



# HARD CALL™

## TRANSCRIPT

### Hard Call COVID Quandaries, Season 2, Episode 2

#### *Sentenced to Sickness? COVID 19 Behind Bars*

**Matt Wynia** [00:00:03] I'm Dr. Matt Wynia.

**Elizabeth Armstrong** [00:00:04] And I'm producer and Elizabeth Armstrong.

**Matt Wynia** [00:00:06] From the University of Colorado's Center for Bioethics and Humanities and CU Boulder's Radio 11-90 KVCU, this is "Hard Call: The COVID Quandaries" series.

**Elizabeth Armstrong** [00:00:18] It's upended everyone's lives, a global pandemic.

**Matt Wynia** [00:00:20] And nursing homes, assisted living facilities, behavioral health centers, they've had some of the most challenges managing outbreaks. The way these buildings are often structured, the vulnerable patient population, the roving staff, all of this make it hard to implement protective measures.

**Elizabeth Armstrong** [00:00:38] But right now, public health officials are grappling with another situation with even more complications. How do we manage jails and prisons?

**Associated Press** [00:00:46] Almost 350 inmates have tested positive at Cummins state prison.

**Elizabeth Armstrong** [00:00:51] That's at a prison in rural Arkansas. In some ways, prisons are the ideal breeding grounds for COVID-19. As with nursing homes, it's been really difficult to implement infection controls, like social distancing at mealtimes and wearing masks. Plus, a recent study in JAMA found prisoners, compared to the general population, are five times more likely to contract COVID-19, and at least three times more likely to die from it.

**Matt Wynia** [00:01:15] It's even more challenging when you think about all the people who work in prisons, the guards and social workers and launderers and caterers, they all have to leave the prison and head back into their communities, and then come back again the next day, potentially carrying the virus in both directions.

**Elizabeth Armstrong** [00:01:33] So one way prisons are trying to reduce risks right now is by allowing for what they're sometimes calling compassionate release of prisoners at higher risk of getting COVID, or of dying from it if they catch it.

**Matt Wynia** [00:01:44] Yeah, we've also heard this called decarceration, basically the opposite of incarceration.

**Elizabeth Armstrong** [00:01:51] Yeah, these plans for letting medically high risk people out of jails and prisons, they often leave a lot of discretion for local departments of correction and judges to decide if it's OK or even safe to let someone out from a criminal justice standpoint. But in general, if someone has already served most of their time, is unlikely to reoffend, is convicted of a nonviolent crime, or is awaiting trial, they can, in many cases, be released.

**Matt Wynia** [00:02:17] So how do we think about justice in this situation? Is it just to keep people in prison if they're at risk of dying there from COVID-19?

**Elizabeth Armstrong** [00:02:27] And on the other hand, is it just for communities or victims to allow them out?

**Matt Wynia** [00:02:31] So how should we decide who should be allowed out because of the pandemic?

**Elizabeth Armstrong** [00:02:36] These are the kinds of decisions we explore on "Hard Call," where values, culture, ethics, and money often clash. Questions for which there may be no right answer, but where the stakes are high.

**Diane Sawyer** [00:02:48] So we head off to find the woman named Eraina Pretty, who's been in prison longer than any other woman in the state of Maryland. 36 years.

**Eraina Pretty** [00:02:55] 36 years-up in here.

**Diane Sawyer** [00:02:58] Do you still remember the day you walked in?

**Eraina Pretty** [00:03:00] Wow, I'm doing a life sentence. It finally hit me that I was here for the rest of my life.

**Elizabeth Armstrong** [00:03:07] Matt, I want to introduce you to Eraina Pretty. That was a clip from 2015. Diane Sawyer interviewed Eraina for a series on America's prisons. She was convicted of first degree murder four decades ago.

**Diane Sawyer** [00:03:19] When she came here, she was 18 years old. She says from a home filled with abuse.

**Eraina Pretty** [00:03:24] I was a little scared kid. All I wanted was attention. I wanted somebody to love me.

**Diane Sawyer** [00:03:34] She says she met a boy and with his friend. They set out to rob the store where she worked, and she admits she was there for the robbery.

**Elizabeth Armstrong** [00:03:41] So her boyfriend was five years older than her, and their crimes made headlines across the Baltimore area. Eraina confessed to helping tie-up Louis Thomas, the owner of an all-night grocery and the father of four children, and then her boyfriend shot him execution style. Plus, it turned out she played a similar role in the murder of a social worker named Preston Cornish. Eraina admitted to all this and she took a plea deal: she agreed to a life sentence to avoid the death penalty.

**Matt Wynia** [00:04:08] Sorry, life without parole, or is she ever going to be eligible for parole?

**Elizabeth Armstrong** [00:04:12] Good question. Actually, she became eligible for parole after 11 years. So that was about 30 years ago.

**Matt Wynia** [00:04:18] Wow. So I take it she's still in prison. What happened?

**Elizabeth Armstrong** [00:04:21] Well, according to reporting from The Washington Post and The Baltimore Sun, while she's been in prison, she's earned a bachelors degree. She's served as a mentor to younger inmates. She's only had three rule infractions over 30 years. But here's the real answer to your question. She's been approved for parole from the Maryland Parole Commission twice. But Maryland has an uncommon system where the governor has to approve her parole. And both times the governor, two different governors, rejected her release. Maybe because the crime was violent and maybe because the victims' families argued that she shouldn't be released.

**Matt Wynia** [00:04:54] You're saying maybe. Does that mean we don't know for sure why the governor decided not to release her or we don't know what the victims families have to say about all this?

**Elizabeth Armstrong** [00:05:03] No, yeah, that's all confidential. And they aren't talking to the press. But whatever the reason why she didn't get parole before, when the COVID outbreak started, she was still in prison.

**Matt Wynia** [00:05:13] I get it. So now she's in prison when the covered outbreak comes. She's got to be over 60 by now. So she's in a high risk group.

**Elizabeth Armstrong** [00:05:20] Totally, and this opens the question about what is a fair punishment for her crime, which is really disputed. The original sentence allowed for parole. So in one sense, she's paid her debt. But the governor has both said no, so they apparently don't think she's paid her debt yet. And in 2003, she actually asked the governor to have her executed, saying that she thought that would be a fair punishment for her.

**Diane Sawyer** [00:05:41] She says a few years back, she asked to be executed.

**Eraina Pretty** [00:05:44] In 2003, I wrote governor Ehrlich. And I asked him for lethal injection.

**Elizabeth Armstrong** [00:05:55] But that request was rejected, too. And so when the pandemic started to hit her prison, she asked to be released. According to her daughter and lawyer, she's at high risk for COVID-19. And if she gets it, she might do very poorly since she's not only 60 years old, she also had some preexisting conditions.

**Matt Wynia** [00:06:13] So that sounds like the hard call. In the face of the COVID pandemic, if you were the governor, would you change your mind and release Eraina Pretty?

**Elizabeth Armstrong** [00:06:23] That sounds right to me.

**Matt Wynia** [00:06:24] OK, well, I love the idea of being governor and I love talking about justice, actually. In bioethics, we talk about justice a lot. It's one of the four principles of biomedical ethics. So from my sort of bioethics viewpoint, I see a couple ethical points to talk about that might help folks think this through. The first is just about the meaning of justice, because that might be the most disputed concept in all of ethics. So, you know, what kind of justice might be achieved by keeping her in prison or by letting her out? What are we really talking about when we talk about justice? And by the way, in health care or in criminal justice, are those the same? And then the second question is, does the fact that we're in a pandemic fit into these concepts of justice at all? Should the pandemic really change anything in terms of how we think about criminal justice?

**Elizabeth Armstrong** [00:07:22] Yeah, let's start with this whole concept of justice, which, by the way, when you ask what kind of justice is putting someone in prison supposed to achieve, that strikes me as a sort of question about what are jails and prisons really all about? You know, what are they for?

**Matt Wynia** [00:07:37] Yeah, so in health care, people define justice in several ways that reflect different views. I called up Dr. Jackie Glover to talk this through. She's a philosopher ethicist, and she's developed curricula about justice for medical schools.

**Jackie Glover** [00:07:53] There's big differences in how we as Americans conceptualize justice. Very different.

**Matt Wynia** [00:08:00] So we talked about how we define justice in health care. And in health care, we often talk about justice as fairness.

**Jackie Glover** [00:08:08] In the most broad, justice is about getting what you're due, what you're owed. And there's vast disagreements about what we owe each other.

**Matt Wynia** [00:08:18] So in health care, when we talk about what we owe each other, we're often talking about the distribution of health care resources, which is distributive justice or fair resource allocation.

**Jackie Glover** [00:08:30] We allocate on every possible notion of fairness we can think of. Disease specific, if you had renal disease, we'll pay for it. Indian Health Service, we were at fault. We took your land and we owe you health care. The V.A. and whole military system.

**Matt Wynia** [00:08:56] But here's where I think this is interesting, because when we're talking about criminal justice, it's almost like the opposite of distributive justice. When we talk about criminal justice, it's not about what we owe the person who committed the crime. It's more about what that person owes and what's a fair punishment.

**Elizabeth Armstrong** [00:09:15] That makes sense. They're both justice because they're both about getting what you deserve. But health care is about getting the care you deserve. And criminal justice is about getting the punishment.

**Matt Wynia** [00:09:24] You know, it's interesting. I said almost exactly those words to Dr. Glover, and she actually tempered me a bit.

**Jackie Glover** [00:09:31] We allocate on every possible. And I think dessert is one of them. And we have, we think people with money deserve more. And we have special laws

for the VIPS. So I think that comment about health care is about caring and criminal justice is about punishment. There's a lot of crossover. And health care is not always about caring. And sometimes criminal justice is about rehabilitation and helping people. You know, sometimes being in prison is the only way you can get treatment for your addiction.

**Elizabeth Armstrong** [00:10:14] Well, that seems like two very different things, that being put in jail or prison might have as goals. It could be for punishment or it could be for rehabilitation.

**Matt Wynia** [00:10:22] Yeah. You know, let's come back to rehabilitation in a minute because as we've talked to criminal justice experts about this, a lot of them say, in reality, prisons are mostly about punishment, which is retributive justice. You committed this crime. You must be adequately punished.

**Elizabeth Armstrong** [00:10:40] That's an ancient idea. You do the crime, you do the time.

**Matt Wynia** [00:10:42] Yeah, an eye for an eye. That's the idea.

**Christie Donner** [00:10:45] At a fundamental level, the construct is around does the punishment fit the crime? Right. That there is some sort of a fairness, proportionality.

**Daniel Goldberg** [00:10:58] Retributive justice is punishing wrongdoers, I guess, proportionate to the level of their crime.

**Matt Wynia** [00:11:05] That was Christie Doonner, who runs a criminal justice reform coalition, and then my colleague, Dr. Daniel Goldberg, who's an attorney and a historian, as well as a bioethicist. And we heard this same thing over and over from others we interviewed. They basically said being put in prison, at least in the U.S., is mainly about retribution. It's about punishment.

**Elizabeth Armstrong** [00:11:28] But there's also some problems with this.

**Christie Donner** [00:11:30] But the problem is, I mean, there is no objective criteria you can use to measure whether or not something's fair because it's in the eye of the beholder. Right, what is fair? What is fair? What is a fair sentence for burglary? What is a fair sentence for a drug offense? What is a fair, I mean, there is no definitive answer to that. So it's kind of in the eyes of the beholder.

**Elizabeth Armstrong** [00:11:54] The issue of conflicting definitions of what's fair is definitely important for Eraina Pretty since the jury sentenced her to her sentence and the parole board said she's eligible for parole. But then two different governors have said basically they disagree and they don't think it would be fair to let her out yet.

**Matt Wynia** [00:12:10] Yeah, this is an area where there's still some discretion, even though, it's interesting, one of the ideas behind sentencing guidelines was that they would create some standards for fair sentences. So we get rid of some of the disparities in sentencing by reducing discretion about who gets what sentence.

**Elizabeth Armstrong** [00:12:29] That's ironic because some sentencing guidelines have pretty clearly made racial disparities even worse, like by having much harder sentences for crack cocaine than for powder cocaine.

**Matt Wynia** [00:12:39] Yeah, sentencing guidelines, I learned, really reflect society's prejudices. And when they were being put together back in the 80s...

**Christie Donner** [00:12:46] People were trying to, you know, outdo each other and how tough they were. And there's no political consequence, right. Negative political consequence for being tough in that era. There was only a political consequence for being soft in that era. And those were the words we used, right. And nobody wanted to be soft, right. So people got trapped in that binary. And we created the largest prison population in the history of humanity as a result.

**Elizabeth Armstrong** [00:13:19] I have to point out that all of these were issues way before the COVID pandemic. The way we use prisons in the U.S. is really controversial, often because of unequal ways retributive justice has been applied.

**Matt Wynia** [00:13:31] Really, a lot of the people we talked to say the whole system has been rigged for generations. Really from the very beginning.

**Daniel Goldberg** [00:13:38] We create the conditions for this intense vulnerability and susceptibility by social, structural and institutionalized injustices and violences. And then, you know, a pandemic shows these shines the brighter light onto these things. Maybe the differences we're just noticing more now.

**Elizabeth Armstrong** [00:13:57] These injustices disproportionately affect people of color. In my background research on this, I found some data from the Sentencing Project that a black man in the U.S. has a one in three chance of being incarcerated. One in three. Compare that to a white man who has a one in 17 chance. And a meta analysis in the Journal of Quantitative Criminology combined the results from 116 studies and found people of color were typically given harsher sentences than similarly situated white people. Unwarranted disparity was really significant, especially when it came to drug offenses.

**Matt Wynia** [00:14:30] Yeah, you know, we'll never know for certain. But it really makes you wonder whether Eraina Pretty, who is black, might've been treated differently if she were white. You know, there's another type of justice that we talk about sometimes in healthcare called procedural justice. That's the idea that something is just if it follows proper protocols, the right people are involved. Decisions are open and transparent. They're equally applied and so on.

**Elizabeth Armstrong** [00:14:58] But I can imagine Eraina Pretty arguing she hasn't gotten procedural justice, since the governor doesn't even have to say why he's rejecting her.

**Matt Wynia** [00:15:06] A lot of people really see the whole mass incarceration of mainly black and brown people in the U.S. as sort of proof that the systems of justice are not equally applied.

**Carlos Franco-Paredes** [00:15:18] But I think the larger society, I think they also want to know more about these social, that chain of destruction that mass incarceration has caused.

**Matt Wynia** [00:15:30] That's Dr. Carlos Franco-Paredes. He's an infectious disease specialist. He provides care to incarcerated people. And when I talked to him, he really emphasized the underlying unfairness of who ends up in jail or prison to begin with.

**Elizabeth Armstrong** [00:15:46] Right. That could definitely be an entire episode, just exploring the nature of policing, who is getting caught, who gets charged, all the social determinants of crime.

**Matt Wynia** [00:15:56] And I think for our purposes, the upshot is that when we begin to think about the nature of prisons and justice, our system focusing on retributive justice, what's a fair punishment for a given crime, it's permeated with unfairness. And procedural justice is also unfairly applied. So I guess with that in mind, I started asking people about alternative views of criminal justice. And the big one here is called restorative justice.

**Elizabeth Armstrong** [00:16:28] Yeah, I did some reading on this as well. It's may be best known for how it was used in truth and reconciliation process in South Africa. The idea is that you actually don't get to justice by just punishing wrongdoers. You get there by bringing the wrongdoers together with the people they harmed and figuring out what it would take to put things right, if it's money or doing repairs or saying sorry, it's about repairing relationships.

**Matt Wynia** [00:16:50] Which is a very different thing from retributive justice, which is just about figuring out who broke the law. What's the appropriate punishment?

**Elizabeth Armstrong** [00:16:59] Restorative justice makes a lot of sense, especially if you need to maintain relationships. So people use this approach all the time in public school systems with kids. For example, parents will make a brother and sister sit down together and work it out. But there's not much use of a restorative justice approach in the U.S. criminal justice system for adults. There are terrific restorative justice programs outside of prisons, again, in schools. There are also religious groups like the Mennonites, Quakers and Amish who adopt this approach. But really, the restorative justice approach actually comes from indigenous groups.

**Daniel Goldberg** [00:17:32] I'm not even sure there was you could concept of restorative justice in a Western context. We actually know there are theories or things that sound more like restorative justice in non-Western contexts, right. And in part, that's why the Truth and Reconciliation Commission in South Africa, when they specifically adopted restorative justice, many of the players that did so evoked African and Southern African traditions to say, to claim that this was the model that they wanted to go by.

**Matt Wynia** [00:18:01] So far, we've got distributive justice, retributive justice, procedural justice, and restorative justice. These are all different kinds of justice with different aims, different methods. But I think we should say there are some other possible aims of jails and prisons. And honestly, I'm not sure these count as part of justice. But we keep hearing them as reasons to keep someone in prison, including maybe someone like Eraina Pretty. So we should mention them. And the first is being in jail or prison might help rehabilitate people so they don't commit more crimes when they get out. The second is that the threat of jail could serve a deterrent function to prevent crimes. And third, jails and prisons could be protecting society from dangerous people who are liable to hurt people if they are released.

**Elizabeth Armstrong** [00:18:57] Yeah, we definitely heard about these three ideas with pretty much everyone we talked to. Every expert. So rehabilitation is the idea that prison should help prisoners become better citizens through counseling, education, work programs. This makes a lot of sense since over 90 percent of people in prisons are

eventually released. We like to think that these people leave prison as better people than when they arrived there.

**Matt Wynia** [00:19:21] That sounds like a great idea and it definitely happens sometimes. We heard stories about this. Though, I have to say, I was struck by the skepticism we heard when we ask people about it.

**Christie Donner** [00:19:32] The criminal legal system is not a system of care that is based on recidivism reduction. I mean, they can aspire or they can make over chores. But the culture of that is one of accountability and punishment. And I may regret what I'm about to say, but it's sort of what I'm, and again, you know, it's something that is complicated. But, I think, I don't believe in rehabilitative prisons. I think that prisons are environments that are not therapeutic, can never be therapeutic.

**Peter Crum** [00:20:16] There is no rehab. Some people can get their G.E.D. while they're in jail, sure. But I don't think anybody goes to jail expecting to come out a better person with a better outlook on life and how to get along with this fellow human being in today's, in the way we do things today. And jail, jail is the opposite of that.

**Matt Wynia** [00:20:38] That's Christie Donner again, and then Dr. Peter Crum who's a physician specializing in correctional care. And I have to say, he was a bit torn about this, since he knows people often do get better medical care and addiction counseling and so on while they're in jail, compared to what they can get on the outside. So prison might actually be rehabilitative in some cases or in some ways for some people. But he still doesn't think, on balance, that prisons are helping people learn how not to commit crimes again when they get out. He told me about a friend's son who's now in prison.

**Peter Crum** [00:21:09] He is not socializing with good people. He's not learning how to socialize with other folks. Learning how to be paranoid and protect himself.

**Elizabeth Armstrong** [00:21:20] We heard some similar things from people involved in prison reforms, even though they want to see reform to make them more about rehabilitation. But mainly they want to keep people out of prisons entirely, since it's so hard to make prisons a place where people can, you know, "improve their character."

**Matt Wynia** [00:21:36] Yeah, and I heard similar concerns when I asked people about prison as a deterrent. Experts just don't really believe it works that way, especially since so many people in prisons today have mental illness, addiction, brain injuries.

**Christie Donner** [00:21:52] Two thirds of people admitted to prison were initially given a community based sentence that then they were revoked for it. Most often it's called a technical violation. So they didn't comply with some requirement of probation or parole or community corrections and they end up in prison. The percentage of folks that end up in the criminal justice system who have a substantial substance abuse history, who have a substantial mental health history. There's emerging research now around the prevalence rates for people with traumatic brain injuries that end up in the criminal justice system. We cannot be surprised because none of those dynamics are impacted by a punishment mentality. You don't punish people out of TBI. You don't punish people out of addiction. You don't punish people out of mental illness. And so in that regard, it's hopeless. It's not only not effective, it's hopeless.



**Elizabeth Armstrong** [00:22:46] So if prisons don't really work as a deterrent, and they don't really work for rehabilitation, that leaves prisons as basically quarantine facilities: a place to hold people who society deems too dangerous to let them out. And unlike when we asked about rehabilitation or deterrence, essentially everyone we talked to agree that actually is an important function of prisons.

**Christie Donner** [00:23:08] You reserve prisons for those people who you find to be so dangerous in the community that they need to be isolated. So they are quarantined. Incarceration, incarcerating them, does that have the public safety benefit? Absolutely.

**Matt Wynia** [00:23:25] But they also all seem to agree that it's a pretty tiny sliver of the prison population that is truly dangerous in that way.

**Peter Crum** [00:23:34] There is that percentage of people who are a danger to society. And you know, if they can't change, then they have to be removed so they don't injure other people. I mean, your sociopaths and your borderline personalities. In my experience, just as a medical physician in a jail, one percent.

**Elizabeth Armstrong** [00:23:58] So this is interesting because when it comes to Eraina Pretty, the odds she'll be involved in another murder if she's released are probably extremely low. There's a logistical thing. She's older. She's been in for a long time. She's got a supportive family. She got a degree while in prison. She has a bunch of factors that probably predict a very low rate of recidivism.

**Matt Wynia** [00:24:17] Right, I asked around about predicting recidivism. And it turns out there are multivariable models they use now, which are pretty good. They're probably racially biased, by the way. But they do use literally 100 or more factors to predict who's likely to end up back in prison. And they do use these for parole decisions. So I expect she's got a very low recidivism score, especially since she's been approved for parole twice. So I doubt she's still in prison to protect public safety. She's presumably still there as punishment. So we're really back to prison as a form of retributive justice.

**Elizabeth Armstrong** [00:24:59] You know, as we're talking about all these possible goals for prisons, I feel like I see all these types of justice and goals in the U.S. criminal justice system. But maybe different places focus on different aspects?

**Matt Wynia** [00:25:11] Say more?

**Elizabeth Armstrong** [00:25:12] Well, like a supermax prison is going to be more focused on retributive justice and public safety as a goal. When we look at ADX Florence, couple hours away from us here in Boulder, for example, that's where El Chapo and the Unabomber are being held. They'll never be released, and the emphasis is on keeping them from harming more people and maybe retributive justice. But in a minimum or medium security prison, there might be more of an emphasis on rehabilitation or even restorative justice, along with retributive justice.

**Matt Wynia** [00:25:40] I think you're right. And a jail, where people are generally held for much shorter periods of time, like while they're awaiting trial, those facilities might focus more on just making sure people don't skip out. Since, for a lot of people in jail, we don't even know if they're guilty of anything yet.

**Elizabeth Armstrong** [00:25:57] And when it comes to reducing populations in response to the pandemic, jails have released many more people than prisons have. And a lot of those people were only in jail because they couldn't afford to post bond.

**Matt Wynia** [00:26:09] Yet another way that our justice system is rigged. This time against people who are poor and can't afford bail.

**Elizabeth Armstrong** [00:26:16] Yeah. So for people in jail, if they haven't even been convicted of anything yet, it seems especially unfair to lock them in a cell where they're at higher risk of getting COVID.

**Matt Wynia** [00:26:25] Yeah. You know, this is getting us to the second question that we talked about at the very beginning. Some of these folks are being released when they wouldn't have been released otherwise because of the pandemic. So you're raising the question now of why should the pandemic make us think differently about releasing people from jails and prisons?

**Elizabeth Armstrong** [00:26:45] We heard really different opinions about this. But the interesting dynamic was that some people think we should've been putting fewer people in prison all along, and those same people think we should let more people out to reduce risks from COVID.

**Daniel Goldberg** [00:26:58] The things that I have read from people who are experts on, you know, carceral populations in prison and those kinds of things is people shouldn't be there in this way to begin with. Right, and so there's even less of a reason to keep people incarcerated at a time like this of a pandemic.

**Matt Wynia** [00:27:16] But that, of course, raises questions about what's really the motivation here.

**Josh Blum** [00:27:21] I think it would be interesting to know if your listeners or people considering this like, well, she should just be released. This is a great opportunity to do that. Well, that's a that's a separate issue that has nothing to do with coronavirus.

**Matt Wynia** [00:27:35] That's Dr. Josh Blum, who provides primary care and HIV care for people who are incarcerated. He really emphasized the split between the medical care system for people in jails and prisons and questions about criminal justice, and that doctors are not supposed to be thinking about whether someone deserves to be released. When I asked him how he thinks about criminal justice, this is what he said.

**Josh Blum** [00:28:00] Yeah, that's a big question. I mean, I think about that a lot. And then in other ways, I completely ignore it because I have to ignore it, because if you're there to provide medical care, you know, you're actually there to sort of suspend in many ways any knowledge of the circumstances around someone's legal case.

**Matt Wynia** [00:28:21] And this so much reminded me of my own training when I was in Boston doing my Infectious Diseases Fellowship. I did rotations at the Shattuck, which is a prison hospital. And we were specifically instructed not to ask people about why they're there or really anything about their legal situation.

**Josh Blum** [00:28:39] You know, sometimes I ask people what they're in for, and I will often regret it because I don't want to know and I really just want to provide the best care I

can. As though I'm in a vacuum and you're in a doctor's office and we're not in this setting that you would not otherwise want to be in.

**Elizabeth Armstrong** [00:28:54] So is there any way in which he thinks the COOVID pandemic should affect these decisions?

**Matt Wynia** [00:28:59] Yeah, sort of.

**Josh Blum** [00:29:00] I am not an expert in Crime and Punishment. As a medical provider, I don't want to be put on the spot to say to make those decisions. You're basically asking me. You're not, But in this case, it'd be like, well, does this person need to be released from medical staff? Well, that's presuming that I am the expert in judging someone's crime and what their punishment should be. And that is not my department. That is way above my pay grade. That's your pay grade. That's the Department of Ethics level of consideration. That is an ethical consideration that is past my ability to say simply, you know, can this person be reasonably cared for in this jail setting?

**Matt Wynia** [00:29:40] So the question of can the person be safely cared for in prison during a pandemic? That's a medical question. But the question of should this person therefore be released? To him, that's a purely criminal justice question.

**Josh Blum** [00:29:55] What are the limitations of medicine? To me, my limitations are I can tell you what I think this person's risk is, and I can tell you they think this person is higher risk or needs more care. And that should be considered in the court's decision. But it would be very presumptuous of me to say, you need to release this person. That's simply not anything I've ever been trained on. I think it would be arrogant of me to assume that because I have medical training, I should be the arbiter of how long someone's punishment lasts.

**Matt Wynia** [00:30:23] And we also heard this from Dr. Peter Crum, who said his department made a long list, literally more than 100 people in their jail, who were at high risk from COVID.

**Peter Crum** [00:30:33] We went to them with a criteria of any respiratory illnesses, diabetes, age greater than 55, pregnancy.

**Matt Wynia** [00:30:44] And they turned that list over to administrators to decide which of them could be released from jail.

**Elizabeth Armstrong** [00:30:49] So I'm hearing attention here. On the one hand, we shouldn't use the risk of COVID almost as a canard to get someone like Eraina Pretty out just because some people thought she should've been released anyway.

**Matt Wynia** [00:31:00] That's the exact word Dr. Blum used.

**Josh Blum** [00:31:03] If the charge has been that this person should be incarcerated because of a crime that we don't use the medical side to necessarily, as a canard a little bit, to get out of that. We consider them separately. In my opinion, the consideration, apart from the medical piece, is should this person be released anyway? Right, that's really the question that needs to be considered. Has this person served her debt to society? And is it reasonable that someone who served 40 years in prison, and went in as a 20 year old, is now a 60 year old? Has that person served her debt? And should she be considered for

release, period? Not in the setting of this pandemic, but simply because it's appropriate now.

**Elizabeth Armstrong** [00:31:49] OK, but in fact, jails and prisons are releasing more people now because of the pandemic, hundreds or thousands in some cases. So what's up with that?

**Matt Wynia** [00:31:58] Well, there is the public health argument that reducing the risk of outbreaks in prisons and jails is good for everyone.

**Christie Donner** [00:32:05] I don't think there's anything equivalent that I've experienced in all my years for the same reason why we've never experienced anything like that, like this, you know, in the community. You know, the complexity of it. The fundamental understanding for both staff and people incarcerated is that COVID presents a life threatening risk. And that is an environment where people do not have the opportunity to engage in some of the public health strategies around masking and hygiene and social distancing. It's just not conducive to those kinds of strategies.

**Matt Wynia** [00:32:43] And then there's the fact, as Dr. Crum put it...

**Peter Crum** [00:32:45] There is a constitutionally guaranteed right to health care when you are a ward of the government.

**Matt Wynia** [00:32:51] This comes from a Supreme Court case that said it would be cruel and unusual punishment to detain someone and then not give them adequate medical care, since that could amount to torture or even a death sentence, depending on what illness they had.

**Elizabeth Armstrong** [00:33:06] So for COVID, some people are asking, is it cruel and unusual punishment to put someone into a situation where they might catch COVID?

**Matt Wynia** [00:33:14] Yeah, Dr. Franco-Paredes said he actually became an advocate for decarceration during COVID because of this very question. He met the cellmate of two men. They were 48 and 74 years old. And both of them caught COVID in jail and they both died. And the cellmate, he called one of the men, Mr. Pete.

**Carlos Franco-Paredes** [00:33:36] Mr. Pete was a really nice guy who came in the U.S. and he was for something very minor. You know, he was in pretrial detention and I think he was drinking a beer and he violated parole or something. I mean, not very significant, but he ended up dying. So he hasn't, you know, is the, is what he asked me is, is the is the cost of being in jail getting COVID-19 and dying? You know. So I said, you know, I don't know. I don't think so.

**Matt Wynia** [00:34:11] So that's why you're seeing a lot of people let out who might normally have been held. While it might be fair to hold them, if doing so is relatively safe, maybe it's not fair to hold them now when it's more dangerous.

**Elizabeth Armstrong** [00:34:26] But the fact that it's happening now does raise some pretty fundamental questions.

**Peter Crum** [00:34:29] At one point, do you go back and say, does this person really need to be in jail? I mean, if you're saying that this person, because of COVID, can get out of jail, then you're essentially, I mean, you're putting a qualifier on this person being in jail.

**Matt Wynia** [00:34:50] Exactly.

**Peter Crum** [00:34:51] You're like, OK, you need to go to jail. However, because there's COVID, you know, and we don't want our jail to be a hot spot, we'll let you go. It's like, well, then why did he need to be in jail in the first place again? Can we revisit? Is it possible just to discuss why this person, why it was so easy to get this person out of jail?

**Elizabeth Armstrong** [00:35:13] So Dr. Crum is saying maybe the pandemic should spark a larger conversation about prison reform.

**Matt Wynia** [00:35:18] Yeah, and if so, then maybe this is one way that prisons and jails are actually similar to hospitals and clinics, because there are some of the things we're doing now just for the pandemic. But we're also realizing, hey, maybe this should carry over to make health care better after the pandemic is over.

**Peter Crum** [00:35:37] I think this is a temporary change in response to the pandemic. And, you know, I don't know. Maybe other things will come out of it. Sometimes it takes things like this for people to realize why we were doing all this in the first place.

**Elizabeth Armstrong** [00:35:53] That's such a powerful idea. We also heard it from Dr. Blum.

**Josh Blum** [00:35:57] You're asking, you know, again, using the coronavirus pandemic to address historic, severe, and systemic racial and ethnic inequities. Combination of the coronavirus pandemic and the Black Lives Matter movement is this incredible nexus of ability to look at all these areas, including jails and prisons, where there is tremendous systemic inequity and inequality.

**Matt Wynia** [00:36:23] So they're both saying, if we care to, we might be able to learn quite a lot about criminal justice reform from what we're doing right now because of the pandemic.

**Peter Crum** [00:36:34] The medical unit gave you 500 names, 300 names, and you let 200 of them out. What were those charges that you said it's OK to let them out? And can we discuss these charges and determine do they really have to be?

**Matt Wynia** [00:36:51] Right cause when we're not in a pandemic, why are we keeping these people in? Yeah.

**Peter Crum** [00:36:56] Yeah. What was it about this specific subset that you said, yeah, you can go home. Or you can do your detention with a bracelet or you can, we'll cut your time short. Why did it take COVID to do that. And are you, I mean, is there regret that you did that for these folks or do you think that they didn't get punished enough? They didn't get rehabilitated enough, they didn't get off the street for long enough? Because if you don't have a good answer for those, then why are you doing it in the first place?

**Elizabeth Armstrong** [00:37:30] So let's get back to how all of this might affect the governors decision about whether to let Eraina Pretty out of prison right now.

**Matt Wynia** [00:37:36] Yeah, we've talked about some different ways of thinking about justice, distributive justice, procedural justice, restorative justice, and retributive justice. And it seems like she really is still in prison because of a notion of retributive justice.

**Elizabeth Armstrong** [00:37:52] Right. The idea that she's still a danger to society seems pretty low.

**Matt Wynia** [00:37:56] Yeah, I imagine not zero, of course.

**Elizabeth Armstrong** [00:37:59] No. But the real question is, if you're the governor, would you change your mind now because of the pandemic?

**Matt Wynia** [00:38:05] Right. And one thing to bear in mind is she does not fit all of the criteria for early release. Right, she fits some like she probably has a low risk of reoffending. She's medically high risk. But she was convicted of violent crimes. So as Dr. Blum put it...

**Josh Blum** [00:38:23] What you're talking about in this case is specifically someone who doesn't qualify under whatever the criteria are for that prison. And now asking to make an exception.

**Elizabeth Armstrong** [00:38:31] OK. So we're going to pose this question to the website and our Twitter page so people can vote on it. If you were the governor, would you change your mind, make an exception and release Eraina Pretty because of the pandemic?

**Matt Wynia** [00:38:42] And if you say yes, or no, I'd love to see comments about whether, and how, the pandemic affects your thinking about this.

**Elizabeth Armstrong** [00:38:51] Yeah. If you heard about the really terrible crimes she was involved in and knew right away, you'd never let her out. Or on the other hand, if you'd heard she'd been granted parole twice but then rejected by the governor and you knew right away, you would let her out. Even without the pandemic, we'd like to know about that, too.

**Matt Wynia** [00:39:07] And then after this episode posts, we'll post an update to let you know what has actually happened to Eraina Pretty since we recorded this. Today's "Hard Call" show was produced by Jared Browsh, with reporting by Meleah Himber, Jeremy Long, Elizabeth Armstrong, and me, Matt Wynia. Thanks to all of the people we interviewed for this episode, and apologies that we didn't get to use a quote in the show from everyone we spoke with.

**Elizabeth Armstrong** [00:39:34] OK, before we go, if you've enjoyed this episode of "Hard Call," I'd like to ask you a favor.

**Matt Wynia** [00:39:39] You know we're going to ask three favors.

**Elizabeth Armstrong** [00:39:40] OK favor one, please subscribe to the "Hard Call" podcast on Apple Podcast or wherever you listen.

**Matt Wynia** [00:39:46] OK, favor two, please tell a friend to listen. Better yet, tell a whole bunch of friends. Put it on social media. Tell them to subscribe. The number one way people discover "Hard Call" is by hearing about it from someone else they know.

**Elizabeth Armstrong** [00:39:59] And I'll bet I know what favor number three is, please leave us a review.

**Matt Wynia** [00:40:03] Yes, of course. Having reviews makes a huge difference in how "Hard Call" shows up on the various services.

**Elizabeth Armstrong** [00:40:11] Next time on "Hard Call"...