staff lives.¹¹⁶

Despite the Supreme Court's intention to make *Carpenter* a narrow

¹⁰⁹ *Schneekloth v. Bustamonte*, 412 U.S. 218, 234 (1973) (quoting *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968)).

¹¹⁰ Natalie Broda, *Oakland University Asking Students, Staff to Wear 'BioButton' to Track COVID-19 Symptoms*, OAKLAND PRESS, (Aug. 9, 2020), https://www.theoaklandpress.com/news/oakland-university-asking-students-staff-to-wear-biobutton-to-track-covid-19-symptoms/article_66f9cdde-d5b8-11ea-9dd6-0b179995c6a7.html.

¹¹¹ Ruth Reader, *A school mandated that students wear a COVID-detection 'BioButton.' They fought back*, FAST COMP. (Aug. 6, 2020), <https://www.fastcompany.com/90537201/why-these-students-fought-back-against-their-universitys-covid-19-program>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See Bender, *supra* note 59.

¹¹⁶ See *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

ruling, and in light of *Katz* and the continued progression of contact tracing via smartphones and other modes of digital surveillance, it is likely that *Carpenter* will become the leading precedent used to oppose such unwanted searches. Therefore, for a court to uphold a contact tracing challenge in which the Fourth Amendment applies, the government will have to obtain a valid search warrant or overcome the additional burden of proving the applicability of one of the exceptions to the warrant requirement in the case of a *Carpenter-Katz* hybrid search. Arguably, this creates a fourth way that a search can occur within the meaning of the Fourth Amendment.

B. Stop in The Name Of COVID-19

In addition to prohibiting unreasonable searches, the Fourth Amendment also prohibits unreasonable seizures.¹¹⁷ The Commerce Clause of the U.S. Constitution allows the federal government to take some preventive measures to combat the spread of diseases from foreign countries and between states, but this power is not absolute.¹¹⁸ For example, the U.S. Department of Health and Human Services through the CDC can impose travel restrictions or order quarantine for individuals returning from foreign countries to the United States or for individuals traveling between states.¹¹⁹ However, the federal government does not have the power to impose statewide restrictions, mandates, or quarantines because the Tenth Amendment to the U.S. Constitution vests such authority regarding public health in state and local governments.¹²⁰ Although public health officials have the authority to promulgate and enact restrictions such as stay-at-home orders or mask mandates, they do not have the authority to enforce these restrictions.¹²¹ Therefore, local and state law enforcement bear the task of enforcing stay-at-home orders and mask mandates.¹²² Even amidst a global pandemic, police action must satisfy Fourth Amendment requirements when stopping individuals allegedly in violation of these orders or mandates.¹²³

Pursuant to the Fourth Amendment, police must have a particularized quantum of proof to stop, question, seize, frisk, or arrest persons in violation of stay-at-home orders.¹²⁴ A police officer must have probable cause to believe an offense has occurred in his presence to lawfully arrest an

¹¹⁷ U.S. CONST. amend. IV.

¹¹⁸ Fradella, *supra* note 11, at 3 (citing U.S. CONST. art 1, § 8, cl. 3).

¹¹⁹ *Id.*

¹²⁰ U.S. CONST. amen. X.; *see Id.*

¹²¹ Fradella, *supra* note 11, at 5.

¹²² *Id.*

¹²³ *Id.* at 1 (“But police authority to stop and question people—even during a pandemic—must nonetheless comply with the requirements of the Fourth Amendment.”).

¹²⁴ *See, e.g., Id.* at 5.

individual absent a warrant or to obtain an arrest warrant.¹²⁵ However, the Supreme Court recognizes several exceptions to this general rule.¹²⁶ For example, if a person consents and complies with a stay-at-home order by sheltering in place and only venturing outside for essential services and needs, the Fourth Amendment implications are not triggered.¹²⁷ Further, the Supreme Court has even upheld suspicionless seizures by relying on the special needs doctrine, which is clearly applicable during a global pandemic.¹²⁸ Some police officers may even try to rely on the exigent circumstances exception to the warrant requirement to obviate the particularized quanta of proof.¹²⁹ Although COVID-19 no doubt qualifies as an exigent circumstance for societal purposes, it is doubtful that people outside their homes in violation of stay-at-home orders will qualify as an exigent circumstance for Fourth Amendment purposes because courts typically construe this exception very narrowly.¹³⁰

However, the most relevant exception to police enforcement of stay-at-home orders is the exception that allows police to stop people based on a reasonable, articulable suspicion of criminal activity, which is a lesser quantum of proof than probable cause.¹³¹ This exception exists because a stop lacks the same intent as an arrest; a stop is a brief detention for investigation purposes only.¹³² In *Terry*, the Supreme Court discussed the limits of police confronting, and thus seizing, individuals on the street.¹³³ A police officer seizes a person when he accosts him and restrains his freedom

¹²⁵ See generally *U.S. v. Watson*, 423 U.S. 411 (1976).

¹²⁶ Fradella, *supra* note 11, at 7.

¹²⁷ See *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

¹²⁸ See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) in which Chief Justice Rehnquist upheld a program that authorized suspicionless roadside sobriety checks by stating:

In sum, the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment.

¹²⁹ Fradella, *supra* note 11, at 8-10.

¹³⁰ *Id.* at 9-10 (“[O]ther than situations in which police, firefighters, and paramedics are responding to calls for emergency medical treatment, courts generally require police to have probable cause that some underlying criminal activity is transpiring when applying the exigent circumstances doctrine.”).

¹³¹ *Id.* at 7.

¹³² *Id.*

¹³³ See generally, *Terry v. Ohio*, 392 U.S. 1, 4-9 (1969) (explaining that the Fourth Amendment “right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”).

to walk away.¹³⁴ *Terry* determined that “a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.”¹³⁵ In such appropriate circumstances, probable cause is unnecessary because “we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims . . . in situations where they may lack probable cause.”¹³⁶ Instead, courts give “due weight” to an officer’s “reasonable inferences” when determining if the stop was reasonable.¹³⁷ Therefore, a police officer need only a reasonable, articulable suspicion that criminal activity is afoot to legally stop an individual on the street for a brief investigation to dispel his suspicion.¹³⁸

This landmark case is pertinent to challenges against police power regarding stops and seizures of individuals in violation of stay-at-home orders during the COVID-19 pandemic. One haunting characteristic of COVID-19 is the fact that many people may have actually contracted the virus but have been completely asymptomatic.¹³⁹ According to The Centre for Evidence-Based Medicine at Oxford University, “between 5% and 80% of people” testing positive for COVID-19 may be asymptomatic.¹⁴⁰ Therefore, it is reasonable to assume that everyone could have the virus and merely be asymptomatic; but is it reasonable for police to stop any and all individuals outside of their homes and in violation of stay-at-home orders?¹⁴¹ Even though a brief stop of an individual in violation of a stay-at-home order to investigate whether he is “out and about” for a permitted purpose¹⁴² is consistent with *Terry*, police should proceed with caution to ensure constitutionality.¹⁴³

Despite the lack of particularized suspicion, reasonable police enforcement of stay-at-home orders or mask mandates is likely constitutional due to the government’s compelling interest in protecting public health and limiting the spread of COVID-19.¹⁴⁴ The special needs

¹³⁴ *Id.* at 16.

¹³⁵ *Id.* at 22.

¹³⁶ *Id.* at 24.

¹³⁷ *Id.* at 27.

¹³⁸ *Id.* at 30.

¹³⁹ Fradella, *supra* note 11, at 8.

¹⁴⁰ *Id.* at 7 (quoting Carl Heneghan, Jon Brassey, & Tom Jefferson, *COVID-19: What Proportion are Asymptomatic?*, CEBM (Apr. 6, 2020), <https://www.cebm.net/COVID-19/COVID-19-what-proportion-are-asymptomatic/>).

¹⁴¹ *Id.* at 8.

¹⁴² *Id.* (explaining that “medical reasons, to buy groceries, and to work in essential services” are permitted reasons to violate a stay-at-home order).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1.

doctrine is likely the best theory under the Fourth Amendment to justify police enforcement during the pandemic because it does not encroach on any individual constitutional rights; whereas matters get more complicated when police try to rely on a *Terry* stop to justify unreasonable police action.¹⁴⁵

IV. THE SIXTH AMENDMENT: ALL IS FAIR IN PANDEMICS AND QUARANTINES . . . ?

In the early stages of the COVID-19 outbreak in the United States, many courts decided to suspend all jury trials and other in-person court proceedings.¹⁴⁶ Some judges even stopped trials mid-testimony, declared a mistrial, and dismissed the courtroom to limit the risk of exposure to COVID-19.¹⁴⁷ Across the nation, courthouses were closed to the public, and the status of thousands of criminal jury trials remained uncertain.¹⁴⁸ Obviously, the purpose of these drastic initial measures was to protect defendants, witnesses, jurors, prosecutors, defense counsel, judges, and other court personnel from contracting or spreading the virus.¹⁴⁹ Although these concerns remain prevalent, Americans will continue to battle the impacts of COVID-19 indefinitely; thus, the country must adapt, evolve, and learn how to conduct criminal jury trials despite the presence of this deadly virus.¹⁵⁰ However, in doing so, courts must safeguard the accused's Sixth Amendment rights.¹⁵¹

The United States' criminal justice system hinges on jury trials.¹⁵² The Sixth Amendment affords several rights to individuals accused of criminal acts in order to protect the integrity and validity of criminal trials:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the

¹⁴⁵ See Fradella, *supra* note 11, at 1.

¹⁴⁶ Brandon Mark Draper, *And Justice for None: How Covid-19 Is Crippling the Criminal Jury Right*, 62 B.C.L. REV. E-SUPPLEMENT I.-1, I.-1 (2020).

¹⁴⁷ Dubin Research & Consulting, *COVID-19'S Next Victim?: The Rights of the Accused*, 44 CHAMPION 22, 22 (2020).

¹⁴⁸ See, e.g., *Id.* at 23.

¹⁴⁹ Draper, *supra* note 146, at I.-1.

¹⁵⁰ *Id.* at I.-3.

¹⁵¹ *Id.*

¹⁵² *Id.* at I.-1.

Assistance of Counsel for his defence [sic].¹⁵³

As the above text reflects, the Sixth Amendment guarantees the defendant in a criminal trial the right to a fair and speedy trial; the right to effective counsel; the right to an impartial jury; and the right to confront his accusers.¹⁵⁴ But, in the age of COVID-19, courts are sacrificing these rights in exchange for an attempt to return to normalcy.¹⁵⁵ In hopes of achieving this goal, courts across the nation are resuming criminal jury trials in two ways: in-person trials that comply with CDC recommendations and completely virtual-based trials.¹⁵⁶ Part A of this section argues that socially distanced, mask-mandated trials are stripping defendants of their Sixth Amendment rights. Part B considers the struggles of exclusively virtual jury trials and how the associated complications deprive the accused of a constitutional trial.

A. In-Person and Un-Constitutional

Nationwide, courts are attempting to reinstate in-person jury trials, but there is an extreme lack of uniformity regarding adherence to CDC recommendations and safety measures.¹⁵⁷ While most courts are requiring all those present in the courtroom to wear masks, some courts are allowing potential jurors to remove their masks when questioned and witnesses to remove their masks when they are on the stand.¹⁵⁸ Meanwhile, other courts are relying solely on social distancing and plexiglass dividers while only recommending masks instead of requiring them.¹⁵⁹ A few courts are even going as far as encouraging courtroom patrons to wear protective gloves and to bring their own writing utensils.¹⁶⁰ Although such safety precautions are necessary to protect all participants of the criminal justice system, the means by which courts are currently conducting in-person jury trials and the overall effect of the pandemic are rapidly eroding the constitutional rights afforded to the accused in several ways.¹⁶¹

First, the pandemic is making it increasingly difficult to provide a

¹⁵³ U.S. CONST. amend. VI.

¹⁵⁴ *Id.*

¹⁵⁵ *See*, Draper, *supra* note 146 at I.-10.

¹⁵⁶ *See, e.g., Id.* at I.-1.

¹⁵⁷ *See generally* Melanie D. Wilson, *The Pandemic Juror*, 77 WASH. & LEE L. REV. ONLINE 65, 69-71 (2020).

¹⁵⁸ *Id.* at 70.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 71.

¹⁶¹ *See*, Draper, *supra* note 146 at I.-10.

defendant with an impartial jury.¹⁶² The Sixth Amendment guarantees a criminal defendant the right to an impartial jury, meaning a jury drawn from a fair cross section representative of the community.¹⁶³ Due to the unique nature of COVID-19, jury pools are likely to experience underrepresentation from populations who are at an increased risk of infection because these populations will refuse to report for jury duty out of fear of contracting the virus.¹⁶⁴ These populations include elderly people, people with underlying health conditions, and racial and ethnic minorities.¹⁶⁵ Moreover, jury pools will be disproportionately comprised of young, white Republicans—the population least concerned with contracting and spreading COVID-19 and most comfortable with gathering in groups.¹⁶⁶ Although it is impossible to predict how a specific juror will view a case, studies show that Republican jurors typically favor the prosecution and have a “law and order” mentality, whereas younger people of color who serve as jurors typically favor the defendant.¹⁶⁷ With more white, Republican jurors reporting for jury duty and less elderly minorities reporting, it seems as though criminal defendants are fighting a losing battle.¹⁶⁸ With such disparity in the populations of jurors willing to serve, it is impossible to obtain a fair cross section representative of the community.¹⁶⁹

Second, many of the social distancing measures that courts have implemented interfere with the assurance of fair jury deliberations.¹⁷⁰ Masks, social distancing recommendations, and plexiglass dividers are not limited to the courtroom.¹⁷¹ The jurors’ task continues in the deliberation room, which is usually a very small room with only one table and just enough chairs for the jurors.¹⁷² In the deliberation room, the jurors discuss the trial, touch evidence, pass papers around, and sit within close proximity

¹⁶² Dubin Research & Consulting, *supra* note 147, at 31.

¹⁶³ *Holland v. Illinois*, 493 U.S. 474, 480 (1990) (“The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which is does). Without that requirement, the State could draw up jury lists in such a manner as to produce a pool of prospective jurors disproportionately ill disposed towards or all classes of defendants, and thus more likely to yield petit juries with similar disposition.”).

¹⁶⁴ Dubin Research & Consulting, *supra* note 147, at 32.

¹⁶⁵ *Id.* at 32-33.

¹⁶⁶ Wilson, *supra* note 157, at 82-83.

¹⁶⁷ *Id.* at 84.

¹⁶⁸ *Id.* at 85.

¹⁶⁹ *Id.*

¹⁷⁰ Dubin Research & Consulting, *supra* note 147, at 34.

¹⁷¹ *Id.*

¹⁷² Wilson, *supra* note 157, at 77.

of one another.¹⁷³ Criminal jury verdicts must be unanimous, and, under normal circumstances, it can take hours, days, or even weeks for a jury to reach unanimity.¹⁷⁴ But jurors who are not comfortable with being in close proximity with others are likely to rush through deliberations just to get out of the courthouse as quickly as possible.¹⁷⁵ Although it is uncertain whether hasty deliberations are more likely to disfavor the defendant, it is undeniable that such hastiness perverts the criminal justice system and has the potential to return verdicts not in accord with the Sixth Amendment's guarantee of a fair trial.¹⁷⁶

Third, the overall nature of the COVID-19 outbreak has infringed upon the accused's right to a speedy and public trial.¹⁷⁷ At the height of the pandemic, hundreds of courts across the nation completely halted all proceedings.¹⁷⁸ There is no doubt that this hiatus interfered with the Sixth Amendment's right to a speedy trial as many defendants indefinitely remained in prison awaiting news that trials would resume soon.¹⁷⁹ Further, continuance of in-person jury trials deprives defendants of the right to a public trial because many states are limiting capacity in courtrooms to comply with the CDC's social distancing requirements.¹⁸⁰ A public trial benefits the defendant because "the presence of interested spectators may keep his triers keenly alive to the sense of their responsibility and to the importance of their function."¹⁸¹ Interested spectators include the defendant's friends and relatives.¹⁸² Therefore, any in-person jury trial that fails to allow the defendant's friends and relatives observe due to social distancing requirements not only places the defendant at a disadvantage, but also ignores the guarantees of the Sixth Amendment.¹⁸³

Fourth, as a result of social distancing requirements and the need to quarantine, criminal defendants are deprived of effective counsel.¹⁸⁴ To comply with social distancing guidelines, a defendant must be at least 6 feet away from his attorney at all times. However, this requirement disadvantages the accused who may need to pass a note or whisper to his

¹⁷³ *Id.*

¹⁷⁴ *See Id.* (citing *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)).

¹⁷⁵ Dubin Research & Consulting, *supra* note 147, at 34.

¹⁷⁶ *See Id.*

¹⁷⁷ *Id.* at 34-35.

¹⁷⁸ Draper, *supra* note 146, at I.-1.

¹⁷⁹ Dubin Research & Consulting, *supra* note 147, at 34-35.

¹⁸⁰ *Id.* at 35.

¹⁸¹ *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)).

¹⁸² *Oliver*, 333 U.S. at 272.

¹⁸³ Dubin Research & Consulting, *supra* note 147, at 35.

¹⁸⁴ *Id.*

attorney during the trial.¹⁸⁵ When the accused is unable to freely communicate with his attorney about his case, he has effectively been denied the right to counsel.¹⁸⁶ Even more, the Sixth Amendment's right to counsel includes the defendant's right to choose who represents him.¹⁸⁷ Attorneys are not immune to COVID-19; the virus is disrupting the practice of attorneys who may have underlying health conditions and are at high risk for serious illness if they contract it.¹⁸⁸ Often, these attorneys are forced to withdraw from representation to avoid appearing in the courtroom and risking infection, especially when the judge demands in-person trials and refuses to make accommodations such as a virtual trial or a continuance.¹⁸⁹ This produces a daunting outcome for the accused: he must face the risk of having the attorney of his choice withdraw in order to avoid exposure.¹⁹⁰ This not only decreases the pool of available attorneys for the accused, but also forecloses the accused's right to counsel.¹⁹¹

Finally, mask mandates and social distancing make it impossible to detect juror bias and assess witness credibility.¹⁹² Although social distancing requirements are necessary to protect the health of all courtroom patrons, these requirements make it extremely difficult to ensure a fair trial.¹⁹³ To comply, jurors will often sit all around the courtroom including behind the defendant instead of the typical jury box location.¹⁹⁴ When jurors are displaced, the attorney cannot view all of them at once to look for cues, nor can the attorney even see the jurors seated behind him without turning around.¹⁹⁵ How will the attorney know how the jurors are reacting to the case? Are they understanding his theory or does he need to slow down? Is he being effective or does he need to change course? Did the jurors believe the witness or did they bypass her testimony with an eye roll? Are the jurors even paying attention? All of these cues and observations are crucial to adequate and fair representation from the moment of voir dire until the judge dismisses the jury the deliberate.¹⁹⁶ Further, mask requirements make

¹⁸⁵ Wilson, *supra* note 157, at 90.

¹⁸⁶ See Dubin Research & Consulting, *supra* note 147, at 35.

¹⁸⁷ *Id.* (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006) (holding that the Sixth Amendment right to counsel "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be the best.")).

¹⁸⁸ *Id.* at 35-36.

¹⁸⁹ See *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See Dubin Research & Consulting, *supra* note 147, at 38.

¹⁹³ See Wilson, *supra* note 157, at 89.

¹⁹⁴ *Id.* at 90.

¹⁹⁵ *Id.*

¹⁹⁶ See *Id.*

it impossible for attorneys to detect juror bias and for jurors to assess witness credibility.¹⁹⁷ Jurors, judges, and attorneys heavily rely on nonverbal communication such as “eye contact, facial expressions, gestures, kinesics, proxemics, and paralanguage” when participating in a trial to assess biases and credibility.¹⁹⁸ According to one study, “55 percent of communication comes from body language, 38 percent is in the tone of voice, and 7 percent is in the actual words that are spoken.”¹⁹⁹ Nonverbal communication plays a vital role in trials, and when a mask covers more than 50 percent of a person’s face, the ability to detect bias and assess credibility evaporates.

Despite the numerous defects with in-person trials, courts across the nation continue to push forward for the sake of normalcy.²⁰⁰ Not only are in-person trials difficult with masks, plexiglass, and social distancing, they deprive the accused of a fair trial. Additionally, defense attorneys must now more than ever fiercely represent the accused to overcome the additional hurdles that COVID-19 placed in the courtroom.

B. Counselor, Please Unmute Yourself

While some courts are struggling through in-person and unconstitutional jury trials, others are struggling with completely virtual jury trials.²⁰¹ Similar to in-person trials, virtual trials do not pass constitutional muster, and the continued use of such trials not only strips defendants of their Sixth Amendment rights, but also opens the door for mistrials and faulty, unfair verdicts.²⁰² Although virtual trials thwart the accused’s constitutional rights, these trials negatively affect judges and lawyers as well.²⁰³ Although many courts are seamlessly using virtual platforms for hearings, client meetings, and other proceedings, the essence of an exclusively virtual jury trial is very different. Virtual trials not only present the same constitutional violations as in-person trials as discussed above, but they also present their own unique difficulties.

The virtual trial platform becomes monotonous and daunting quickly, which decreases jurors’ attention span and increases the risk of careless verdicts.²⁰⁴ Virtual trials require jurors to sit in front of their computers for

¹⁹⁷ See Dubin Research & Consulting, *supra* note 147, at 38.

¹⁹⁸ *Id.* at 31.

¹⁹⁹ *Id.*

²⁰⁰ See, Draper, *supra* note 146, at I.-10.

²⁰¹ See, *Id.* at I.-1.

²⁰² See generally Dubin Research & Consulting, *supra* note 147, at 26.

²⁰³ *Id.*

²⁰⁴ See generally Dubin Research & Consulting, *supra* note 147, at 29-31.

countless hours and devote their attention to the trial. This is a mentally exhausting task, and many jurors will experience “Zoom fatigue” before the end of the trial.²⁰⁵ When fatigue sets in, jurors are more apt to become distracted.²⁰⁶ Because most jurors are attending trial virtually from their homes, they are at an even higher risk of becoming distracted. Jurors who are working from home are likely to be multi-tasking during the trial, or because of school closures, jurors with children must also care for their children while attempting to pay attention to a trial.²⁰⁷ Jurors are also likely to fall asleep or “zone out” while in the comfort of their own home.²⁰⁸ All of these distractions decrease jurors’ attention spans and take their attention away from the trial.²⁰⁹ But there is very little that can be done to ensure that jurors pay attention during virtual trials, so defense attorneys must continue to zealously represent their clients despite this roadblock.²¹⁰

Perhaps the most pressing issue regarding virtual trials is the plethora of associated technical difficulties and how those difficulties can easily lead to ethical violations.²¹¹ Virtual trials are a new phenomenon for which attorneys, witnesses, jurors, and judges have not yet completely ironed out the kinks. Judges constantly have to remind attorneys and witnesses to unmute or mute their speakers.²¹² Even though jurors must access the internet in order to operate Zoom or a similar platform, judges have to instruct jurors that they may not use their phones or the internet to obtain information about the case during the trial.²¹³ Further, judges often have to stop the trial to ask family members to leave the room so the juror is alone.²¹⁴ However, there is no way to ensure that jurors are complying with such requirements. Even worse, there is no way to ensure that attorneys are not on the other side of a witness’s screen coaching and giving cues.

But these issues only come into play when the virtual platform itself is not experiencing technical difficulties. When participating in virtual jury trials, there is always the risk that the judge, an attorney, the defendant, a witness, or a juror will be disconnected. Further, certain populations may face challenges with virtual trials.²¹⁵ For example, low-income jurors may have trouble accessing a computer and a webcam or connecting to reliable

²⁰⁵ *Id.* at 31.

²⁰⁶ *Id.*

²⁰⁷ *See Id.*

²⁰⁸ *See Id.*

²⁰⁹ *Id.*

²¹⁰ Dubin Research & Consulting, *supra* note 147, at 29-31.

²¹¹ *Id.* at 30.

²¹² *Id.* at 24.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 33-34.

internet.²¹⁶ Specifically, people living in public housing developments that provide free but spotty Wi-Fi often do not have enough service to support the video feeds and experience frequent connection issues.²¹⁷ Additionally, virtual trials disadvantage elderly people because they typically have difficulty obtaining and navigating the software.²¹⁸ Even more, in this time of economic turmoil, it is difficult to seat juries for trials that run longer than one or two days.²¹⁹ Because businesses are closing daily based on new state restrictions, people do not want to miss a day's worth of pay to participate in a jury trial.²²⁰ All of these issues disrupt the trial process, which in turn, strips the accused of a fair trial and can lead to mistrials and faulty verdicts.²²¹ Simply put, virtual jury trials circumvent the rights guaranteed by the Sixth Amendment.

Forcing people to participate in jury duty during the pandemic, whether in-person or virtually, requires individuals to weigh their health, safety, and economic wellbeing against their civic duty. Though pausing jury trials is a temporary fix, it might be the best option for the time being to ensure that the constitutional rights of the accused remain intact. Moving forward, courts must assess their trial method and weigh the benefit of public safety against the impact of such precautions on the accused.²²² If courts do not proceed with caution, it is inevitable that the integrity of the criminal justice system will suffer. For the collective rights of the public should never swallow individual liberties even during a global pandemic.²²³

V. CONCLUSION: TEST NEGATIVE AND STAY POSITIVE

The COVID-19 pandemic has affected every aspect of daily life, and the Constitution is no exception. Unfortunately, this is only the beginning; there is still so much uncertainty regarding this virus and how its vaccination will affect individual constitutional rights. For example, courts should expect equal protection challenges regarding “immunity passports” after the implementation of the vaccination. The concept of an “immunity passport” is that if a person has contracted COVID-19 and will not carry the virus again, or if a person has received the vaccination, that would create an escape valve from CDC and other governmental restrictions for that

²¹⁶ Dubin Research & Consulting, *supra* note 147, at 33-34.

²¹⁷ *Id.*

²¹⁸ *Id.* at 33.

²¹⁹ *Id.* at 34.

²²⁰ *See Id.*

²²¹ *See generally Id.* at 26.

²²² Dubin Research & Consulting, *supra* note 147, at 38..

²²³ *See Magee, supra* note 9, at 13.

person.²²⁴ This essentially creates an “antibody-carrying elite” class of people who can travel, date, and work without regard to restrictions and recommendations.²²⁵ In the future, there are likely to be equal protection challenges stemming from this concept.

But even in the middle of the deadliest pandemic in modern history, “the Constitution cannot be put away and forgotten.”²²⁶ It is clear that the COVID-19 era has resulted in an erosion of individual rights to favor the collective rights of the public. Even more terrifying, the government is not only allowing this to happen, but it is playing a key role in the annihilation of individual liberties. For the true values and rights enshrined in the Constitution to emerge unbroken from the destruction of COVID-19, government officials must fight against all odds to protect and defend the true values and rights enshrined in the Constitution. Otherwise, the consequences will be grave. “[W]e may not shelter in place when the Constitution is under attack. Things never go well when we do.”²²⁷

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²²⁴ Andrew Webb, *Coronavirus: How ‘immunity passports’ could create an antibody elite*, BBC WORLD SERV. (July 2, 2020), <https://www.bbc.com/news/business-53082917>.

²²⁵ *Id.*

²²⁶ *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam).

²²⁷ *Id.* at 71 (Gorsuch, J., concurring).