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Résumé de l'article

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COVID-19, Bail, and the Jail: Trends and Responses to Harmful Conditions of Imprisonment

by **Jay DE SANTI***
and **Marie MANIKIS**†

Ce texte fait état d'une étude empirique et analyse l'impact de l'émergence de la COVID-19 sur les décisions judiciaires de mise en liberté provisoire. Aux prises avec les risques liés à la propagation de la COVID-19 dans les établissements carcéraux, les tribunaux ont généré une abondante jurisprudence sur la manière de traiter le virus dans le cadre de la législation existante sur la mise en liberté provisoire. En s'appuyant sur des données de cent cinquante et une décisions de mise en liberté sous caution rendues au cours des douze premières semaines de la pandémie au printemps 2020, cet article soutient que les premières réponses des tribunaux à la COVID-19 reflètent les tendances punitives prépandémie. Entre autres résultats statistiques, cette étude souligne que plus de la moitié de ces décisions (66,23 %) ont abouti à une détention. Elle applique ensuite la typologie de Manikis sur la culpabilité et les préjudices de l'État au stade de la mise en liberté provisoire. Ce cadre offre aux décideurs des justifications juridiques et des outils pendant la mise en liberté sous caution pour reconnaître et considérer ces préjudices comme

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pertinents pour décider si une personne doit être détenue conformément au troisième pilier qui sert à maintenir la confiance dans l'administration de la justice. En outre, il propose des solutions de remplacement à l'emprisonnement sur la base des responsabilités de l'État et de la reconnaissance des préjudices qu'il crée.

This article undertakes an empirical study and analyzes the impact of the emergence of COVID-19 on judicial interim release decisions. Courts dealing with the risks and realities of the spread of COVID-19 within carceral settings prompted a flurry of jurisprudence contemplating how to deal with the virus within existing bail law. Drawing on a dataset of one hundred fifty-one bail decisions released in the first twelve weeks of the pandemic in spring 2020, this article argues that the courts' early responses to COVID-19 demonstrate a continuation of pre-pandemic punitive trends. Among other statistical findings, this study highlights that more than half (66.23%) of these decisions resulted in detention. It then proceeds to apply Manikis' typology of state blame/harms to the bail stage. This framework offers decision-makers legal justifications and tools in the context of bail to recognize and consider these harms as relevant to deciding whether a person should be detained according to the third prong which serves to maintain the confidence in the administration of justice. Moreover, it offers alternative options to imprisonment on the basis of state responsibilities and recognition of state created harms.

Este artículo emprende un estudio empírico y analiza el impacto de la emergencia del COVID-19 en las decisiones judiciales relacionadas con la libertad provisional. El hecho de que los tribunales tuvieran que enfrentar los riesgos y realidades de la propagación del COVID-19 en establecimientos carcelarios provocó una oleada de jurisprudencia sobre la manera de manejar el virus dentro del marco de la legislación vigente en materia de libertad bajo fianza. Basados en un conjunto de datos de ciento cincuenta y una decisiones de libertad bajo fianza emitidas en las primeras doce semanas de la pandemia en la primavera de 2020, este artículo sostiene que las primeras respuestas de

los tribunales al COVID-19 demuestran una continuación de las tendencias punitivas prepandemia. Entre los resultados de las estadísticas, este estudio destaca que más de la mitad (66,23 %) de estas decisiones resultaron en una detención. A continuación, se procede a aplicar la tipología de Manikis sobre la culpabilidad y los perjuicios del Estado en la fase de libertad bajo fianza. Este marco ofrece a los responsables de la toma de decisiones justificaciones y herramientas jurídicas en el contexto de la libertad bajo fianza para reconocer y considerar estos perjuicios como relevantes a la hora de decidir si una persona debe ser detenida según el tercer pilar, que sirve para mantener la confianza en la administración de justicia. Además, se ofrecen alternativas al encarcelamiento sobre la base de las responsabilidades del Estado y el reconocimiento de los daños ocasionados por el Estado.

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Introduction

The impact of the COVID-19 pandemic on the criminal legal system is of significant interest to scholars and practitioners in this field. Indeed, the pandemic posed substantial challenges to both the practical functioning of the courts and the established legal doctrine that required immediate responses from a system unaccustomed to immediate action. The system's response to this crisis is an important and pressing matter of study, both for the immediate purpose of building and disseminating knowledge about the crisis and as an opportunity to reflect on the broader dynamics at play in the interaction of the pandemic and criminal legal processes. Such reflections are even more pressing as ever more stringent bail rules permeate the public and political landscape.[1] Research into COVID-19's impact on the criminal legal system has importance beyond merely understanding its impact as an event in recent history. This pandemic exposed and worsened existing problems of the criminal legal system; understanding its impact is crucial for working toward reforms that uphold, rather than undermine, the purpose of the system.

This article seeks to contribute to and further this knowledge of the criminal legal system's response to the pandemic, by focusing on the bail process. It does so by examining the data available across Canada from published bail decisions during the first wave of COVID-19, from mid-March to June 2020. The article will proceed as follows: after a brief review in Part I of the literature on criminal law and COVID-19, Part II discusses the legal regime of bail and its punitive dimensions that existed before the pandemic. Essentially, these punitive dimensions were manifested in two ways, namely in the retributive just deserts logic imported from sentencing, particularly during the third prong analysis, as well as in the harms suffered by individuals held in pre-trial custody, which have been referred to as punitive or punishment in the literature. Part III presents relevant data collected as part of our study to determine whether the wider punitive trends and logic mentioned above

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1 *An Act to Amend the Criminal Code (Bail Reform)*, bill nº C-48 (assented – December 5, 2023), 1st Sess., 44th Parl. (Can.). This bill increases the range of reverse onus situations with a focus on charges involving violence, weapons, and with previous criminal charges or convictions of the same. It also requires Parliament to revisit the provisions at or as soon as practicable after the 5-year anniversary of its enactment.

were also present during the first wave of the pandemic. We also bring out the harms suffered by individuals in detention as revealed in the data. This part discusses these results and emphasizes the continuous punitive trend while highlighting the specificities and increased harms relating to the pandemic as revealed by the data. Part IV proposes a potential way to address this punitive logic, i.e. implementing a preliminary framework based on Manikis' state blame/harms. This framework offers decision-makers legal justifications and tools during bail to recognize and consider these harms as relevant to deciding whether a person should be detained under the third prong which serves to maintain the confidence in the administration of justice. Moreover, it offers alternative responses to imprisonment on the basis of state responsibilities and recognition of state created hams.

I. Literature on Canadian Criminal Law and COVID-19

Much of the early scholarship on the impact of COVID-19 on the criminal legal system examines the jurisprudential and administrative responses to the pandemic in its early stage when little was known about the virus, its spread, and its short – or long-term health impacts. Some scholars, including Rudnicki[2] and Kerr and Dubé,[3] focused on the jurisprudence relating to imprisonment – bail and sentencing decisions – that arose in the early months. Broadly speaking, these works highlight two main lines of reasoning in the jurisprudence, one being the position that COVID-19 constituted a material condition deserving consideration in carceral decisions,[4] and the second, the argument that an ongoing pandemic was on its own insufficient to impact upon

2 Chris Rudnicki, "Confronting the Experience of Imprisonment in Sentencing: Lessons from the COVID-19 Jurisprudence," (2021) 99-3 *Can. Bar Rev.* 469.

3 Lisa Kerr & Kristy-Anne Dubé, "Adjudicating the Risks of Confinement: Bail and Sentencing During COVID-19," (2020) 64-7 *Criminal Reports* 311; Lisa Kerr & Kristy-Anne Dubé, "The Pains of Imprisonment in a Pandemic," (2021) 46-2 *Queen's L.J.* 327.

4 See *e.g.* C. Rudnicki, *supra*, note 2, 479 and 480; L. Kerr & K.-A. Dubé, "Adjudicating the Risks of Confinement: Bail and Sentencing During COVID-19," *supra*, note 3, 311; L. Kerr & K.-A. Dubé, "The Pains of Imprisonment in a Pandemic," *supra*, note 3, 328-330.

a decision relating to the incarceration of an individual.[5] Other scholarship focuses on what could be loosely termed "administering" the courts: how court operations changed in response to COVID-19,[6] how trial delays might be impacted,[7] courts' preparedness for such an event,[8] and the use of technology in the courts during the pandemic and beyond.[9] Finally, Skolnik considered the possible expansion of criminalization in the wake of the COVID-19 emergency measures.[10]

A common theme in the scholarship is the opportunity provided by the pandemic to rethink various components of the current criminal legal system. The courts' belated embrace of the various forms of technology allowing for distance communication may provide for better use of court time.[11] The impacts of COVID-19 on bringing to light the already unacceptable or alarming conditions of carceral facilities, especially provincial jails, demonstrated a need

5 See *e.g.* C. Rudnicki, *supra*, note 2, 479 and 480; L. Kerr & K.-A. Dubé, "Adjudicating the Risks of Confinement: Bail and Sentencing During COVID-19," *supra*, note 3, 311; L. Kerr & K.-A. Dubé, "The Pains of Imprisonment in a Pandemic," *supra*, note 3, 328 and 329.

6 See: Richard Haigh & Bruce Preston, "The Court System in a Time of Crisis: COVID-19 and Issues in Court Administration," (2021) 57-3 *Osgoode Hall L.J.* 869; Veena Kumar & Scott Latimer, "The View from the Ground: Perspectives on the Future Use of Technology in Ontario's Criminal Courts," (2021) 74-7 *Criminal Reports* 163; Adelina Iftene, "COVID-19, Human Rights and Public Health in Prisons: A Case Study of Nova Scotia's Experience During the First Wave of the Pandemic," (2021) 44-2 *Dalhousie L.J.* 477; Sarah Burningham, "Reflections on COVID-19 and Criminal Law: How Does Judicial Doctrine Function in a Crisis?," (2022) 59-3 *Alta L. Rev.* 587.

7 Palma Paciocco, "Trial Delay Caused by Discrete Systemwide Events: The Post-Jordan Era Meets the Age of COVID-19," (2020) 57-3 *Osgoode Hall L.J.* 835.

8 R. Haigh & B. Preston, *supra*, note 6.

9 V. Kumar & S. Latimer, *supra*, note 6; Nicole Marie Myers, "The More Things Change, the More They Stay the Same: The Obdurate Nature of Pandemic Bail Practices," (2021) 46-4 *Canadian Journal of Sociology* 11.

10 Terry Skolnik, "Criminal Law During (and After) COVID-19," (2020) 43-4 *Man. L.J.* 145.

11 V. Kumar & S. Latimer, *supra*, note 6, par. 2 and 3.

for courts to engage more thoughtfully with these types of considerations in relationship to the use of incarceration.[12]

This article seeks to contribute to this current conversation on two fronts. First, rather than focusing on jurisprudence as a source of law, we analyze decisions empirically, based on detention rates across the various types of bail hearings, to determine whether trends by the state-run system continued to create unjustified excess harms for individuals during the first wave of the pandemic. This original data provides a groundbreaking empirical portrait of the trends pertaining to the list of grounds for detention. Second, the time that elapsed between the pronouncement of the decisions and the writing of this article allowed for a reflective reanalysis of the early months of the COVID-19 pandemic and its impact on the criminal legal system in that period. The results of this study reveal no novelty in Canadian courts in the period from mid-March to June 2020, instead, they show that the treatment of legally innocent persons has remained consistent since pre-pandemic times. We therefore argue that a more robust framework is needed, and we draw on Manikis' "state blame" model, which shifts the focus to the state's responsibilities and role as regards harmful jail conditions.

II. Bail in Canada

Section 11(e) of the *Canadian Charter of Rights and Freedoms* guarantees the right to reasonable bail for all persons charged with an offence in Canada.[13] In most cases, this right is operationalized in the *Criminal Code* under Part XVI, with the specific grounds of detention listed at section 515(10).[14] There are multiple scenarios for release following an arrest. Not covered by this article are two such instances as they largely bypass the courts: first, release by peace officers, which occurs outside of the courts; and

12 C. Rudnicki, *supra*, note 2; L. Kerr & K.-A. Dubé, "Adjudicating the Risks of Confinement: Bail and Sentencing During COVID-19," *supra*, note 3; L. Kerr & K.-A. Dubé, "The Pains of Imprisonment in a Pandemic," *supra*, note 3; T. Skolnik, *supra*, note 10.

13 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* [Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.)], s. 11(e) (hereinafter "*Charter*").

14 *Criminal Code*, R.S.C. 1985, c. C-46, s. 515(10) (hereinafter "*Criminal Code*").

second, when prosecutors concede or consent to someone's release. The latter is a form of the "regular" bail hearing – where a person seeks release before a court after being detained by police – also known as judicial interim release. This release occurs before any determination over the person's legal guilt. Most of these are held pursuant to section 515 of the *Criminal Code*.[15] Although the detained person is legally presumed innocent, many charges induce a reverse onus at the bail stage, meaning the person is required to demonstrate their releasability; these circumstances are enumerated in the *Criminal Code* at section 515(6) and include charges relating to firearms or weapons, narcotics, and alleged breach of a release order.[16] If the person is detained following this hearing, there are two forms of review. First, sections 520 or 521 of the *Criminal Code* provide for reviews initiated by the accused or the prosecutor, respectively.[17] Second, section 525 prescribes mandatory reviews that occur ninety days after the initial detention of the person.[18] Additionally, for certain offences, section 522 requires that the bail hearing be heard by a Superior Court and the resulting decisions are subject to review under the same section.[19] All section 522 hearings are reverse onus hearings.

Section 515(10) of the *Criminal Code* provides the following three grounds for pre-trial detention:

(a) where the accused poses a risk of flight or is unlikely to attend court (the primary[20] ground);
(b) where there is a substantial likelihood that the accused will commit further offences if released (the secondary ground); and

15 *Id*., s. 515.
16 *Id*., s. 515(6).
17 *Id*., ss. 520 and 521.
18 *Id*., s. 525.
19 *Id*., s. 522.
20 The language of primary/secondary/tertiary in reference to bail grounds is used as a shorthand to refer to the three grounds for detention, but do not indicate a hierarchy of grounds. As *R.* v. *St-Cloud*, 2015 SCC 27, par. 41 (hereinafter "*St-Cloud*") notes, "since the change made to the wording in 1997, s. 515(10) has no longer provided for a hierarchy of grounds for detention."

(c) where detaining the accused is necessary to maintain public confidence in the administration of justice into disrepute (the tertiary ground).

Bail may also be sought when the accused appeals their conviction and finding of guilt. For summary convictions, this appeal is dealt with under section 816[21] and relies on the grounds for release enumerated at section 515(10). For indictable offence convictions, bail processes and grounds for release are dealt with under section 679.[22]

Section 679(4) of the *Criminal Code* enumerates the three grounds on which an offender may be released pending determination of the appeal:

(a) where the appeal has sufficient merit that continued detention would be an unnecessary hardship;
(b) where it is determined that the offender will surrender themself into custody in accordance with the release order; and
(c) where the offender's detention is not necessary in the public interest.

Multiple Supreme Court of Canada decisions in recent years have reaffirmed and clarified the scope and contents of the right to bail, chief among them *R.* v. *Hall*,[23] *R.* v. *St-Cloud*,[24] *R.* v. *Antic*,[25] and *R.* v. *Zora*.[26] *Hall* and *St-Cloud* primarily concerned application of the tertiary ground of detention, confirming it as a discrete ground of detention, not one to be used as a "catch-all" for reasons a court may have to not want to release an individual.[27] *Antic*, in affirming the constitutional obligations imposed by section 11(e) of the *Charter*, introduced the ladder principle to the jurisprudence on judicial release, which provided a clear directive to seek the least onerous form of release.[28]

21 *Criminal Code*, *supra*, note 14, s. 816.
22 *Id*., s. 679.
23 2002 SCC 64 (hereinafter "*Hall*").
24 *Supra*, note 20.
25 2017 SCC 27 (hereinafter "*Antic*").
26 2020 SCC 14 (hereinafter "*Zora*").
27 *Hall*, *supra*, note 23, par. 30; *St-Cloud*, *supra*, note 20, par. 87.
28 *Antic*, *supra*, note 25, par. 44-46.

Most recently, *Zora* addressed administration of justice offences – which primarily include breaches of release conditions – clarifying the *mens rea* standard for these offences as one of specific intent.[29] In confirming that bail conditions must be tailored to the individual,[30] the ruling in *Zora* further emphasizes the importance of both the constitutional right to reasonable bail and the presumption of subjective intent absent clear statutory language to suggest otherwise.[31]

A) State Harms and Bail

It has become trite to state that Canada's remand population has significantly increased in the past few decades. Several scholars, including Manikis and De Santi,[32] Myers and Dhillon,[33] Sylvestre, Blomley, and Bellot,[34] have documented the varying ways in which Canadian bail processes in Canada fail to uphold the constitutional right to reasonable bail and continue to rely on carceral and punishment-based approaches even though the person before the court is legally innocent. In 2014, the Canadian Civil Liberties Association released a comprehensive report identifying the many shortcomings of current approaches to bail.[35] A common theme across these studies is the pervasiveness of punitive approaches taken by the courts to the question of judicial release of legally presumed innocent, yet incarcerated people.

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29 *Zora*, *supra*, note 26, par. 109-113.

30 *Id*., par. 4.

31 *Id*., par. 4 and 20.

32 Marie Manikis & Jess De Santi, "Punishment and Retribution Within the Bail Process: An Analysis of the Public Confidence in the Administration of Justice Ground for Pre-Trial Detention," (2020) 35-3 *Can. J.L. & Society* 413, 419; Marie Manikis & Jess De Santi, "Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences," (2019) 60-3 *C. de D.* 873.

33 Nicole M. Myers & Sunny Dhillon, "The Criminal Offence of Entering Any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions," (2013) 55-2 *Can. J. Crimin. & Crim. Jus.* 187.

34 Marie-Eve Sylvestre, Nicholas Blomley & Céline Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People*, Cambridge, Cambridge University Press, 2019.

35 Canadian Civil Liberties Association and Education Trust, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention," *Canadian Civil Liberties Association*, July 2014, online.

In their work, Manikis and De Santi have highlighted the punitive nature of the law of bail, particularly the incorporation of sentencing considerations under the tertiary ground of detention.[36] These considerations, including the objective gravity of the offence, the circumstances of the offence, the possible length of imprisonment, and mitigating and aggravating factors, are based on just deserts/retributive principles in bail determination, despite the accused being legally innocent.[37] Similar themes can be seen in the data presented above, particularly regarding the increased risk for contracting COVID-19 in a carceral setting, unjustified detention resulting in the limited operation of courts and lengthy detentions without opportunity to try one's case, and the chronic overcrowding of provincial jails.

B) Impact of COVID-19 on Bail Procedures

The early stages of the COVID-19 pandemic brought along several changes to court proceedings across Canada and Canadian legal systems, including the bail process. First, all matters except bail (and sentencing for non-custodial sentences) were cancelled, limiting the number of people in courts on any given day to those whose presence was necessary: defence and prosecution lawyers, clerks of the court, judges, justices of the peace, guards, sureties, and representatives from John Howard and Elizabeth Fry Societies, and other organizations providing assistance.[38]

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36 M. Manikis & J. De Santi, "Punishment and Retribution Within the Bail Process: An Analysis of the Public Confidence in the Administration of Justice Ground for Pre-Trial Detention," *supra*, note 32.

37 *Id*., 424 and 425.

38 Criminal courts in Canada are not centralised; instead, they are administered regionally. While the rules of practice are generally consistent across a given province, some regions may have particularized rules according to local conditions. For a selected sample of such rules changes across Canada, see the following: Ontario Superior Court of Justice, "Notice to Profession – Central East Region – Criminal," *Ontario Superior Court of Justice*, 1 April 2020, online; Supreme Court of British Columbia, "March – December 2020 (COVID-19 Announcements)," *The Courts of British Columbia*, 22 December 2020, online; The Provincial Court of British Columbia, "Notice to the Profession and Public. COVID-19: Suspension of Regular Court Operations," *The Provincial Court of British Columbia*, 19 March 2020, online; Court of King's Bench of Alberta, "Notice to the Profession & Public Regarding Courts'

By April 2020, criminal courts were physically closed to the public and to anyone whose offices were not physically located in the building. All bail and sentencing matters were heard remotely, and all other matters continued to be postponed. These hearings were held over teleconference or videoconference, depending on the jurisdiction. In some jurisdictions, the courts provided additional guidelines to enable rapid resolution, especially where prosecution and defence agreed that the accused could be released on bail. Documents were shared between counsel, court clerks, and assistants to the members of the judiciary by email.[39] These measures were upheld for several months across Canada. Court rules were regularly updated in response to local conditions, court capacity, and technological infrastructure improvements.

Additionally, at least some prosecution bodies issued directives to their members to restrict the frequency at which they sought detention. Most notably, the Public Prosecution Service of Canada, responsible for criminal prosecutions under the *Controlled Drugs and Substances Act*, the *Immigration and Refugee Protection Act* and other statutes, directed its members and agents to not seek detention, which included revising its stance on existing files.

III. Data Collection and Dataset Features

The following sections examine the bail jurisprudence available in the first four months of the outbreak of the COVID-19 pandemic. Data was collected between March and June 2020 from four case law databases: CanLII, Lexis Advance Quicklaw, Westlaw, and SOQUIJ. To find the relevant decisions, the case law component of each database was searched using the following search words: "COVID-19," "coronavirus," and "pandemic." Collection consisted in gathering and recording information on a variety of data points contained in all contested bail decisions rendered by a court of any

Responses to COVID-19 Pandemic," *Alberta Courts*, 23 March 2020, online; Chief Justice Tracey DeWare, "New Brunswick Court of Queen's Bench – COVID-9 Guidelines. Criminal Matters," *New Brunswick Court of King's Bench*, 20 March 2020, online.

39 *Id*.

level during that time that were published in one of these databases.[40] Data collection activities mostly occurred contemporaneously with the release of the decisions; as a result, decisions that were only made available after June 2020, even if they were made earlier, are not included in the dataset.

This approach to data collection provides a unique perspective. Collecting data as the data (i.e. decisions) are being released mirrors its availability to the lawyers, judges, and justices of the peace involved in bail processes and therefore engaged in examining how existing law should apply in the early stages of the COVID-19 pandemic. This data collection method captures lawmaking almost in "real time." Moreover, as further explored below, fairly early in the pandemic, jails were identified as being particularly vulnerable to the rapid spread of a deadly and still poorly understood virus for which no treatment or vaccine existed at the time, and against which few methods of protection were available to the public. Incarcerating a person in these conditions took on a heightened risk for their health and life, all the more serious in light of the fact that, except for bail on appeal, the individuals were legally presumed innocent.

In total, these search methods yielded 146 bail cases, involving a total of 151 individuals seeking judicial release about whom release decisions were made. Geographically, the decisions were fairly well distributed, with at least one case from nine out of ten provinces (no cases from New Brunswick were available during that time period), and none from the territories. At the same time, Ontario was overrepresented in the available decisions: 103 out of 151 decisions were made by the judiciary of this province. Perhaps unsurprisingly, the earliest and latest dated decisions also arise in this province: *R.* v. *Zang*[41] was decided on 18 March 2020, and *R.* v. *S.M.*[42] was decided on 26 June 2020.

40 This distinction is relevant because it eliminates two other previously mentioned avenues for release: release by peace officers, or release cases in which the prosecutor concedes or consents to the release of an individual.

41 [2020] O.J. No. 1240 (Ont. Ct. of J.) (Lad/QL).

42 2020 ONCA 427.

Table 1: Types of Bail Decisions

Hearing Type	Number
First bail hearing (excluding s. 522)	27
Bail review ss. 520 & 521	69
Bail review ss. 520 & 525	5
Bail review s. 525	20
Bail hearing s. 522	8
Bail review s. 523	2
Bail pending appeal s. 816	1
Bail pending appeal – all others	18
Bail review s. 680	1
Total	**151**

As Table 1 demonstrates, a clear majority of hearings were reviews of previous bail decisions – primarily detentions, but in a couple of instances the prosecutor applied for the review of a decision to release an individual. In total, 97 decisions in this dataset (64.24%) were made pursuant to a previous release decision. In fact, only 35 decisions, or 23.18%, were made at the conclusion of a first bail hearing (including section 522 hearings). The remaining 19 decisions (12.58%) are bail decisions made on appeal. The latter stand apart from the other two categories as these are decisions on bail after a legal determination of guilt has been made regarding the person seeking release.

Table 2: Burden of Proof by Hearing Type

Burden of Proof	Number	Percentage
First bail hearing		
Crown	4	14.81%
Accused	22	81.48%
Both	1	3.70%
Subtotal	**27**	**100%**

Burden of Proof	Number	Percentage
Bail review ss. 520 & 521		
Crown	3	4.35%
Accused	66	95.65%
Subtotal	**69**	**100%**
Bail review s. 525		
Crown	0	0%
Accused	13	65%
None	7	35%
Subtotal	**20**	**100%**
Combined ss. 520 & 525		
Crown	0	0%
Accused	5	100%
Subtotal	**5**	**100%**
Bail hearing s. 522		
Crown	0	0%
Accused	8	100%
Subtotal	**8**	**100%**
Vacate order s. 523		
Crown	0	0%
Accused	2	100%
Subtotal	**2**	**100%**
Bail review s. 680		
Crown	0	0%
Accused	1	100%
Subtotal	**1**	**100%**
Bail appeal s. 816		
Crown	0	0%
Accused	1	100%
Subtotal	**1**	**100%**

Burden of Proof	Number	Percentage
All other appeal bail		
Crown	0	0%
Accused	18	100%
Subtotal	**18**	**100%**
Totals		
Total – Crown	**7**	**4.64%**
Total – Accused	**136**	**90.07%**
Total – Both	**1**	**0.66%**
Total – None	**7**	**4.64%**
TOTAL	**151**	**100%**

Unsurprisingly, given the dataset, the accused bore the burden of proof at the hearing in most decisions. This feature is a product of Canadian bail law. Certain types of hearings – section 522 bail hearings held before the provincial superior court and all applications for release pending an appeal – require the accused person (or offender) to demonstrate that they can be released.[43] First bail hearings not held under section 522, and most bail reviews, may require either the prosecutor or the accused person (recall section 515(6) provisions), or potentially both parties, to meet the burden of proof.[44] Finally, section 525 review hearings – a mandatory review of an accused person's detention every ninety days[45] – seem to be the locus of confusion for the courts regarding who bears the burden of proof. In some cases, one or the other party was required to meet the burden; in others, the courts explicitly exclude either party as having a particular burden, treating the hearings as a general review of the person's detention.

43 *Criminal Code*, *supra*, note 14, ss. 522, 679 and 816.

44 It depends on whether or not the offence carries a reverse onus; most if these are specified at section 515(6) of the *Criminal Code*.

45 *Criminal Code*, *supra*, note 14, s. 525. This was also confirmed in: *R.* v. *Myers*, 2019 SCC 18.

Table 3: Outcomes by Hearing Type

Hearing Type	Detained	Released	Total	Detention Rate
First bail hearing	13	14	27	48.15%
S. 520 or 521 review	47	22	69	68.12%
Mixed ss. 520 & 525	3	2	5	60.00%
S. 525 review	14	6	20	70.00%
S. 522 bail hearing	7	1	8	87.50%
S. 523 bail review	2	0	2	100.00%
S. 816 appeal bail	1	0	1	100.00%
All other appeal bail	13	5	18	72.22%
S. 680 bail review	0	1	1	0.00%
TOTAL	**100**	**51**	**151**	**66.23%**

The outcomes per hearing type present some initial interesting findings. First, although predominant, with 66.23% across hearing types, the detention rate must be contextualized given the prevalence of reverse onus situations in which the accused are required to convince the court to grant them bail (see Table 2). Similarly, in reviews of pre-trial detention, detention remains the most frequent outcome – despite the circumstances of the early months of the pandemic, these individuals had been detained by a court following a contested bail hearing (except the rare occasions indicated in the dataset above in which the prosecutor sought a review of an individual's release). As will be further explored in the following sections, the pandemic may not override other concerns present in the record before the court.

The most notable finding in Table 3 is that during this period, outside of section 522 bail hearings (in our dataset, all of them involved a form of murder charge), at a first bail hearing, the detention rate dropped below 50% – a slightly greater number of people were released at a contested bail hearing. This data breaks with prior research on bail hearings, which has repeatedly revealed that

most contested bail hearings result in the accused person's detention.[46] This finding, whose significance was worth noting at this stage, will be explored in more detail in later sections of this article.

The offences charged against the persons seeking release were more diverse, although data collection was slightly more complicated. In part, this is a product of the varied ways in which members of the judiciary author bail decisions. Not all decisions contain the same information, and not all decisions present the information they contain with the same depth. A second complication is that, quite simply, many individuals were charged with several offences at all levels of severity. Therefore, we took a slightly different approach to data collection and focused on the types of offences charged. Offence "type" broadly speaking refers to the characterization of the offence itself on a factual basis, and generally follows categorizations found in the *Criminal Code*.

Table 4A below provides information on whether a particular case involved only one type of offence or multiple types of offences. Table 4B focuses on the frequency of the types of offences: how many decisions included charges of a particular type, across bail decisions. As a result, each row in Table 4B, unlike previous tables, is a fraction of the 151 bail decisions that make up the dataset. To take an example: if a person in the dataset was charged with several breaches of a release order and only that type of offence, they would be categorized under Single type of offence in Table 4A, and under charge type including Administration of justice or sentencing offence in Table 4B.

Table 4A: Same or Mixed Types of Offences

Type of Offences	Number of Decisions	Percentage
Single type	44	29.14%
Mixed type	100	66.23%
Unstated	7	4.64%
TOTAL	**151**	**100%**

46 M. Manikis & J. De Santi, "Punishment and Retribution Within the Bail Process: An Analysis of the Public Confidence in the Administration of Justice Ground for Pre-Trial Detention," *supra*, note 32, 419.

Table 4B: Frequency of Offence Types Across all 151 Bail Decisions

Charge Type	Frequency out of 151	Percentage as Fraction of 151
Against the person	64	42.38%
Against property	45	29.80%
Involving firearm or weapon	68	45.03%
Related to the operation of a motor vehicle	15	9.93%
Narcotics/*Controlled Drugs and Substances Act*[47]	52	34.44%
Administration of justice and/or sentencing offence	36	23.84%
Related to a criminal organization	2	1.32%
Against animals	1	0.66%
Fisheries Act[48] offences	1	0.66%
Related to sex work	3	1.99%
Includes unstated charges	8	5.30%
TOTAL	**295**	
Average number of charge types per decision	**1.95**	

There is no single type of offence that dominates in the dataset. Rather, there are a number of recurring charge types, a few relatively rare offences, and in a small number of cases, some or all of the charges are not stated in the decision.

Information relating to the charge types may help to explain some of the previously described features of the dataset, particularly regarding the location of the burden of proof and the prevalence of review decisions. First, recall

47 S.C. 1996, c. 19.

48 R.S.C. 1985, c. F-14.

that despite the constitutional right to bail and the presumption of innocence guaranteed by the *Charter*, in practice, bail decisions of various types place on the accused the burden to demonstrate why they should be released, even where there is no finding of guilt.

Reversing the onus onto the accused person to demonstrate that they should be released is a higher burden to meet than the burden on the prosecutor in a "regular" bail hearing. This greater burden is the natural outcome of the law: while a prosecutor needs only meet their burden on one of three grounds, when the onus is reversed, the accused person must demonstrate on balance of probabilities and on each of the three grounds for detention that they can be released. It would therefore be unsurprising that the accused fails to meet this burden more often than the prosecutor fails to meet theirs, and indeed, some recent research suggests this may be the case in practice.[49] In the context of the early months of the COVID-19 pandemic, this tendency may partly explain the predominance of bail review decisions, the overwhelming majority of which were brought on application and, more often than not, by the accused person. While this dataset cannot provide a definitive answer, it gestures toward an explanation of these trends that considers the calculation made by the accused person, their counsel, and potentially prosecutors, regarding the acceptability of maintaining pre-trial incarceration when it is associated with a heightened exposure to COVID-19.

A) Grounds for Detention

As seen above, all bail matters are decided based on the three grounds for detention articulated at section 515(10) of the *Criminal Code*, except for appeals from convictions for indictable offences, which are dealt with at section 679(3) of the *Criminal Code*. The following few tables separate bails pending appeal decisions that are determined according to section 679(3), including reviews of such bails, from decisions determined according to section 515(10). Note that the decision on grounds is a separate question from the onus at the bail hearing, which can vary based on the type of hearing, and the type of offence.

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49 See: *Id.*

Table 5A: Grounds at Issue per Hearing Type. Section 515(10) Decisions

	Hearing Type								
Grounds at Issue		**First bail hearing**	**S. 520 or 521 review**	**Mixed ss. 520 & 525 review**	**S. 525 review**	**S. 522 bail hearing**	**S. 523 bail review**	**S. 816 appeal bail**	**TOTAL**
	Primary	0	0	0	0	0	1	0	**1**
	Secondary	5	16	1	5	1	0	0	**28**
	Tertiary	0	6	0	1	0	0	0	**7**
	Primary & Secondary	0	4	0	1	0	0	0	**5**
	Primary & Tertiary	4	0	0	0	0	0	0	**4**
	Secondary & Tertiary	11	27	2	10	6	0	1	**57**
	All three grounds	6	12	1	2	1	1	0	**23**
	Unstated/ Unclear	1	4	1	1	0	0	0	**7**
	TOTAL	**27**	**69**	**5**	**20**	**8**	**2**	**1**	**132**

Table 5B: Grounds at Issue per Hearing Type. Section 679(3) Decisions

	Hearing type			
Grounds at Issue		**All other appeals**	**S. 680 bail review**	**TOTAL**
	Primary	0	0	**0**
	Secondary	0	0	**0**
	Tertiary	10	0	**10**
	Primary & Secondary	0	1	**1**
	Primary & Tertiary	3	0	**3**
	Secondary & Tertiary	2	0	**2**
	All three grounds	2	0	**2**
	Unstated/Unclear	1	0	**1**
	TOTAL	**18**	**1**	**19**

Tables 5A and 5B provide a global view of the grounds on which bail cases were contested. Most bail appeal cases relate to the third reason for release – the public interest ground. These results are unsurprising insofar as the first two reasons for release present a relatively low threshold for offenders seeking release pending determination of their appeal. The third ground, in contrast, is very broad.

Conversely, bail hearings, including reviews and summary bail appeals, held pursuant to section 515(10), overwhelmingly considered the secondary ground of detention, i.e. the substantial likelihood that the accused will commit further offences if released. In fact, 113 out of the 132 decisions, or 85.61% of decisions made pursuant to this section, were argued in whole or in part on this ground for detention. At the same time, this ground was usually paired with at least one other ground for detention, most frequently the tertiary ground. In 91 of these 132 decisions, the parties argued over whether it would infringe public confidence in the administration of justice to continue to detain the accused individual. These results again echo some previous research in which these two grounds tended to co-occur.[50]

Tables 6A and 6B below begin our examination of the success of these grounds, by first presenting the grounds on which people were detained in the decisions included in dataset.

50 *Id*., 420.

Table 6A: Grounds for Detention by Hearing Type. Section 515(10) Decisions

	Hearing Type								
Grounds for Detention		**First bail hearing**	**S. 520 or 521 review**	**Mixed ss. 520 & 525 review**	**S. 525 review**	**S. 522 bail hearing**	**S. 523 bail review**	**S. 816 appeal bail**	**TOTAL**
	Primary	0	0	0	0	0	1	0	**1**
	Secondary	6	14	1	7	2	0	0	**30**
	Tertiary	0	2	0	0	0	0	0	**2**
	Primary & Secondary	0	4	0	1	0	0	0	**5**
	Primary & Tertiary	0	0	0	0	0	0	0	**0**
	Secondary & Tertiary	6	19	1	4	4	0	1	**35**
	All three grounds	0	3	0	1	1	1	0	**6**
	Unstated/ Unclear	1	5	1	1	0	0	0	**8**
	TOTAL	**13**	**47**	**3**	**14**	**7**	**2**	**1**	**87**

Table 6B: Grounds for Detention by Hearing Type. Section 679(3) Decisions

	Hearing type			
Grounds for Detention		**All other appeal bail**	**S. 680 bail review**	**TOTAL**
	Primary	1	0	**1**
	Secondary	0	0	**0**
	Tertiary	9	0	**9**
	Primary & Secondary	0	0	**0**
	Primary & Tertiary	2	0	**2**
	Secondary & Tertiary	1	0	**1**
	All three grounds	0	0	**0**
	Unstated/Unclear	0	0	**0**
	TOTAL	**13**	**0**	**13**

Once again, the public interest ground dominates in decisions made under section 679(3) in terms of justifying the continued detention of the offender. Twelve of the thirteen persons covered by Table 6B data were in continued detention on this ground (92.31%), and nine among the twelve were detained solely on this ground (69.23% of the cases presented in the table).

Similarly, the secondary ground is prevalent in the detention of individuals denied bail under section 515(10). In 76 of 87 decisions, or 87.36%, the accused were detained in whole or in part on this ground. Similarly to the grounds argued, in most cases, the secondary ground was retained alongside one or more other grounds for detention. Yet, this data on actual grounds of detention reveals some intriguing trends. First, there are more cases in which the secondary ground of detention was the sole ground retained than there are cases in which it was the sole ground argued. Concurrent decreases in the cases in which the secondary and tertiary ground (sixth row), and in which all three grounds (seventh row), were retained, helps to account for this phenomenon.

Second, and perhaps most noteworthy, is the sharp decline in cases in which the tertiary ground is retained as a reason for detention. The accused was detained solely on the tertiary ground in only two cases, both of which were review cases. In the remaining forty-one cases, the tertiary ground was included as a reason for detention alongside the secondary ground and in six of those cases, alongside both the primary and secondary grounds. Some possible explanations for this finding will be explored following a final set of tables regarding the grounds argued and the grounds on which people were detained in the decisions included in the dataset.

Table 7A: Grounds at Issue versus Grounds Retained for Detention. Section 515(10) Decisions

		Hearing Type								
Grounds Retained for Detention		Primary	Secondary	Tertiary	Primary & Secondary	Primary & Tertiary	Secondary & Tertiary	All three grounds	Unstated/ Unclear	TOTAL
	Primary	1	0	0	0	0	0	0	0	**1**
	Secondary	0	23	0	0	0	0	0	0	**23**
	Tertiary	0	0	1	0	0	0	0	0	**1**
	Primary & Secondary	0	0	0	5	0	0	0	0	**5**
	Primary & Tertiary	0	0	0	0	0	0	0	0	**0**
	Secondary & Tertiary	0	6	1	0	0	29	0	2	**38**
	All three grounds	0	1	0	0	0	6	6	0	**13**
	Unstated/ Unclear	0	0	0	0	0	0	0	6	**6**
	TOTAL	**1**	**30**	**2**	**5**	**0**	**35**	**6**	**8**	**87**

Table 7B: Grounds at Issue versus Grounds Retained for Detention. Section 679(3) Decisions

		Grounds Retained for Detention								
Grounds at Issue		**Primary**	**Secondary**	**Tertiary**	**Primary & Secondary**	**Primary & Tertiary**	**Secondary & Tertiary**	**All three grounds**	**Unstated/ Unclear**	**TOTAL**
	Primary	0	0	0	0	0	0	0	0	**0**
	Secondary	0	0	0	0	0	0	0	0	**0**
	Tertiary	0	0	6	0	0	0	0	0	**6**
	Primary & Secondary	0	0	0	0	0	0	0	0	**0**
	Primary & Tertiary	1	0	0	0	2	0	0	0	**3**
	Secondary & Tertiary	0	0	0	0	0	1	0	0	**1**
	All three grounds	0	0	2	0	0	0	0	0	**2**
	Unstated/ Unclear	0	0	1	0	0	0	0	0	**1**
	TOTAL	**1**	**0**	**9**	**0**	**2**	**1**	**0**	**0**	**13**

Tables 7A and 7B demonstrate the overall trends pertaining to the grounds retained by courts as justification for detention, regardless of the type of hearing. This information provides a more generalized examination of how courts interpreted the law in light of what the parties argued before them. The observable outcomes in terms of which grounds for detention ultimately prevailed are the same as those presented in Tables 6A and 6B. The new information that Tables 7A and 7B provide relates to the frequency of success of the various grounds, alone and in combination, for justifying detention.

We can note some previously identified trends in these tables as well. The reliance on and success of the public interest ground as a reason not to release someone on bail pending an appeal heard under section 679(3) continues to be exceedingly evident.[51] More interestingly, as regards Table 7A – which, to recall, covers all cases (save one) in which the individual is legally presumed innocent – said trend is the continuing prevalence of secondary grounds. Moreover, the data provides a clearer indication of how successful this ground was, alone and in combination with other grounds, at convincing a court to detain an individual: 76 of 87, or 87.36%, of all detentions included the secondary ground.

Interestingly, the tertiary ground was most successful when argued alongside other grounds, especially the secondary ground. Again, this confirms earlier research conducted on the grounds of detention after *St-Cloud*.[52] At face value, these outcomes in particular gesture toward the dissent in *Hall*, which held the tertiary ground to be entirely unconstitutional, and specifically contended that the circumstances in which the tertiary ground would justify detention would likely justify detention on one of the other grounds under

51 And parallels prior research on bail hearings decided under section 515(10)(c) of the *Criminal Code*, see: M. Manikis & J. De Santi, "Punishment and Retribution Within the Bail Process: An Analysis of the Public Confidence in the Administration of Justice Ground for Pre-Trial Detention," *supra*, note 32; M. Manikis & J. De Santi, "Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences," *supra*, note 32.

52 M. Manikis & J. De Santi, "Punishment and Retribution Within the Bail Process: An Analysis of the Public Confidence in the Administration of Justice Ground for Pre-Trial Detention," *supra*, note 32, 420.

section 515(10).[53] Taken in combination with the prevalence of reverse onus situations, this data suggests a punitive dimension to the current bail process.

B) COVID-19 and Harm in the Decisions

1. COVID-19 and Jail Conditions: An Increase in Health Risks across Provinces

An initial legal issue the courts needed to address was within which area of existing law to consider COVID-19-related health risks? Under which ground of detention? Answering these questions preoccupied much of the early jurisprudence included in the dataset. Given the aforementioned over-representation of Ontario decisions, it is unsurprising that much of this consideration was carried out in Ontario courts.

First, however, we must acknowledge a common thread that runs through this jurisprudence, across regions and over time. At the earliest stages of the pandemic, courts clearly indicated that COVID-19 was not a " 'get out of jail free' card."[54] This phrase, or similar statements, are found across the jurisprudence from the first wave of the pandemic. Thus, from the beginning, it seems that the judiciary was at the very least wary of making any significant changes to its approach to judicial release. This is a key point in this jurisprudence because, in those early days of the pandemic, at a time when Canadian governments were enacting strict measures intended to protect the public's health and limit the spread of the virus, including physical distancing, the courts were making decisions that ran contrary to those mandates. It is also an ironic choice of phrase for courts to use at the bail stage: constitutionally, and according to Supreme Court jurisprudence, the right to bail is literally a right to get out of jail with the most freedom possible. Consequently, from the outset, it seemed that the courts were curtailing the transformative opportunity of the moment.

The type of hearing partly determined how courts approached COVID-19. By the end of March 2020, an early consensus developed around

53 *Hall*, *supra*, note 23, par. 88.

54 *R.* v. *P.O.*, 2020 ABQB 355, par. 116.

two points: first, that the pandemic was a material change in circumstances permitting a de novo hearing on bail review applications; second, that consideration of the virus should be done under the tertiary ground of detention. An early leading case on both points is *R.* v. *J.S.*, a bail review application under section 520 in which the tertiary ground was the sole ground at issue. In this decision, dated 20 March 2020, the court accepted a "greatly elevated risk" of contracting the virus faced by detained individuals versus those who were not detained, and confirmed that the risk must be considered under tertiary grounds.[55] Specifically, the judge at the hearing found that it was the inherent nature of the jail which posed a problem. At the time, the only known effective measures to prevent the spread of the virus required maintaining substantial distance between people, a feature that was quite simply impossible regardless of measures taken by carceral staff because jails are "confined space[s] with many people."[56] The judge specifically emphasized the fact that inmates did not have access to single cells, a structural and architectural feature of jails, which prohibited social distancing.[57] Taking into consideration other factors, including a new, stricter bail plan, the court released the accused.[58]

A related pattern running throughout the dataset is the close attention paid by the courts to the presence or absence of COVID-19 within carceral settings, even specific carceral institutions. For example, in two separate decisions, *R.* v. *Knott*,[59] released on 24 March 2020 and *R.* v. *Cotterell*,[60] released on 26 March 2020, the Ontario Court of Justice took judicial notice of the fact that correctional officers and staff at the Toronto South Detention Centre had tested presumptively positive[61] for COVID-19. In both decisions,

55 *R.* v. *J.S.*, 2020 ONSC 1710, par. 18.

56 *Id*., par. 19.

57 *Id*.

58 *Id*., par. 21.

59 [2020] O.J. No. 1322 (Ont. Ct. of J.) (LAd/QL) (hereinafter "*Knott*").

60 [2020] O.J. No. 1433 (Ont. Ct. of J.) (LAd/QL) (hereinafter "*Cotterell*").

61 The term "presumptively positive" for COVID-19 refers to an initial positive result on a COVID-19 antigen test. For more information on COVID-19 testing and case definitions, please see: Government of Canada, "National case definition: Coronavirus disease (COVID-19)," *Public Health Agency of Canada*, 6 June 2023, online.

these factors were identified alongside the previously mentioned issues concerning the ability to realistically comply with measures of social distancing and stringent hygiene practices in jails, thereby increasing the risk of exposure to inmates and staff alike.[62] All of these concerns were exacerbated in light of the lengthening court delays due to COVID-19.[63] Ultimately, the court released the accused individuals in both cases.

The rapidly changing situation in courts and jails also gave rise to significant difficulties for both parties in obtaining and providing evidence to the courts. In Ontario, both the prosecution and defence presented formal documentary evidence regarding COVID-19 in the jails, the mitigation measures being taken, and assessments of risks. On the prosecution side, as of 27 March 2020 and the section 520 bail review in *R.* v. *Budlakoti*, it became commonplace to cite a Solicitor General's Briefing Note describing the measures being taken within Ontario provincial jails to mitigate the spread of the virus and indicating the significant reduction in the overall jail population in the province.[64]

On the defence side, an affidavit from Dr Aaron Orkin, a physician and epidemiologist at the University of Toronto, began to appear in cases by mid-April 2020, the first one being *R.* v. *Paramsothy*.[65] The affidavit was also cited in cases elsewhere in Canada. In *R.* v. *Shingoose*, the Saskatchewan Court of Appeal cited the affidavit in an evidentiary record supporting the release of the offender pending his appeal hearing. The record included specific risks for Mr. Shingoose related to contracting COVID-19 as well as mitigation measures as part of the release plan, including a fourteen-day quarantine.[66]

The particular vulnerability of the defendant, and whether a specific risk needed to be demonstrated, was a hotly contested topic in the dataset alongside and independent from jail conditions. *Budlakoti* was the first major

62 *Knott*, *supra*, note 59, par. 59; *Cotterell*, *supra*, note 60, par. 44 and 45.

63 *Knott*, *supra*, note 59, par. 62; *Cotterell*, *supra*, note 60, par. 47-49.

64 *R.* v. *Budlakoti*, [2020] O.J. No. 1352 (Ont. S.C.J.) (LAd/QL), par. 14 (hereinafter "*Budlakoti*").

65 2020 ONSC 2314.

66 *R.* v. *Shingoose*, 2020 SKCA 45, par. 32.

break with the reasoning in *R.* v. *J.S.*[67] In it, the court ruled that a specific risk to the accused must be demonstrated.[68] The debate over the relevance of individualized risk versus the COVID-19 risks that are inherent to jails and the spatial limitations in those settings, was present in cases throughout the dataset from across Canada. In *R.* v. *J.R.*, dated 20 April 2020, a judge on the Ontario Superior Court of Justice explicitly rejected the line of jurisprudence that required a demonstration of individualized risk.[69] On the same day, a judge of the same court in an adjacent region, effectively decided in the opposite direction: the lack of specific risk for the accused as well as the absence of an active outbreak at the jail in which he was detained both indicated that the material circumstances had not changed and rejected the section 520 of the *Criminal Code* application for a review of detention.[70] Ultimately, the necessity of demonstrating individualized risk was not resolved within the Ontario portion of the dataset.

Courts in Quebec, while generally acknowledging the existence of the pandemic, seemed to strongly favour, in their own jurisprudential lines, a highly individualized approach to assessing the importance of COVID-19 in bail decisions. In fact, all five Quebec bail decisions in our dataset – three bail hearings and two reviews under section 520 of the *Criminal Code* – resulted in continuing the detention of the accused person. In *Couture* c. *R.*, the Superior Court of Quebec accepted evidence regarding measures taken within the jails to mitigate the risk of the spread of COVID-19, based on which it rejected the accused's bail review application.[71]

The decision in *Brown* c. *R.*,[72] demonstrates the problematic lengths to which the individualization of risk logic could be taken. This case, released on 25 May 2020, was a rejection of the accused's application for bail review. In the decision itself, the court noted that the pandemic could be considered under all three grounds for detention but focused on the tertiary ground. The

67 *Supra*, note 55.
68 *Budlakoti*, *supra*, note 64, par. 14.
69 *R.* v. *J.R.*, 2020 ONSC 1938, par. 50.
70 *R.* v. *Baidwan*, 2020 ONSC 2349, par. 77-79.
71 *Couture* c. *R.*, 2020 QCCS 1201, par. 29 and 36.
72 2020 QCCS 1675.

court accepted that fifteen staff and fifteen inmates had contracted COVID-19; the court also accepted that the accused had chronic obstructive pulmonary disorder (COPD) and sleep apnea – both conditions which negatively impact a person's ability to breathe.[73] Yet, the court rejected the argument that COVID-19 had led to a deterioration of the accused's health because he had not been in contact with one of the (cumulatively thirty) people at the institution who had the virus.[74]

Overall, the courts of the Atlantic provinces for which we have data from the period – Newfoundland and Labrador, Prince Edward Island, and Nova Scotia – did not treat the pandemic or the virus as particularly relevant to bail proceedings. In fact, of the seven cases across the three provinces, only one resulted in the release of the accused[75], and the judge in that case specifically rejected the *R.* v. *J.S.*[76] reasoning mentioned above.

The various courts of the central and western provinces exhibit more variation in their appraisals of the seriousness with which the courts should approach COVID-19, including the specific context of jails. In multiple decisions, British Columbia courts took account of current outbreaks in carceral institutions at large and appeared to take it as a given that COVID-19 would eventually make its way into the specific jail or prison in which the accused person was detained.[77] In fact, in their decisions on 3 April 2020, two separate courts noted in two separate cases, in which all the accused individuals were detained at Okanagan Correctional Centre, that the Centre had reported its first positive COVID-19 case during the writing of the decisions.[78] The courts in this province primarily considered COVID-19 under the primary and secondary grounds, but occasionally considered it under tertiary grounds or as a general consideration. Alberta, Saskatchewan, and Manitoba, like Ontario, frequently

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73 *Id*., par. 10.

74 *Id*.

75 *R.* v. *Alexander*, [2020] N.J. No. 69 (Nfld. Prov. Ct.) (LAd/QL), par. 7.

76 *Supra*, note 55.

77 *R.* v. *Duncan*, 2020 BCSC 590, par. 42 (hereinafter "*Duncan*"); *R.* v. *Peters*, 2020 BCSC 592, par. 23 (hereinafter "*Peters*"); *R.* v. *Cota Garcia*, [2020] B.C.J. No. 599 (B.C. Prov. Ct.) (LAd/QL), par. 61 (hereinafter "*Cota Garcia*").

78 *Peters*, *supra*, note 77, par. 23; *Cota Garcia*, *supra*, note 77, par. 61.

considered COVID-19 in relation to the requirement for a material change in circumstances as a ground for a bail review.

2. COVID-19, the Limited Operation of the Courts, and Lenghty Detention

An additional trend in the dataset, and a serious legal dilemma, comes to light in the decisions examined, although its acknowledgement by the courts varies considerably. By late March 2020, court systems across the country reduced in-person activity, most notably by cancelling all trials, preliminary inquiries, pre-trial motions, including those related to the *Charter*, and guilty pleas that resulted in custodial sentences.[79] Practically speaking, this situation left thousands of people in jail without any indication of when their detention would end.[80] On at least one occasion in the dataset, the court explicitly recognized that the accused had been partway through a trial.[81] In another, the accused was set to have hearings on pre-trial motions for exclusion of evidence for a breach of section 8 of the *Charter*.[82]

As previously mentioned, the *Charter* protects both the right to be presumed innocent until proven otherwise and the right to reasonable bail. However, Canadian law had no precedent for how to uphold these constitutional rights when it is deemed necessary to shut down the very institutions charged with the task of applying these rights to specific individuals. Decisions to continue incarceration when there is no end date envisaged or even attainable, at a minimum, raises serious questions about the legitimacy of the detention, a concern raised in several cases.

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79 For a selected sample of such rules changes across Canada, see the following: Ontario Superior Court of Justice, *supra*, note 38; Supreme Court of British Columbia, *supra*, note 38; Provincial Court of British Columbia, *supra*, note 38; Court of King's Bench of Alberta, *supra*, note 38; Chief Justice Tracey DeWare, *supra*, note 38.

80 Jamil Malakieh, "Adult and Youth Correctional Statistics in Canada, 2018/2019," *Statistics Canada*, 21 December 2020, online.

81 *R.* v. *P.O.*, *supra*, note 54, par. 7 and 8.

82 *R.* v. *Sappleton*, [2020] O.J. No. 1531 (Ont. S.C.J.) (LAd/QL), par. 15 and 16.

One avenue for dealing with these concerns was by considering the impact of court delay. In *R.* v. *Steer*, the accused was released on bail review in part because there was a real risk that otherwise he might spend more time in custody awaiting trial than he would on a sentence if convicted.[83] In *Knott*, the court noted the cancellation and the impossibility of scheduling pre-trial procedures and trials as demonstration of how COVID-19 impacts the public confidence in the administration of justice (the tertiary ground).[84] The Ontario Court of Justice in *Cotterell* specifically noted that pre-COVID-19 trial delays in the region had already attracted constitutional scrutiny, and were almost certainly going to be compounded by the emergency court closures and restrictions on matters.[85]

In this context, *R.* c. *Videz-Rauda*, which rejected the accused's application for release, is a particularly troubling decision in the dataset. Here, the judge went to great lengths to explain why evidence from the accused regarding the insufficiency of COVID-19 mitigation measures in the jail should not be considered, effectively excluding evidence regarding carceral conditions from the purview of the courts because it should be dealt with by the jail administration.[86] What the decision does not do is articulate clearly the grounds on which the accused was detained, or provide reasoning specific to those grounds.

IV. Bail, Communicating State Blame, and Confidence in the Administration of the Process

A) Manikis' Framework for State Blame/Harms

The continuing punitive approach undertaken by the current bail law in Canada, even when confronting a pandemic, underscores the need for bail reform, although not in the direction recently outlined by the Canadian federal government. The reform should seek, on the one hand, to expand conversations within the bail process and introduce possibilities for decision-makers to

83 *R.* v. *Steer*, 2020 BCSC 613, par. 4 and 5.
84 *Knott*, *supra*, note 59, par. 62 and 63.
85 *Cotterell*, *supra*, note 60, par. 47-49.
86 *R.* c. *Videz-Rauda*, 2020 QCCS 1478, par. 30-60.

take into account the state's role in producing harms that affect incarcerated individuals in the context of bail, particularly those considered innocent by the law, and, on the other hand, to support the use of a framework aimed at integrating "state harms" in the context of criminal processes. One option is to integrate into Canadian bail law a framework developed by Manikis, referred to as "state blame/harms."[87] Manikis' framework is useful to the extent that it provides justifications for the state's responsibility in the production of harms to be deemed relevant to decision-making processes. Moreover, this framework provides an approach and typology for creating language, engaging, and responding to state harms at various stages of the criminal process. The following paragraphs discuss this framework rooted in communicative theories of sentencing. While current law does not incorporate dimensions of state responsibility in the process, we argue that state responsibility should be developed and applied in the context of bail.

Specifically, Manikis' recent 2022 framework explores the communicative dimension of criminal punishment, contending that such communication should not only encompass the offender's wrongdoing and responsibility but ought to include communication with the state in decision-making processes in order to account for criminogenic conditions and related harms created by the state.[88] Traditional communicative theories of punishment are heavily underpinned by just-desert-based considerations, which view criminal punishment as justified to the extent that it is proportional to the gravity of the offence and the level of blameworthiness of the offender.[89] In

87 The inclusion of Manikis' framework in this article is normative and does not purport to discuss the current state of the law. Our objective is to introduce a framework for legal reform that is not limited to drawing up a typology of harm. We argue instead that engaging with these harms within the bail process is key to the public confidence dimension, which should also serve as a guiding principle for determining whether a person should be detained.

88 Marie Manikis, "Recognising State Blame in Sentencing: A Communicative and Relational Framework," (2022) 81-2 *C.L.J.* 294.

89 *Id*., 296. For more on communicative theories of punishment, see *e.g.* R. A. Duff, *Punishment, Communication and Community*, Oxford, Oxford University Press, 2001; Julian V. Roberts & Netanel Dagan, "The Evolution of Retributive Punishment: From Static Desert to Responsive Penal Censure," in Antje du Bois-Pedain & Anthony E.

this sense, punishment is understood and justified as part of a communicative process of individual censure which conveys a message to the offender about their wrongdoing and signals this to the wider society. In recent years, communicative theories of punishment refer to this communicative potential as "responsive censure,"[90] and have also started to recognize the relevance for dialogue between the offender and the state. Specifically, rather than a one-way process where the state blames the offender, theorists argue that the offender should also be provided an opportunity to respond to the state. If the offender responds to the censuring message by the state, this should be taken into account by the state.

Building on this idea of responsive censure, Manikis expands the communicative endeavour, by suggesting that responsive communication that focuses solely on censuring the individual is incomplete and fails to accurately communicate wrongdoing in instances where the state may also be responsible for wrongdoing and related harms. In other words, the state would also need to be subjected to communicational censure when it creates criminogenic harms, as well as harms that exceed the legitimate level of punishment.

To take the framework a step further, we posit that this communicative theory can also be justified from a public confidence perspective, since the state and polity would gain in legitimacy from a wider relational communicative understanding that allows for self-criticism and mutual opportunities for blame.[91]

We suggest that while this framework was primarily introduced as a way of thinking about and integrating relevant factors within the context of sentencing[92] and the administration of the sentence[93], it can also be relevant at the bail stage when assessing the public confidence dimension in decisions about detention and release. In other words, the state's level of responsibility

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Bottoms (eds.), *Penal Censure. Engagements Within and Beyond Desert Theory*, Oxford, Hart Publishing, 2019, p. 141, at p. 143.

90 J. V. Roberts & N. Dagan, *supra*, note 89; M. Manikis, *supra*, note 88, 295.

91 M. Manikis, *supra*, note 88.

92 *Id*.

93 *Id*.

in creating criminogenic conditions and causing harms should be taken into consideration in decisions relating to bail. As seen in Part III and in previous research[94], the current bail process operates within a retributive desert-based logic of individual censure under the tertiary ground of pre-trial detention, namely the confidence in the administration of justice.

Specifically, we suggest that the confidence in the administration of justice standard, also referred to as the tertiary ground, should no longer include desert-based considerations at this stage of the process, and that courts should instead incorporate Manikis' framework, which takes into account the state's wrongdoing and the related typology of harms in decisions relating to bail. Considering and responding to these state-produced harms would indeed contribute to greater confidence in the administration of the process.

A way to implement this reform would entail the redrafting of section 515(10)(c) of the *Criminal Code* to include the various state harms relating to custody, as a relevant factor for consideration by the actors in the system when making decisions that relate to maintaining the confidence in the administration of justice. Indeed, although in practice state harms are not currently recognized as relevant to the analysis of the confidence in the administration of justice criterion, we propose that they be deemed relevant to the confidence in the administration of justice. In this sense, in contexts where state-produced harms are present at bail, they would need to be adequately considered and responded to in decision-making relating to release and pre-trial detention. Moreover, in instances of unpredictable custodial conditions that only end up occurring during pre-trial detention, state harms would also be relevant in review decisions.

Manikis provides a typology of four types of state failures and harms. The first type of harm results from the state's systemic criminogenic

94 See *e.g.* M. Manikis & J. De Santi, "Punishment and Retribution Within the Bail Process: An Analysis of the Public Confidence in the Administration of Justice Ground for Pre-Trial Detention," *supra*, note 32; M. Manikis & J. De Santi, "Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences," *supra*, note 32; N. M. Myers & S. Dhillon, *supra*, note 33.

contribution to creating and maintaining social inequalities.[95] These harms result from state policies that create or produce inequalities that are known to contribute to criminogenic conditions; for example, the role of past and present colonial policies in crimes of violence against Indigenous women and girls.[96]

The second type of harm comes from the systemic contributions of the state's criminalization policies that target or affect marginalized groups.[97] Literally, the state criminalizes certain marginalized populations, either directly and explicitly, or indirectly by targeting conduct or activities that the state knows will result in criminalizing particular populations.[98]

Third, the state contributes to the harms that result from a sentence.[99] Manikis argues that some consequences of a sentence cannot rightly be considered part of the experience of punishment, whether they occur during or after sentencing; for example, access to mental health or substance use resources, or finding post-custody accommodation.[100]

The final type of harms are human rights violations by abusive state actors.[101] These are specific instances of violations of the rights of a particular offender, such as those that occur during arrest, detention, or searches and seizures, and they are committed by individuals acting on behalf of the state.[102] It might be worth noting that, unlike the previous three types, these harms are most explicitly the result of state actors violating the state's own policies.

For the purposes of this paper, which focuses on the context of bail decisions released in the early months of the COVID-19 pandemic, the most recurring state harms arise out of the decision and conditions of detention. Nevertheless, as discussed below, all four types of state harms described by Manikis can apply to pre-trial detention. It is worth specifying that for the third

95 M. Manikis, *supra*, note 88, 307.
96 *Id*.
97 *Id*., 309.
98 *Id*.
99 *Id*., 313.
100 *Id*., 314.
101 *Id*., 316.
102 *Id*.

type of harm, although Manikis refers to the production of harms that result from the sentence, we have demonstrated that this can be transposed to the bail process and the associated conditions of detention.

Within the typology of state created harms, chronic overcrowding is an important example of harm that predates the COVID-19 pandemic. Indeed, all jails and prisons in Canada are public, that is, they are funded, staffed, and operated, by the state. In the context of bail cases, these jails are run by the provinces. Failures to adequately provide for the basic necessities in jails is a failure of the state to maintain equal access to services for the predominantly marginalized populations under its care (first type) and it causes identifiable harm to detained individuals (third type). Severe overcrowding, denounced in the Ontario Solicitor General's report, forcing two or more detainees to share a single-person jail cell and to sleep on the floor, causes tangible harm. For example, early pandemic reporting regarding conditions at the Ottawa-Carleton Detention Centre described the following situation in just one part of the jail:

> Dorm 3 holds 30 men who share 15 bunks, one urinal that barely works, two sinks, two toilets that often plug and two showers with a heavy amount of black mould. The black mould is so thick in their showers it can be peeled off, according to the inmates in Dorm 3.
>
> The fan in the bathroom has been broken for three months.[103]

Chronic overcrowding in jails compounds and amplifies other harms. Conditions such as those described are damaging to the health and well-being of detainees, and they facilitate the spread of contagious diseases, such as COVID-19, among the prison population. This connects to an additional state harm observable within the data: the increased health risks for the individuals incarcerated, which are even greater for those with pre-existing disabilities.

Insofar as the state controls the carceral system, it is responsible for the condition of those facilities. In addition, having pre-existing knowledge of the state of carceral institutions, the state could arguably foresee that they would be highly contagious environments. In fact, as discussed in previous sections, the

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103 Jorge Barrera, "Tension, Fear Rising inside Dorm 3 of Ottawa Jail over COVID-19," *CBC News*, 19 March 2020, online.

use of the Solicitor General's memo providing current information regarding the rates of COVID-19 among staff and inmates indicates that the state had current knowledge of the harm as it was happening.[104] This fact is underscored by the multiple jail closures that occurred throughout the pandemic starting in April 2020, the state itself being responsible for such closures and relocation of prisoners.

Turning to the more personal or individual health risk considerations, it would admittedly be unreasonable to expect the state to have any foreknowledge of the health of any particular person it arrests and initially detains. However, once individuals are taken into custody, the state becomes responsible for providing healthcare to them and therefore gains knowledge of the health status of individual inmates. Similarly, while the COVID-19 pandemic was not foreseeable, the adequacy (or inadequacy) of healthcare provision in provincial jails generally would, or should, be known at the stage of bail decision-making. Before COVID-19, healthcare in jails was already the subject of considerable criticism and concern across Canada.[105] The pandemic intensified existing problems and brought new ones to the fore, which in turn placed new emphasis on the specifics of an accused person's health status.

Therefore, in light of the foregoing, the lines of cases in the dataset contemplating or excluding information regarding health-related concerns can be reinterpreted as a relevant assessment of the risk of harm arising from pre-trial or pre-sentence detention, for which the state is responsible. This form of state harm would be relevant within a reformed section 515(10)(c) analysis of the confidence in the administration of justice. Let us recall that courts in British Columbia took as a given that COVID-19 would eventually make its

104 *Budlakoti*, *supra*, note 64.

105 Giacomo Panico, "Health Worries Dominate Talk on New Jail Hotline," *CBC News*, 15 January 2019, online; Élise Jetté, "La prison Leclerc pour femmes : un pénitencier 'complètement scrap,' " *Le Journal de Montréal*, 5 February 2019, online; Jonny Wakefield & Claire Theobald, "Provincial Inmates Say They Suffered When Jail Doctors Switched Them off Community Prescribed Medications," *Edmonton Journal*, 11 February 2018, online; Austin M. Davis, "Waiting Room: Inmates Say They Are Falling Through Gaps in Saskatchewan's Correctional Healthcare System," *Regina Leader-Post*, 6 July 2018, online.

way into the provincial jails[106] and that despite its efforts, the state's ability to prevent harm to incarcerated individuals would be limited. In this sense, this legislative reform would provide a framework within which discussions about the state's role in the creation of such harms would be relevant at bail and during bail review.

To these direct and clearly indicated harms of incarceration created by the state, must be added the harm arising from detention in a context where criminal courts had largely ceased their activities due to COVID-19, particularly those which challenged the state's ability to punish. With bail and certain forms of sentencing being the only substantive matters that could be brought before the courts, pre-trial detainees were faced with two options: either plead guilty and be punished, or remain detained for an indefinite length of time (until the courts resume) with no ability to challenge the state's authority to detain during that time – via trial or pre-trial hearings that may impact the prospect of conviction. As mentioned above, contexts in which criminal courts had suspended most of their activities would arguably give rise to unjustifiable detention, particularly where people presumed innocent did not have the possibility to challenge charges to the contrary.

This harm operates on two levels. First, there is the direct harm to the persons so detained, in terms of exposure to heightened health risks and the psychological, emotional, and physical impact of a detention with no end date. Second, there is a broader harm to the criminal legal system's legitimacy: the premise of pre-trial detention is that there will be a trial to determine an individual's culpability. This second aspect of harm harkens back to a key aspect of just deserts punishment theory: culpability. In the absence of culpability, just deserts theory of punishment dictates that there can be no punishment or, to appropriate the language of bail, that there is confidence that justice will be administered. Without this component of the system in operation, there is no legitimate basis to detain someone for alleged criminality.

106 *Duncan*, *supra*, note 77; *Peters*, *supra*, note 77; *Cota Garcia*, *supra*, note 77.

Overall, these harms fall most closely within the third type of harm Manikis identifies, that which occurs during the sentence.[107] While not administering a sentence, pre-trial and pre-sentence detention can create excess harms that are not part of a legitimate punishment, and the harms identified in this paper are directly produced by the administration of such a detention. What remains is the question of how such harms ought to be accounted for at the bail stage. Unique to a first bail hearing is that, in most cases, there is little information on the conditions of the person's detention. At a sentencing hearing, in contrast, while the court cannot look forward in time, if the offender was incarcerated prior to the hearing – especially where the sentence results in continued detention in a provincial jail – the court may have information regarding the conditions of detention. One possible response to this difficulty is to require the provision of current information about the jail at which the person is likely to be placed in pre-trial detention. As mentioned above, the COVID-19 pandemic and defence counsels' use of an expert affidavit from Dr. Orkin instigated the Crown to regularly provide updated information about COVID-19 and the precautions taken in the relevant carceral institutions at the bail stage. This occurred most notably in Ontario, but there were indications of court awareness of some conditions, particularly the number of COVID-19 cases among inmates and staff, in multiple provinces and the courts explicitly recognized these in their decisions.[108] In this sense, the experience of the early stages of the pandemic may provide guidance regarding what types of information would be useful and from whom in considering prison conditions at the bail stage. Moreover, it is important to also highlight the relevance of reviews in decisions relating to pre-trial detention. In such contexts, unforeseeable harms that emerge during custody can be part of a review process that would seek to engage, take into account, and respond to these harms.

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107 For more in-depth analysis on considering prison conditions in such settings see: Marie Manikis & Audrey Matheson, "Communicating Censure: The Relevance of Conditions of Imprisonment at Sentencing and During the Administration of the Sentence," (2024) 87-3 *Mod. L.R.* 570.

108 *Duncan*, *supra*, note 77; *Peters*, *supra*, note 77; *Cota Garcia*, *supra*, note 77; *Couture* c. *R.*, *supra*, note 71; *Brown* c. *R.*, *supra*, note 72.

Finally, importing the state blame framework into the bail process requires the state as a decision-maker to take into account these harms and to respond to them by providing alternatives to detention that do not create additional harms. There are various possible responses, including alternatives such as providing housing and other related services. The next section discusses some of these alternatives in a response that predates the bail decision-making process. We suggest that implementing these options, incorporated in bail decisions, can maintain the confidence in the administration of justice.

B) State Blame and Potential Complementary Responses – the Proactive Measures Taken by Nova Scotia

The framework of state blame can work in a complementary way to wider systemic initiatives aimed at accounting for the role the state plays in reproducing criminality and in the impact of the criminal law system on those who enter it. Indeed, the framework of state blame can be part of a call for a response that would require wider systemic and community involvement in its implementation.

A recently published study by Adelina Iftene reviews Nova Scotia's provincial efforts to depopulate its jails in the first wave of the pandemic.[109] In response to significant community advocacy, prisons, police, courts, and the Department of Justice, worked together with organizations who support individuals in the criminal legal system, including the Elizabeth Fry and John Howard Societies, the Coverdale Courtwork Society and others, to release almost half of the province's jail population.[110]

Unprecedented collaboration between these distinct organizations made it possible to plan and coordinate release efforts, alongside implementing new measures between police and non-governmental organizations to find housing and other supports for people picked up off the street instead of bringing them to jail.[111] In total, 41% of the provincial jail population was released; this allowed the province to close two of its four jails, with the remaining

109 A. Iftene, *supra*, note 6.
110 *Id*., 484.
111 *Id*., 486.

two operating well below their capacity.[112] An infectious disease and public health specialist with experience in working with criminalized populations was contracted by the provincial health authority to create and oversee protocols implemented in the jails to limit the spread of COVID-19.[113]

Iftene notes that the plan was far from foolproof, with important shortcomings as regards oversight and, most crucially, that these measures largely ended by June 2020.[114] However, this experience provides lessons for jurisdictions in Canada and elsewhere about how to respond proactively to an emergency in carceral settings.[115] Arguably, this might also be a lesson and model for implementing responses that are communicated by the courts during bail in the event that there is evidence of harms within carceral institutions. Notably, many of those measures can be relevant responses, including arranging for housing and support for vulnerable street-involved people instead of sending them to jail; providing short-term housing for recently released individuals and providing a caseworker to help them navigate their needs, including housing, mental and physical health, etc.[116] These actions would form part of the state's responsibility and response to evidence of wrongdoing and harms, and as highlighted by Iftene, they would be geared toward creating stability in the person's life, providing care to them, and meeting their needs, all of which are conditions that help to reduce recidivism and breaching conditions of release.[117] We suggest that such responses would be important within a framework that recognizes state wrongdoing and harms and aims to further the maintenance of the administration of justice.

Conclusion

The foregoing analysis demonstrates that early pandemic jurisprudence did not break with the characteristics of pre-pandemic bail jurisprudence or

112 *Id*., 484.
113 *Id*., 487.
114 *Id*., 490-492, 499.
115 *Id*., 499.
116 *Id*., 498.
117 As Iftene notes, of the 30 people who were supported during the first wave through a federally-funded pilot housing program, none breached their conditions of release: *id*.

existing practice. In particular, punitive logics continue to permeate the bail process, including at stages where the accused person is legally innocent. The fact that these logics continued to hold at the bail stage during a global health crisis and despite the courts' access to information on the risks of infection spread in carceral settings underscores the urgency of the calls for change. In this context, Manikis' typology of state harms as applied to the sentencing stage can be imported to the bail stage as a way of explicitly accounting for such harms at bail. If a global health crisis like COVID-19 could not kickstart a more compassionate bail process, perhaps the system itself is in need of reform if it is going to meaningfully uphold the constitutional right to a reasonable bail in Canada.