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## From the Legal Literature: Covid and the Criminal Law

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# From the Legal Literature

Francesca Laguardia\*

## COVID AND THE CRIMINAL LAW

### I. INTRODUCTION

At the time of this writing, COVID-19 is once again surging across the United States.<sup>1</sup> According to *The New York Times* COVID Case Tracker, “[c]ase numbers are spiking across most of the United States, leading to dire warnings about full hospitals, exhausted health care workers and potential lockdowns.”<sup>2</sup> In response, courts that had begun trying to resume a normal schedule and in-person proceedings are returning to the closures and limitations that accompanied the emergency of the spring;<sup>3</sup> and states that had rejected mask mandates and curfews are reconsidering.<sup>4</sup>

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<sup>1</sup>Sarah Almkhatar et al., *COVID in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last updated Dec. 20, 2020, 7:56 A.M.); Chris Canipe & Lisa Shumanker, *Where U.S. Coronavirus Cases Are Rising and Falling*, REUTERS, <https://graphics.reuters.com/HEALTH-CORONAVIRUS/USA-TRENDS/dgkvlgkrkpb/index.html> (last visited Nov. 18, 2020).

<sup>2</sup>Almkhatar et al., *supra* note 1.

<sup>3</sup>E.g., Molly Crane-Newman, *NYC Courts Indefinitely Halt Most in-Person Proceedings After Uptick in Coronavirus Cases*, DAILY NEWS (Nov. 13, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-courts-halted-proceedings-indefinitely-20201113-punyp25c2nh7jd2iftbdlkie7e-story.html>; McKenna Oxenden, *Federal Courts in Maryland Are Closing to the Public Again After a Rise in Coronavirus Cases*, CAP. GAZETTE (Nov. 11, 2020), <https://www.capitalgazette.com/coronavirus/bs-md-district-court-closing-20201111-nsdzjsjgfrb7talyawhuqfb4si-story.html>.

<sup>4</sup>Minyonne Burke, *As Coronavirus Cases Rise, Governors Reverse Course After Refusing Statewide Mask Mandates*, NBC NEWS (Nov. 18, 2020, 12:57 PM), <https://www.nbcnews.com/news/us-news/coronavirus-cases-rise-governors-reverse-course-after-refusing-statewide-mask-n1248124>; Noah Higgins-Dunn, *Cancel Thanksgiving, Stay Home, Wear a Mask — State and City Leaders Impose Targeted Coronavirus Restrictions to Curb COVID without Tanking Economy*, CNBC (Nov. 18, 2020, 2:04 PM), [cnbc.com/2020/11/18/coronavirus-states-impose-targeted-lockdowns-curfews-mask-mandates-ahead-of-thanksgiving.html](https://www.cnbc.com/2020/11/18/coronavirus-states-impose-targeted-lockdowns-curfews-mask-mandates-ahead-of-thanksgiving.html) (“Even Republican governors, many of whom have long resisted statewide lockdowns and mask requirements, are now imposing curfews and starting to order residents to wear face coverings in public.”).

These responses to COVID-19 have serious repercussions for criminal law, due process, and criminal procedure.<sup>5</sup> Despite the hopes of the nation, the virus is not under control; it continues to run rampant and that has serious implications for criminal justice.<sup>6</sup> Moreover, it is entirely possible that many of the emergency provisions enacted will last long after the virus is contained.<sup>7</sup>

The articles explored in this review begin to grapple with these implications. This review begins with the specific effects of COVID-19 on the courts and jury trials.<sup>8</sup> It then moves to the staying power of these effects.<sup>9</sup> Finally, the review looks to the possible Fourth Amendment implications for efforts to enforce COVID-19 responses.<sup>10</sup>

## II. IMPLICATIONS FOR TRIAL RIGHTS

The earliest foray into scholarly exploration of COVID-19 emergency procedures is that of Ryan Shymansky.<sup>11</sup> Published in May of 2020, Shymansky focuses on the effects of court delays and social distancing on speedy trial rights.<sup>12</sup> He stresses that “pretrial detainees in particular may wallow in prison for indeterminate periods of time pending trials that may never arrive.”<sup>13</sup> This is because federal district courts have generally determined that continuances are justified in this circumstance.<sup>14</sup>

He acknowledges that the reasons for these delays are legitimate.<sup>15</sup> Trials, by necessity, bring witnesses, jurors, and defendants not only in contact with each other, but also with the restaurants surrounding the courthouse and all other occupants in

<sup>5</sup>Brandon Marc Draper, *And Justice for None: How COVID-19 Is Crippling the Criminal Jury Right*, 62 B.C. L. REV. E. SUPP. I.-1 (2020); David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISCOURSE 246 (2020); Henry F. Fradella, *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 (2020); Michael Gentithes & Harold Krent, *Pandemic Surveillance—The New Predictive Policing*, 12 CONLAWNOW 57 (2020); Ryan Shymansky, *Justice Diseased Is Justice Denied: Coronavirus, Court Closures, and Criminal Trials*, 122 W.V. L. REV. ONLINE 1 (2020).

<sup>6</sup>See *supra* notes 1 & 2.

<sup>7</sup>Engstrom, *supra* note 5, at 248, 251–54; Fradella, *supra* note 5, at 8; Gentithes & Krent, *supra* note 5, at 73.

<sup>8</sup>Draper, *supra* note 5; Shymansky, *supra* note 5.

<sup>9</sup>Engstrom, *supra* note 5.

<sup>10</sup>Fradella, *supra* note 5; Gentithes & Krent, *supra* note 5.

<sup>11</sup>Shymansky, *supra* note 5.

<sup>12</sup>Shymansky, *supra* note 5.

<sup>13</sup>Shymansky, *supra* note 5, at 2.

<sup>14</sup>Shymansky, *supra* note 5, at 4, 5–6.

<sup>15</sup>Shymansky, *supra* note 5, at 4.

the courthouse who those individuals might have avoided otherwise.<sup>16</sup> These increased contacts create a significant risk of spreading disease.<sup>17</sup>

Having acknowledged the risk, Shymansky turns to the law. He begins with a discussion of U.S. Supreme Court doctrine on the Sixth Amendment right to a speedy trial, pointing out that pandemics were well known at the time of the drafting of the Bill of Rights.<sup>18</sup> But despite this fact, there is little Constitutional doctrine on the right, and the test for a speedy trial violation relies on an *ad hoc* analysis of four broad factors—“length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”<sup>19</sup> This lack of guidance spurred Congress to pass the Speedy Trial Act,<sup>20</sup> limiting the time to indictment to within thirty days from arrest, and limiting trial to within seventy days of indictment or information.<sup>21</sup> The Act also offers eight exceptions, most being tailored to specific circumstances, but also allowing for delay when a judge finds that the delay serves “the ends of justice” to such a degree that it outweighs a defendant’s interests in a speedy trial.<sup>22</sup> This is a broad exception, generally allowing for any delay, and has been used to approve delays of over a year.<sup>23</sup>

As Shymansky points out, delays related to COVID-19 are likely to be extensive.<sup>24</sup> When Shymansky’s article was published, there may have been hope for only a brief pause and recovery over the summer, but it is clear now that the delays are likely to be long-term.<sup>25</sup> But while the Speedy Trial Act may allow for such delays, Shymansky suggests that the Sixth Amendment may be more restrictive as time drags out and alternative solutions (such as mandating that people wear masks in court or even appear using teleconferencing technology) are more accepted.<sup>26</sup> The extent of the delay, and the likelihood that many defendants will assert their rights and be

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<sup>16</sup>Shymansky, *supra* note 5, at 4–5.

<sup>17</sup>Shymansky, *supra* note 5, at 4–5.

<sup>18</sup>Shymansky, *supra* note 5, at 7.

<sup>19</sup>Shymansky, *supra* note 5, at 8 (quoting *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)).

<sup>20</sup>Pub. L. No. 93-619, 88 Stat. 2076 (1975) (codified as amended at 18 U.S.C.A. §§ 3161 to 74 (2020)); *see also* Shymansky, *supra* note 5, at 9.

<sup>21</sup>Shymansky, *supra* note 5, at 9.

<sup>22</sup>Shymansky, *supra* note 5, at 10.

<sup>23</sup>Shymansky, *supra* note 5, at 10.

<sup>24</sup>Shymansky, *supra* note 5, at 11.

<sup>25</sup>*See supra* notes 1–3 and accompanying text.

<sup>26</sup>Shymansky, *supra* note 5, at 12–13.

prejudiced by the delay, suggest that significant Sixth Amendment Speedy Trial claims may arise.<sup>27</sup>

Yet, Shymansky points out, these “solutions” bring with them their own problems. As he states,

Attorneys can no more effectively conduct a voir dire examination via conference call than witnesses can identify evidence via videoconference. Similarly, jurors cannot be expected to apprehend evidence published to them in a courtroom as they would evidence emailed to them during some form of virtual trial.<sup>28</sup>

Shymansky has no answers to these problems; at the early time during the pandemic that he wrote his article, he merely describes the dilemma. Brandon Draper, however, does so when he examines the right to a jury trial, in all its uniqueness.<sup>29</sup>

As if writing in response to Shymansky “six months into the pandemic,” Draper analyzes the solutions courts have found.<sup>30</sup> He focuses on holding trials either in a socially distanced manner or via videoconference.<sup>31</sup> Both, he suggests, pose serious problems for the jury trial, “the cornerstone of the criminal justice system in the United States.”<sup>32</sup>

Draper begins with the problems inherent in socially distanced in person trials.<sup>33</sup> These include the jury’s fear in attending a trial, where they risk becoming infected, causing fear and anger that may interfere with thoughtful deliberation.<sup>34</sup> He also notes press reports that, in the pandemic, juries are skewing more heavily toward White and conservative jurors, undermining the “Sixth Amendment right to a jury that represents a fair cross-section of his community.”<sup>35</sup> Finally, the requirements of social distance and masks hamper attorneys’ ability to read potential jurors’ reactions to questions in voir dire.<sup>36</sup> These problems, Draper suggests, completely destroy courts’ abilities to provide a fair and impartial jury.<sup>37</sup>

But teleconferenced trials present even more problems to Draper’s

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<sup>27</sup>Shymansky, *supra* note 5, at 11–12.

<sup>28</sup>Shymansky, *supra* note 5, at 13.

<sup>29</sup>Draper, *supra* note 5.

<sup>30</sup>Draper, *supra* note 5, at 1.-1.

<sup>31</sup>Draper, *supra* note 5, at 1.-1, 1-3.

<sup>32</sup>Draper, *supra* note 5, at 1.-1.

<sup>33</sup>Draper, *supra* note 5, at 1.-3–5.

<sup>34</sup>Draper, *supra* note 5, at 1.-4.

<sup>35</sup>Draper, *supra* note 5, at 1.-4–5.

<sup>36</sup>Draper, *supra* note 5, at 1.-5.

<sup>37</sup>Draper, *supra* note 5, at 1.-5.

mind.<sup>38</sup> These include privacy and security issues, the psychological wear on participants, and the tendency of people (jurors) to misread social cues like facial expressions and emotions when people communicate by video (an obvious problem for the analysis of witness credibility and character).<sup>39</sup> Moreover, federal rules may not even allow for virtual presence in all cases, jurors may be less likely to focus on the case, and the financial demands of acquiring the best technology for video trials may exacerbate the disparity in quality of legal representation between wealthy and indigent defendants.<sup>40</sup>

Given all these issues, Draper believes many defense attorneys and prosecutors will come to the conclusion that they cannot obtain true justice through teleconferenced trials.<sup>41</sup> He concludes that socially distanced, in-person trials are necessary instead, and recommends that judges and defense attorneys warn defendants of the problems presented, and actively seek to counter them.<sup>42</sup>

Draper does not acknowledge the possibility (or even likelihood) that courts will simply postpone trials until the crisis is contained, as suggested by Shymansky.<sup>43</sup> Nor do either Draper or Shymansky seem to imagine the possibility that these modifications, problematic as they are, may outlast the virus itself—or at least the associated crisis. David Freeman Engstrom, however, makes that argument.<sup>44</sup>

### III. IMPLICATIONS FOR THE COURTS AFTER COVID-19

Engstrom sees the COVID-19 crisis not as a self-standing issue, but as part of a broad range of problems facing the courts and the country.<sup>45</sup> He argues that the pandemic has given the opportunity to reimagine courts to better serve the interests of the country.<sup>46</sup> To that he begins by offering a different perspective on courts, trials, and COVID-19. He states:

Even before 2020, America's justice system was already at a fork in the road . . . . Our courts are chronically underfunded, increasingly politicized, and behind the curve technologically. They are also shockingly out of touch with the justice needs of ordinary Americans, who

<sup>38</sup>Draper, *supra* note 5, at 1.-10.

<sup>39</sup>Draper, *supra* note 5, at 1.-6.

<sup>40</sup>Draper, *supra* note 5, at 1.-6–8.

<sup>41</sup>Draper, *supra* note 5, at 1.-9.

<sup>42</sup>Draper, *supra* note 5, at 1.-9–10.

<sup>43</sup>Shymansky, *supra* note 5, at 4, 5–6, 11.

<sup>44</sup>Engstrom, *supra* note 5.

<sup>45</sup>Engstrom, *supra* note 5, at 248.

<sup>46</sup>Engstrom, *supra* note 5, at 246, 248, 264–65.

get little help in most—perhaps 85 percent or more—of the legal problems they encounter.<sup>47</sup>

In sharp contrast to Draper and Shymansky's criticism, Engstrom notes with approval the way courts mobilized to continue necessary activities such as bail hearings, orders of protection, and child protection hearings.<sup>48</sup> To facilitate these activities courts increased reliance on technology, including parties' opportunities to file papers electronically or, yes, hold court over Zoom, Skype, or other teleconferencing platforms.<sup>49</sup> Courts also offered outdoor proceedings, added plexiglass shields, and found other ways to protect participants.<sup>50</sup>

But, Engstrom warns, there is no simple return to normal coming when the crisis ends.<sup>51</sup> Instead, court caseloads will rebound with a fury as a backlog of non-immediate, stayed cases pushes back into the schedule.<sup>52</sup> Additionally, recessions in general encourage lawsuits, and bankruptcies, creditor-debtor disputes, divorce proceedings, child support claims, and domestic violence all may increase in response.<sup>53</sup> COVID-19 has created even worse circumstances than such recessions, and thereby contains "the makings of a surge that could easily swamp anything we have seen in the past."<sup>54</sup> Importantly, in the face of this soon-to-come tidal wave of cases, Engstrom warns that "unmet justice problems,"—issues that never make it into court for a number of reasons—may pose an even larger problem.<sup>55</sup> Engstrom is as interested in increasing the likelihood that these issues are resolved as he is interested in preparing the courts for the surge.<sup>56</sup>

To respond to these issues, Engstrom recommends relying on the new technologies that courts have employed during this crisis.<sup>57</sup> He notes that virtual hearings cut down on staff required, as well as cutting down on attorneys' travel time, thereby saving money.<sup>58</sup> While he acknowledges the problems for Sixth Amendment trial rights described by Shymansky and Draper, Engstrom highlights that these

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<sup>47</sup>Engstrom, *supra* note 5, at 248.

<sup>48</sup>Engstrom, *supra* note 5, at 250.

<sup>49</sup>Engstrom, *supra* note 5, at 250–51.

<sup>50</sup>Engstrom, *supra* note 5, at 250–51.

<sup>51</sup>Engstrom, *supra* note 5, at 251.

<sup>52</sup>Engstrom, *supra* note 5, at 253.

<sup>53</sup>Engstrom, *supra* note 5, at 252.

<sup>54</sup>Engstrom, *supra* note 5, at 253.

<sup>55</sup>Engstrom, *supra* note 5, at 254.

<sup>56</sup>Engstrom, *supra* note 5, at 264–65.

<sup>57</sup>Engstrom, *supra* note 5, at 255.

<sup>58</sup>Engstrom, *supra* note 5, at 255.



rights are limited to criminal trials, suppression hearings, and criminal adjudication—leaving a great deal of criminal and all of civil litigation open to innovation.<sup>59</sup>

To Engstrom’s mind, a great deal of the courts’ failure to innovate in the face of overwhelming caseloads and underwhelming numbers of cases actually adjudicated can be explained by the legal profession, which has rejected such innovation.<sup>60</sup> In this light, the impetus of COVID-19 may be a boon to civil litigants and victims of crime, forcing the legal profession to open the doors to innovations that can make justice more broadly available.<sup>61</sup> Engstrom points to restraining orders and family law as examples of areas where victims and litigants might be well-served by non-legal expertise and lawyerless proceedings.<sup>62</sup>

Most of Engstrom’s analysis concerns civil proceedings, including the bankruptcies and creditor disputes with which he begins.<sup>63</sup> He discusses the use of artificial intelligence as a way to lessen demands on attorneys and lessen the need for attorneys at all, to break the legal monopoly held by attorneys, and leaves criminal proceedings out of this analysis entirely.<sup>64</sup> But given the backlog of cases suggested by Shymansky’s analysis of speedy trial exceptions,<sup>65</sup> one has to wonder whether similar technological innovation could be used to speed proceedings in the criminal context. Engstrom also acknowledges Draper’s concerns of disparities in technology,<sup>66</sup> but suggests that this is a reason to act purposefully to avoid this problem, rather than give up on the possibilities technology offers.<sup>67</sup>

This warning may be even more appropriate in the context of search and seizure in relation to COVID-19, discussed below.

#### IV. ENFORCING COVID-19 RESTRICTIONS

The spread of COVID-19 has led many states to issue mass mandates and stay at home orders.<sup>68</sup> These orders are primarily enforced through civil penalties, with criminal penalties used “only as

<sup>59</sup>Engstrom, *supra* note 5, at 256.

<sup>60</sup>Engstrom, *supra* note 5, at 257, 259, 265–66.

<sup>61</sup>Engstrom, *supra* note 5, at 257, 260.

<sup>62</sup>Engstrom, *supra* note 5, at 260.

<sup>63</sup>Engstrom, *supra* note 5, at 252.

<sup>64</sup>Engstrom, *supra* note 5, at 2560–64.

<sup>65</sup>See *supra* notes 16–22 and accompanying text.

<sup>66</sup>Engstrom, *supra* note 5, at 263.

<sup>67</sup>Engstrom, *supra* note 5, at 265.

<sup>68</sup>See *supra* note 4 and accompanying text.



a last resort.”<sup>69</sup> But, in the end, if these orders are ignored they are primarily enforced by law enforcement, i.e. police, and if such measures as temperature checks or other surveillance is imposed by the government, it may well implicate Fourth Amendment concerns even if no criminal prosecution is brought.<sup>70</sup> As Henry Fradella explains, enforcing stay at home orders or isolation may require police “to stop and question people in ways that would otherwise be impermissible under the Fourth Amendment—namely without any individualized suspicion.”<sup>71</sup> Further complicating the issue, research on asymptomatic carriers of COVID-19 is inconclusive but considers the possibility that up to 80% of COVID-19 carriers may be asymptomatic.<sup>72</sup> This *could* lead to a conclusion that police might have reason to stop and interrogate anyone at any time.<sup>73</sup> Accepting such a framework would pose a risk of becoming a “new normal,” broadly expanding government power even after the crisis is past.<sup>74</sup> Therefore, Fradella argues, it would be better to limit such authority by relying on doctrines with a narrower reach.<sup>75</sup>

One such doctrine, Fradella suggests, would be that of the exigent circumstances exception to Fourth Amendment requirements.<sup>76</sup> But this exception is particularly narrow, and “courts generally require police to have probable cause that some underlying criminal activity is transpiring.”<sup>77</sup> The particular harm posed by violations of stay at home orders is also very speculative, further undermining its exigency.<sup>78</sup> A second exception raised and dismissed by Fradella is that pertaining to border searches, but it is difficult to apply this exception to people travelling locally by foot, car, or bicycle.<sup>79</sup>

Finally, Fradella settles on special needs searches, an exception that exists specifically to allow police to conduct limited searches in situations that are outside of “the normal need . . . to detect crime.”<sup>80</sup> This exception allows for completely suspicionless searches, in order to protect public safety, although only when conducted

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<sup>69</sup>Fradella, *supra* note 5, at 4.

<sup>70</sup>Fradella, *supra* note 5, at 5; Gentithes & Krent, *supra* note 5, at 63–73.

<sup>71</sup>Fradella, *supra* note 5, at 6.

<sup>72</sup>Fradella, *supra* note 5, at 7.

<sup>73</sup>Fradella, *supra* note 5, at 8.

<sup>74</sup>Fradella, *supra* note 5, at 8.

<sup>75</sup>Fradella, *supra* note 5, at 8.

<sup>76</sup>Fradella, *supra* note 5, at 8.

<sup>77</sup>Fradella, *supra* note 5, at 9.

<sup>78</sup>Fradella, *supra* note 5, at 10.

<sup>79</sup>Fradella, *supra* note 5, at 10–11.

<sup>80</sup>Fradella, *supra* note 5, at 11.

reasonably.<sup>81</sup> The special needs exception brings an added benefit of being more clearly limited to the special circumstances that currently exist, and therefore less likely to outlive the pandemic.<sup>82</sup>

This concern is also reflected in Michael Gentithes and Harold Krent's exploration of pandemic surveillance.<sup>83</sup> Gentithes and Krent explore the problem of the transition to a post-pandemic society.<sup>84</sup> While they primarily explore the question of using antibody tests to give more freedom to some individuals than others, their analysis might also be useful as authorities begin to provide vaccinations. In this context we still must ask—can rights be limited based on an analysis of the likelihood that someone might have (and therefore spread) COVID-19?<sup>85</sup> They look to predictive policing as a model by which to determine if such limitations might violate Fourth and Fifth Amendment (search and due process) protections.<sup>86</sup>

Predictive policing is the name for methods by which police may focus attention on certain crime “hot spots,” or even warn some individuals that they are under enhanced scrutiny, in order to deter them from committing crime or warn them that they may be at risk of victimization.<sup>87</sup> To make these predictions police rely on the correlation between past and future crime.<sup>88</sup> Gentithes and Krent argue that, as a strategy of focusing attention and possibly warning certain individuals, these strategies do not violate the Fourth Amendment; but they cannot justify a *Terry* stop and to punish individuals more harshly based on a failure to heed the warning (and cease criminal activities) would violate the Fifth Amendment's Due Process Clause.<sup>89</sup>

Following this logic, Gentithes and Krent argue that such precautions as temperature scans, which are less invasive than a breathalyzer, would likely be acceptable.<sup>90</sup> Connecting the right to go to work to such invasions, however, would reach a level of imposition that it would be problematic, particularly given how the high

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<sup>81</sup>Fradella, *supra* note 5, at 11–12.

<sup>82</sup>Fradella, *supra* note 5, at 14.

<sup>83</sup>Gentithes & Krent, *supra* note 5.

<sup>84</sup>Gentithes & Krent, *supra* note 5.

<sup>85</sup>Gentithes & Krent, *supra* note 5, at 57.

<sup>86</sup>Gentithes & Krent, *supra* note 5, at 57, 60–61.

<sup>87</sup>Gentithes & Krent, *supra* note 5, at 58–59.

<sup>88</sup>Gentithes & Krent, *supra* note 5, at 59. These correlations, and other crime correlations, are also used in some bail and parole determinations. Gentithes & Krent, *supra* note 5, at 62.

<sup>89</sup>Gentithes & Krent, *supra* note 5, at 60–61.

<sup>90</sup>Gentithes & Krent, *supra* note 5, at 63.

percentage of inaccurate readings.<sup>91</sup> They are similarly accepting of contact and trace procedures, but only if the data is anonymized and aggregated to avoid spreading government use of sensitive information.<sup>92</sup> More invasive requirements such as isolation would likely be justified based on the strong government interests involved and the accuracy of testing.<sup>93</sup>

To allow greater freedom to people who have antibodies would have Fourth Amendment implications due to the invasive nature of a blood draw, particularly given that there is no suspicion of wrongdoing involved.<sup>94</sup> Gentithes and Krent believe that, again, given the strong government interests most courts would probably allow these impositions.<sup>95</sup> But this would also run a risk creating a new normal, which could allow such information to be used after the public health crisis ends.<sup>96</sup> To avoid this, Gentithes and Krent recommend requiring that all the acquired information be destroyed once the crisis has passed.<sup>97</sup>

As all of these authors suggest, while there are questions of how far states and the federal government may go in responded to the threat posed by COVID-19, courts are likely to allow a majority of the responses.<sup>98</sup> Thankfully, however, an end may be in sight.<sup>99</sup> The real question is, how many of these changes will be allowed to remain. As these authors agree, it would be best for the country to move carefully in creating exceptions that might quickly become the norm.

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<sup>91</sup>Gentithes & Krent, *supra* note 5, at 65–66.

<sup>92</sup>Gentithes & Krent, *supra* note 5, at 66.

<sup>93</sup>Gentithes & Krent, *supra* note 5, at 67–68.

<sup>94</sup>Gentithes & Krent, *supra* note 5, at 71–72.

<sup>95</sup>Gentithes & Krent, *supra* note 5, at 73.

<sup>96</sup>Gentithes & Krent, *supra* note 5, at 73.

<sup>97</sup>Gentithes & Krent, *supra* note 5, at 73.

<sup>98</sup>Draper, *supra* note 5, at 9–10; Fradella, *supra* note 5, at 1–4; Gentithes & Krent, *supra* note 5, at 65, 72; Shymansky, *supra* note 5, at 10.

<sup>99</sup>Jade Scipioni, *Dr. Fauci Says Masks, Social Distancing Will Still Be Needed After a COVID-19 Vaccine—Here's Why*, CNBC (Nov. 16, 2020, 12:44 PM), <https://www.cnbc.com/2020/11/16/fauci-why-still-need-masks-social-distancing-after-COVID-19-vaccine.html> (“Fauci predicted to Tapper that most of the country will get vaccinated in the second or third quarter of 2021.”).